Geographical Indications: What is Their Worth? A Comparison of Geographical Indication Registrations Between Australia and Italy

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Abstract

This thesis explores the worth of using food Geographical Indications (GIs) on food products to make an origin claim in the context of a *sui generis* food GI system. It assesses the value of using a *sui generis* food GI system to protect the connection between Australian regional food and origin and to protect the assets that Australia has in Australian regional names as identifiers of authentic regional food products that have a clear and strong connection with Australian regions. This assessment is made against a background of significant and original fieldwork carried out in Italy and South Australia.

Since 1992, Italy has operated under a *sui generis* food GI system as provided for in the European Union Regulation EU No. 1151/2012 of the European Parliament and Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs (EU–Italian food GI system).\(^1\) Italy currently has 294 food GI registrations,\(^2\) the highest number of food GI registrations in the European Union (EU). Therefore, Italy was the ideal case study to determine the worth of a food GI system. Interviews were conducted with a variety of food producers and agricultural industry-based organisations and GI Consortiums as part of the Italian fieldwork. The overall aim and objective of the Italian fieldwork was to determine the effectiveness of the EU–Italian food GI system in protecting the connection between food and origin and the lessons that could be learned from the EU–Italian food GI system in considering implementation of a *sui generis* food GI system in Australia. The Italian fieldwork revealed that a *sui generis* food GI system was an effective legal framework to protect the connection between food and origin. It provided valuable insight into the elements required for a successful food GI system.

The overall aim and objective of the South Australian fieldwork was to determine whether the interviewees considered that Australia should implement a *sui generis* food GI system. Interviews were conducted with regional food producers based in the South Australian regions of the Barossa Valley and Adelaide Hills, as well as other representatives of the South Australian food industry, as part of the South Australian fieldwork. The South Australian fieldwork revealed that regional food producers based in the Barossa Valley and the Adelaide Hills were interested in a *sui generis* food GI system. The South Australian fieldwork provided valuable insight into the elements that the regional food producers considered necessary for a successful Australian food GI system.

Against the backdrop of this significant and original fieldwork, this thesis recommends that Australia implement a *sui generis* food GI system to overcome the deficiencies of current consumer protection, passing off and trademark laws that inadequately regulate the connection between food and origin. This thesis explains

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1. Regulation EU No. 1151/2012 of the European Parliament and Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs (‘EU Regulation 1151/2012’).

2. This number is current as at October 2017. Sourced from Qualivita <http://www.qualivita.it/statistiche-italia/>.
that a *sui generis* food GI system is not only important for Australia at a national level, it is also crucial at an international level.
Declaration

I certify that this work contains no material which has been accepted for the award of any other degree or diploma in my name in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text. In addition, I certify that no part of this work will, in the future, be used in a submission in my name, for any other degree or diploma in any university or other tertiary institution without the prior approval of the University of Adelaide and where applicable, any partner institution responsible for the joint-award of this degree.

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I acknowledge the support I have received for my research through the provision of an Australian Government Research Training Program Scholarship.

.................................................................

Paula Caroline Zito
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This thesis involved fieldwork in the South Australian regions of the Barossa Valley and Adelaide Hills and in the Italian regions of Piedmont, Emilia-Romagna and Tuscany. The individuals who participated in the interviews were extremely generous, both in their time and in providing valuable information. I thank them for agreeing to participate in the interviews and contributing to my research.

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Finally, I would like to acknowledge my mum Maria Timpano and both my nonnas for teaching me the value of food, origin, regionality and culture. I look forward to continually contributing to these areas through a legal perspective, in an authentic way, applying the values that they have taught me.
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<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>ABM</td>
<td>Aceto Balsamico di Modena</td>
</tr>
<tr>
<td>ABTM</td>
<td>Aceto Balsamico Tradizionale di Modena</td>
</tr>
<tr>
<td>ACCC</td>
<td>Australian Competition and Consumer Commission</td>
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<tr>
<td>ACL</td>
<td>Australian Consumer Law</td>
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<td>AFGC</td>
<td>Australian Food and Grocery Council</td>
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<td>AGWA</td>
<td>Australian Grape and Wine Authority</td>
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<tr>
<td>AoO</td>
<td>Appellation of Origin</td>
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<tr>
<td>ASEAN</td>
<td>Association of Southeast Asian Nations</td>
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<tr>
<td>AUSEU</td>
<td>Australia–EU FTA</td>
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<tr>
<td>AUSFTA</td>
<td>Australia–United States Free Trade Agreement</td>
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<tr>
<td>AWBC</td>
<td>Australian Wine and Brandy Corporation</td>
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<tr>
<td>AWRI</td>
<td>Australian Wine Research Institute</td>
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<tr>
<td>BBA</td>
<td>Bayerischer Brauerbend eV</td>
</tr>
<tr>
<td>BFF</td>
<td>Barossa Fine Foods</td>
</tr>
<tr>
<td>BGWA</td>
<td>Barossa Grape and Wine Authority</td>
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<tr>
<td>BTA</td>
<td>Bilateral Trade Agreement</td>
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<tr>
<td>CAP</td>
<td>Common Agricultural Policy</td>
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<tr>
<td>CCA</td>
<td>Competition and Consumer Act</td>
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<tr>
<td>CCFN</td>
<td>Consortium for Common Food Names</td>
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<tr>
<td>CETA</td>
<td>Comprehensive Economic Trade Agreement</td>
</tr>
<tr>
<td>CoOL</td>
<td>Country of Origin Labelling</td>
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<tr>
<td>CTM</td>
<td>Certification Trade Mark</td>
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<tr>
<td>CUB</td>
<td>Carlton United Brewery</td>
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<tr>
<td>DIAL</td>
<td>Dairy Innovation Australia Ltd</td>
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<tr>
<td>EC</td>
<td>European Community</td>
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<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
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<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
<td>EU</td>
<td>European Union</td>
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<tr>
<td>FTA</td>
<td>Free Trade Agreement</td>
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<tr>
<td>GI</td>
<td>Geographical Indication</td>
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<tr>
<td>GIC</td>
<td>Geographical Indications Committee</td>
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<tr>
<td>ICB</td>
<td>Intercontinental Brands Ltd</td>
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<tr>
<td>INAO</td>
<td>Institut national de l’origine et de la qualité</td>
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<tr>
<td>IP</td>
<td>Intellectual Property</td>
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<tr>
<td>LIP</td>
<td>Label Integrity Program</td>
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<tr>
<td>NMPF</td>
<td>National Milk Producers Federation</td>
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<tr>
<td>OHS</td>
<td>Occupational Health and Safety</td>
</tr>
<tr>
<td>PDO</td>
<td>Protected Designations of Origin</td>
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<tr>
<td>PGI</td>
<td>Protected Geographical Indication</td>
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<tr>
<td>PoOL</td>
<td>Place of Origin Labelling</td>
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<tr>
<td>PTA</td>
<td>Preferential Trade Agreement</td>
</tr>
<tr>
<td>RRR</td>
<td>Regional, rural and remote</td>
</tr>
<tr>
<td>SA</td>
<td>South Australia</td>
</tr>
<tr>
<td>SATC</td>
<td>South Australian Tourism Commission</td>
</tr>
<tr>
<td>TE</td>
<td>Traditional Expressions</td>
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<tr>
<td>TM</td>
<td>Trade Marks (Manual)</td>
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<tr>
<td>TPP</td>
<td>Trans-Pacific Partnership</td>
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<tr>
<td>TRIPS</td>
<td>Trade-Related Aspects of Intellectual Property Rights</td>
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<tr>
<td>TSG</td>
<td>Traditional Specialties Guaranteed</td>
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<tr>
<td>TTIP</td>
<td>Transatlantic Trade Investment Partnership</td>
</tr>
<tr>
<td>UK</td>
<td>United Kingdom</td>
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<tr>
<td>US</td>
<td>United States</td>
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<tr>
<td>WAC</td>
<td>Wine Australian Corporation</td>
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<tr>
<td>WIPO</td>
<td>World Intellectual Property Organization</td>
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WTO  World Trade Organization
Chapter 1. Introduction

1.1. About the Thesis

In this thesis I explore the worth of using food Geographical Indications (GIs) on food products to make an origin claim in the context of a sui generis food GI system. My aim is to assess the value of using a sui generis food GI system to protect the connection between Australian regional food and origin and to protect the assets that Australia has in Australian regional names as identifiers of authentic regional food products that have a clear and strong connection with Australian regions. I make this assessment against a background of significant and original fieldwork carried out in Italy and South Australia.

1.2. Fieldwork

In 2014, I undertook fieldwork in Italy and South Australia. The methodology of the Italian fieldwork is explained in detail in part two of Chapter 5 and the methodology of the South Australian fieldwork is explained in detail in part three of Chapter 6. I chose Italy as a case study of a European country that has been operating under a food GI system since 1992, in accordance with European Union’s (EU) Regulation EU No. 1151/2012 of the European Parliament and Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs (EU–Italian food GI system).\(^3\) Italy currently has 294 food GI registrations,\(^4\) the highest number of food GI registrations in the EU. Therefore, Italy was the perfect case study to determine the worth of a food GI system.

I chose to focus on the Italian regions of Piedmont, Tuscany and Emilia-Romagna for the following two main reasons:

- they have very similar geographical features to the South Australian regions focused on in the South Australian fieldwork, the Barossa Valley and the Adelaide Hills
- the food products produced in the Italian regions, namely cheese, meat and smallgoods, vinegars, olive oil, and wine are also very similar to the food products produced in the South Australian regions.

I interviewed a variety of food producers who have been operating under the EU–Italian food GI system since 1992, as well as agricultural industry-based organisations and GI Consortiums. The overall aim and objective of the Italian fieldwork was to determine the effectiveness of the EU–Italian food GI system in

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\(^3\) Regulation EU No. 1151/2012 of the European Parliament and Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs (‘EU Regulation 1151/2012’).

\(^4\) This number is current as at October 2017. Sourced from Qualivita <http://www.qualivita.it/statistiche-italia/>. 
protecting the connection between food and origin and what lessons could be learned from the EU–Italian food GI system in considering implementation of a *sui generis* food GI system in Australia.

In relation to the South Australian fieldwork, I chose the regions of Barossa Valley and Adelaide Hills. I interviewed regional food producers from these regions as well as other representatives of the South Australian food industry. The overall aim and objective of the South Australian fieldwork was to determine whether the interviewees considered that Australia should implement a *sui generis* food GI system.

1.2.1. Findings from the Italian and South Australian fieldwork

While Chapters 5 and 6 explain the findings of the Italian and South Australian fieldwork in detail, the Italian fieldwork revealed that a *sui generis* food GI system is an effective legal framework to protect the connection between food and origin. The Italian fieldwork provided valuable insight into the elements required for a successful food GI system.

The South Australian fieldwork revealed that regional food producers who are based in the Barossa Valley and Adelaide Hills are interested in a *sui generis* food GI system. They would like to see a similar system implemented for the food industry as the Australian wine GI system. The South Australian fieldwork provided valuable insight into the elements that regional food producers based in the Barossa Valley and the Adelaide Hills consider necessary for a successful food GI system.

1.3. Synopsis

Against the backdrop of this significant and original fieldwork, I undertook a comprehensive study of the relevant literature on *sui generis* food GI systems and GIs in general to determine the value of using a *sui generis* food GI system to protect the connection between Australian regional food and origin.

I begin this assessment in this thesis by explaining the value that exists in using Australian regional names on food labels to make claims about the origin of food. I refer to this as ‘Regional Branding’. In Chapter 2, I explain that there is value in Regional Branding because of current consumer preferences for ‘local’ and ‘authentic’ regional food products. Many consumers want to know the origin of the food products that they purchase and who has grown or made their food. Regional Branding has intangible value not only because it indicates a food product’s regional origin, but also because it infuses food products with certain qualities and characteristics that can be linked back to its origin. However, not all Regional Branding of food products demonstrates a clear and strong connection with the region named in the food label. In some instances, food producers and traders use Regional Branding on food products that have very little connection with the named region and take advantage of the reputation that certain Australian regions have for producing quality, authentic regional food and the value that accordingly exists in Australian regional names. In Chapter 2, I provide practical examples of this usage of Regional Branding and emphasise that food producers and traders can use Regional Branding in this way because of deficiencies of current laws and
regulations in Australia that regulate the usage of Regional Branding on food labels.

The current patchwork of Australian laws and regulations regulating the usage of Regional Branding on food labels falls into the following main groups:

- consumer protection laws under the *Australian Consumer Law* which is set out in Schedule 2 of the *Competition and Consumer Act 2010 (Cth)*
- passing off and extended passing off
- trademark laws under the *Trade Marks Act 1995 (Cth)*.

In Chapter 2, I analyse each of these laws and regulations and highlight that they are deficient in the following main ways:

1) they allow food producers and traders to use Regional Branding on food labels that just fall short of being misleading or deceptive, or involving passing off, even though the food only has a weak connection with the named region
2) they do not give regional food producers enough *ex ante* guidance as to when they can make an origin claim on food labels and products, especially where some of their ingredients are sourced, or some of their food production takes place, outside the named region
3) they do not adequately regulate whether there is a clear connection between food and origin before a regional name can be used on a food label to make an origin claim.

These deficiencies mean that food producers can use Regional Branding on food labels to make origin claims on food products that lack any clear or strong connection with the region claimed. In doing so, many food producers and traders take advantage of, and benefit from, the reputation that Australian regions have for producing quality regional food and the value that accordingly exists in the relevant Australian regional names.

In Chapter 2, I identify the four main problems that exist due to this usage of Regional Branding and free-riding by food producers, that current laws and regulations are not adequately protecting against:

1) consumers cannot rely on, or trust, food labels that include Regional Branding to obtain accurate information about the origin of food products
2) regional food producers are being deterred from making additional investment in producing Regionally Branded food products

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5. *Australian Consumer Law* is set out in *Competition and Consumer Act 2010 (Cth)* Sch 2 (‘ACL’).
3) the value that exists in Australian regional names as identifiers of authentic regional food products that have a clear connection with Australian regions is not being adequately protected

4) Australia risks losing the assets that it has in Australian regional names for the purposes of Regional Branding food products. This has the potential to affect Australia’s regionality and Australia’s agricultural and agrifood industries.⁸

In Chapter 2, I explore each of these problems and identify them as types of harm that current consumer protection, passing off and trademark laws are not protecting against.

To overcome the deficiencies of current consumer protection, passing off and trademark laws, and the problems that result from these, I recommend that clear ex ante guidance is required for food producers and traders as to when they can use regional names on food labels to make an origin claim. As part of this recommendation, in Chapter 2 I also analyse the Australian wine GI system that has been operating in Australia since 1994. The analysis of the Australian wine GI system highlights the vast differences that exist under current Australian laws in the regulation of how Australian regional names are used on food labels to make origin claims, compared to how regional names are used on wine labels in the form of wine GIs to make origin claims. In highlighting these differences, the review of the Australian wine GI system will affirm that current laws and regulations regulating the usage of regional names on food labels are deficient in the ways identified throughout Chapter 2. The analysis of the Australian wine GI system also provides insight into the ways a GI system can assist with overcoming the deficiencies of current laws and regulations that inadequately regulate the usage of Australian regional names on food products.

The analysis in Chapter 2 leads me to recommend that Australia should implement a dedicated (sui generis) food GI system to overcome the deficiencies of current consumer protection, passing off and trademark laws and the problems that arise from these. In Chapter 3, I explore how authentic Australian regional food products are connected to Australian regions, as the central purpose of a sui generis food GI system is to identify and protect the connection between food and origin. Article 22.1 of the Trade-Related Aspects of Intellectual Property Agreement 1994 (TRIPS Agreement) defines GIs as ‘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.’⁹ Therefore, in Chapter 3, I explain how food is ‘hitched to

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everything else in the universe”\textsuperscript{10} and how a region’s geographical and human factors can influence a food’s quality, reputation or other characteristic as suggested by Article 22.1 of the TRIPS Agreement. In doing so, I explore the concept of regionality—the unique factors of a region that give a region its point of difference when compared to other regions. I explore how regionality has historically been embedded in European countries’ culture as opposed to the slower emergence of regionality in Australia and how this has influenced European countries’ protection of regional names on products, notably agricultural products and foodstuffs, in the form of GIs. I focus on Italy as an example of a European country that protects food GIs under Europe’s \textit{sui generis} food GI system.

In Chapter 4, I explain the case for a \textit{sui generis} food GI system on the basis that GI protection provided under a GI system is stricter and more regulated than protecting GIs under other laws and regulations. While there are a variety of ways in which food GIs can be protected in accordance with international laws, I explain why the protection of GIs under a dedicated GI system is better than protecting GIs under other laws, such as trademark laws. Australia currently provides protection for GIs for all goods other than wines and grape goods, with registration of GIs as Certification Trade Marks (CTMs). I recommend why a \textit{sui generis} GI system is the ideal legal framework to protect food GIs and the connection between food and origin, given the limitations of certification trademarks and GI protection provided to Australian wine GIs under the Australian wine GI system.

I also explore why the implementation of a \textit{sui generis} food GI system is important for Australia at an international level. I explain that food GIs have become a very significant trading concession and the subject of several bilateral trade agreements (BTAs) and free trade agreements (FTAs). Food GIs have become an important aspect of international trade with more countries interested in knowing about the regional origin and provenance of their trading partners’ food products. However, a dichotomy exists between World Trade Organization (WTO) members regarding the protection of food GIs under the TRIPS Agreement and the levels of GI protection provided to food products under Article 22.2 of the TRIPS Agreement that is lower than that provided to wines and grape products under Article 23.1 of the TRIPS Agreement. I provide an analysis of Australia’s current position on these issues compared to the EU’s position and consider their respective positions and attitudes to GIs. Given this divergence of opinions in relation to the protection of food GIs, I explain the increase in FTAs WTO members and non-WTO members have entered to obtain food GI protection and open up trading opportunities between countries that identify and protect food GIs. I explore FTAs that affect Australian food producers’ use of EU food GIs and explain the concepts of Old World terms, generic product descriptors and common food terms. Notwithstanding Australia’s position in choosing not to protect food GIs under a food GI system, and not protecting food GIs at the higher level provided under Article 23.1 of the TRIPS Agreement, I explain that the Australian government needs to reassess its

\textsuperscript{10} Joe Fassler, 'How John Muir is Revolutinizing the Farm-to-Table Food Movement' (2014) \textit{7 The Atlantic} 1, 4.
current position to place itself in a stronger trading position in the future. This is relevant given that many of Australia’s neighbouring countries such as China protect food GIs under a food GI system and are only looking to trade with countries that can provide reciprocal GI protection. This is also relevant for Australia, as it is currently negotiating the Australian-European Union FTA (AUSEU FTA) with the EU. Therefore, the increased interest in food GIs at an international level provides further support for the implementation of a *sui generis* food GI system in Australia.

In Chapter 5, in establishing that there is a case for implementing a *sui generis* food GI system in Australia, I explain the findings that the Italian fieldwork revealed regarding the effectiveness of a *sui generis* food GI system to protect the connection between food and origin. I also explain the elements that are crucial for a successful food GI system. These include the following:

- there must be a qualitative connection between product and origin. This is what a food GI system should be about. While many Italian GI Consortiums still regulate this connection, some of the larger Consortiums do not
- there must be clear ex ante guidance and criteria in place for producers to refer to, so that they can understand when and how they can use a GI on their food products. The criteria must be practical to reflect the actual connection that does exist between product and origin and must establish a uniform standard across producers. Therefore, it is useful to involve producers in establishing the rules and criteria that are relevant to their products to have a GI attached to them
- there needs to be one main governing body that carries out the due diligence of the food GI system to ensure that all criteria are applied fairly and equally to producers wishing to use the GI on their products. This body must regulate that GIs are only attached to products that meet the relevant criteria. It is important that the governing body consistently and effectively regulate the connection between food and origin
- the costs involved with using a food GI system need to be maintained at a fair standard so that all participating producers can afford to be part of the system
- education on what a food GI system represents and how it works is needed for food industry organisations (from manufacturers and retailers to restaurants), producers and consumers. Education is required early in the process of implementing a food GI system, so that everyone understands what a GI represents in terms of the quality and characteristics of the product (including information about its origin and core ingredients sourced from there) and to signify that a legal system of control or audit exists to ensure that the criteria has been met for the product to qualify having a GI attached to it
- a food GI system needs to cater for a country’s international trade obligations regarding GIs and food terms, as well as other general trade obligations, to secure a proper balance of the ideal of protecting the qualitative connection between food and origin with trade, economic and political issues.
In Chapter 6, I explain the findings that the South Australian fieldwork revealed about regional food producers and food industry representatives’ views on whether Australia should implement a *sui generis* food GI system. I also explain the elements that the South Australian interviewees considered essential for a successful Australian food GI system. These include that the food GI system:

- be tailored to Australia’s cultural, political and trading needs
- be inclusive
- be collaborative
- have simple rules and criteria for producers to follow
- include an education roll-out to help consumers understand what a legal food GI system represents
- be administered by one governing body
- be assisted by government funding.

1.4. Recommendations

A case for implementing a *sui generis* food GI system in Australia exists to:

- overcome the deficiencies of current consumer protection, passing off and trademark laws and the problems that result from these
- provide GI protection for Australian regional names used on food products at the same level as provided to Australian regional names (in the form of wine GIs) used on wines in the context of the Australian wine GI system
- protect Australia’s regionality and the assets that Australia has in Australian regional names as food GIs
- place Australia in a stronger position in the context of international GI issues.

In addition, the Italian and South Australian fieldwork also revealed that there is a case for implementing a *sui generis* food GI system, as it is an ideal legal framework to identify and protect the connection between food and origin.

In Chapter 7, I recommend that the Australian government work together with Australian regional food producers, and the broader Australian food, agrifood and agricultural industries, to design and implement a *sui generis* food GI system tailored for Australia. By drawing on the observations that I made during the Italian and South Australian fieldwork, I recommend the key elements that are required for a successful Australian *sui generis* food GI system. I explain these with a view to assisting Australian government and Australian regional food producers and the broader Australian food, agrifood and agricultural industries, to design a *sui generis* food GI system that takes into consideration GI-related issues relevant to Australia at both a national and an international level. My recommendation is that a *sui generis* food GI system is crucial for Australia to ensure adequate regulation and protection of the connection between Australian regional food and origin nationally and internationally.
Chapter 2. Australian Laws and Regulations on Regional Branding on Food and Wine Labels

2.1. Introduction

2.1.1. The value in Regional Branding

Over the last three to four years, Australian food producers and traders have realised the intangible value that exists in using Australian placenames on food labels. This value has arisen primarily because the provenance of food has become a substantive issue for many consumers. Many consumers want to know where food comes from and who has grown or made the food that they purchase. They actively seek out ‘local food’ for health and lifestyle reasons, as well as to support homegrown products. For these consumers, the more ‘local’ a food product is, the more likely they will purchase the food. Many consumers want to buy ‘authentic’ regional food and have ‘paddock-to-plate’ experiences of eating food that is unspoilt, honest and fresh. In the many instances in which consumers are unable to attend farmers’ markets, to meet directly with food producers and buy these types of foods from them, many consumers look to food labels to understand the story behind the food. Therefore, there is significant consumer demand to have correct and specific information about the origin of food included on food labels. Consumers want to be able to rely on and trust labels to determine the origin of food—where ingredients are grown or from, where the ingredients are sourced, where the food is produced and who is the producer. With these preferences in mind, many consumers are willing to pay more for food products that include Australian placenames on food labels. Consumers assume that such labels signify that the products are made in, and of ingredients that have been sourced from, the place claimed.

The Australian placenames that this thesis focuses on are Australian regional names such as Barossa Valley and Adelaide Hills. Australian regional names have ‘become increasingly valuable to producers and the agrifood business in Australia


13 Abernethy, above n 11.

and in other countries. Many food producers and traders use regional names on food labels (Regional Branding) to respond to current consumer preferences for ‘local’ and ‘authentic’ foods. There is value in Regional Branding, because it not only indicates the food product’s geographical origin, but also infuses food products with:

Certain qualities and characteristics … and [suggests] the manner in which they are grown and produced. These are qualities that are derived from the use of food staples that are genuinely produced in the area concerned, harvested and processed by local producers, or in accordance with local traditions. Consumers have learned to expect such characteristics for [food] emanating from a particular place, either because of their own previous testing and tasting of the food or through advertising and promotion.

Food products that are labelled with the names Barossa Valley or ‘Barossa’ are examples of food products that consumers have come to expect will have certain qualities and characteristics. As will be discussed throughout this thesis, the Barossa Valley is a region that is renowned for its food culture. English and German settlers arrived in the region in the 1840s and have contributed to the many food traditions and a rich culinary heritage that have provided the region with a very strong reputation for food. The Barossa is recognised as a region that produces quality food products that local food producers make using locally sourced seasonal ingredients. In many instances, methods and processes have been handed down through generations. The food producers who grow and produce local food products, and invest time and money in making authentic Barossa food, contribute to the region’s strong food reputation and the value that exists in the regional name. These food producers have built the brand ‘Barossa’ and ‘Barossa Valley’. Accordingly, the Barossa has its own sense of regionality and food story that consumers seek out:

The Barossa food story is a multi-faceted, continually evolving ode to seasonality and regionality. It tells of fruit ripened to perfection and vegetables bursting with real flavour. Of milk and cheese that taste of goodness and of poultry, pork and lamb that are fed well and nurtured with kindness. Of artisan food prepared with care and passion. And of time-honoured recipes passed down through six generations.

Consequently, substantial value exists in the names ‘Barossa Valley’ and ‘Barossa’ for the purposes of Regionally Branding food products. These names have value


16 van Caenegem, above n 7, 5.

not only because they indicate the geographical origin of food, but also because of the secondary meaning that the names provide to food products. The names imply that the food products to which they are attached have certain qualities because they come from the Barossa. Consumers respond positively to food products that are branded with Barossa or Barossa Valley, because they are aware of the reputation that the Barossa has for producing quality food products.

However, in many circumstances, food products that are branded with Barossa or Barossa Valley have a very weak connection with the Barossa or no connection at all. Notwithstanding this lack of connection, many food producers take advantage of the reputation that the region has for producing quality and authentic regional food products, and the value that accordingly exists in the region’s name, to respond to consumer preferences for local and authentic food products. In an article on food marketing, Fairfax Media agribusiness writer Andrew Marshall notes, ‘Many companies … cash in on the Barossa tag without being closely associated with the region or using big and consistent volumes of its produce.’ 18 In many instances, the names are used on food products that are also of an inferior quality to the typical regional food products that originate from the Barossa. Consequently, food producers and traders that lack a clear connection with the region but use the regional names Barossa and Barossa Valley on their food products, cause regional food producers to be ‘disadvantaged by others eroding the consumer perception’ 19 of these names.

For example, Barossa Almonds (see Figure 2.1) are sold at IGA and Foodland stores throughout South Australia. It is very likely that consumers, on seeing the label of these almonds, would expect that there is some relationship between the almonds and the Barossa Valley region. For instance, they might assume that the almonds were grown in the Barossa Valley or that they were sourced from the Barossa Valley and, possibly, that they were packaged in the Barossa Valley. They might also assume that the almonds are of a certain quality because they come from the Barossa Valley. However, there is no connection between these almonds and the Barossa Valley. Virginia Farm Produce, a South Australian family business based in Virginia, South Australia, grows and packages the almonds in Virginia and supplies the almonds for sale. 20 On the Virginia Farm Produce website, the business discloses that ‘based in Virginia, on the edge of the famous Barossa wine region, Virginia Farm Produce grows more than 400 acres of almond groves.’ 21 However, Virginia Farm Produce is drawing a fine line in representing that Virginia is ‘on the edge’ of the Barossa Valley. This is because Virginia is located approximately 48

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19 Ibid.

20 Information obtained from ‘Virginia Farm Produce’ website, http://www.virginiafarm.net.au/.

21 Ibid (emphasis added).
kilometres from the Barossa Valley region\textsuperscript{22} and ‘more than 30 kilometres beyond the furthest reaches of the coveted wine zone’ of the Barossa.\textsuperscript{23} Therefore, Virginia is not ‘on the edge’ of, or in, the Barossa Valley region.

\textbf{Figure 2.1: Barossa Almonds}

Source: http://www.virginiafarm.net.au

In the small print label printed on Virginia Farm Produce’s Barossa Almonds’ packaging it states that the almonds are grown and packaged in Virginia. The website also notes that ‘the clay soils of Virginia and secured water, plus Virginia’s microclimate, means it is always the first Australian crop to be harvested.’\textsuperscript{24} Clearly, there is a strong connection between the almonds and Virginia. Given the clear connection, Virginia Farm Produce should have included ‘Virginia’ as part of the almonds’ Regional Branding. However, it is likely that Virginia Farm Produce chose to include ‘Barossa’ in its almond branding because of the strong food reputation that the Barossa Valley has and the value that accordingly exists in that name. Including the name ‘Barossa’ rather than ‘Virginia’ would make the almonds more appealing to consumers, who would be then more likely to follow through with purchasing the almonds.

Further, Virginia Farm Produce has an association with trademark number 1439410 for the words ‘Farmers Barossa Almonds’ in classes 29 (almonds, ground, ground almonds and prepared almonds), 30 (almonds covered in chocolate, coated almonds

\textsuperscript{22} Information obtained from ‘Google Maps’, https://www.google.com.au/search?q=distance+from+Virginia+South+Australia+to+Barossa+Valley&oq=distance+from+Virginia+South+Australia+to+Barossa+Valley&aqs=chrome..69i57.10709j0j1&sourceid=chrome&ie=UTF-8.


\textsuperscript{24} Ibid.
and sugared almonds) and 31 (almonds [fruits]). On a close review of the Barossa Almonds’ label, the word ‘Farmers’ is also included in purple and italic font. In between the words ‘Barossa Almonds’ and ‘Farmers’ are the words ‘Naturally Australian Grown’. Barry Farmer is the registered owner of this trademark. Mr Farmer’s address on the trademark registration is the same address as that of Virginia Farm Produce. The fact that Mr Farmer is the registered owner of the trademark ‘Farmers Barossa Almonds’ would assist Virginia Farm Produce in being able to use the Regional Branding ‘Barossa’ on its almonds’ labelling. This is because a registered trademark provides its registered owner with certain legal propriety rights in the registered trademark or brand including the exclusive right to use the trademark in relation to the goods for which it has been registered. Therefore, Mr Farmer and Virginia Farm Produce can use the name ‘Barossa’ in context of its registered trademark on the almonds, notwithstanding the lack of connection between the almonds and the Barossa.

In 2014–2015, Chef Mark McNamara from the Barossa Valley ‘questioned the integrity of [the almonds] named after the region but grown and packaged in Virginia’, given the lack of connection between the almonds and the Barossa. The Barossa Almonds product and its title were reported to the Australian Competition and Consumer Commission (ACCC) in 2014 on the basis that Chef McNamara knew firsthand (i.e., as a resident of the Barossa Valley) that the almonds could not have been from the Barossa given that ‘no one [was] growing any commercial value of almonds in the Barossa Valley’. However, the complaint that was lodged with the ACCC was never investigated by the regulator and the almond products are still available for consumers to purchase, labelled with the Regional Branding ‘Barossa Almonds’.


26 Ibid. It is also assumed that Mr Farmer is the director of ‘Adelview Pty Ltd’ ABN 077 485 100, the company that is the registered owner of the business name ‘Virginia Farm Produce’. Information obtained from ASIC Business Name Summary for ‘Virginia Farm Produce’ (online), https://connectonline.asic.gov.au/RegistrySearch/faces/landing/bn/SearchBnRegisters.jspx?_adf.ctrl-state=11wwvd37ca_4.

27 Trade Marks Act 1995 (Cth) s 20(1) (‘Trade Marks Act 1995’).

28 Mattson, above n 23. Chef Mark McNamara is currently executive chef of St Hugo’s restaurant located in Rowland Flat, Barossa Valley, South Australia. Chef Mark McNamara is currently executive chef of St Hugo’s restaurant located in Rowland Flat, Barossa Valley, South Australia.

29 Mattson, above n 21.

30 Ibid.
The Barossa Almonds example demonstrates how food producers and traders in Australia are currently using Regional Branding on food products. Many food producers and traders are using Regional Branding on food products to make an origin claim, notwithstanding that their food products lack a clear and strong connection with the region claimed. This chapter will emphasise that food producers are able to use Regional Branding in this way because of deficiencies of current laws and regulations in Australia that regulate the usage of Regional Branding on food labels.

2.1.2. Laws and regulations on the usage on food labels

The current patchwork of Australian laws and regulations regulating the usage of Regional Branding on food labels falls into the following main groups:

- consumer protection laws under the Australian Consumer Law that is set out in Schedule 2 of the Competition and Consumer Act 2010 (Cth)\(^\text{31}\)
- passing off and extended passing off
- trade mark laws under the Trade Marks Act\(^\text{32}\).

The analysis of the relevant laws and regulations in this chapter will highlight that they are deficient in three main ways:

1) they allow food producers and traders to use Regional Branding on food labels that falls short of being misleading or deceptive, or involving passing off, even though the food has only a weak connection with the named region
2) they do not give regional food producers enough ex ante guidance as to when they can make an origin claim on food labels and products, especially where some of their ingredients are sourced, or some of their food production takes place, outside the named region
3) they do not adequately regulate whether there is a clear connection between food and origin before a regional name can be used on a food label to make an origin claim.

These deficiencies mean food producers can use Regional Branding on food labels to make origin claims on food products that lack any clear or strong connection with the region claimed. In doing so, many food producers and traders take advantage of, and free-ride on, the reputation that Australian regions have for producing quality regional food and the value that accordingly exists in the relevant Australian regional names.

Consequently, this chapter will identify that this usage of Regional Branding and free-riding by food producers causes four main problems in current laws and regulations:

\(^{31}\) Australian Consumer Law is set out in Competition and Consumer Act 2010 (Cth) Sch 2 (‘ACL’).

\(^{32}\) Trade Marks Act 1995.
1) Australian consumers cannot rely on, or trust, food labels that include Regional Branding to obtain accurate information about the origin of food products
2) regional food producers are being deterred from making additional investment in producing Regionally Branded food products
3) the value that exists in Australian regional names as identifiers of authentic regional food products that have a clear connection with Australian regions is not being adequately protected
4) Australia risks losing the assets that it has in Australian regional names for the purposes of Regional Branding food products. This has the potential to affect Australia’s regionality and Australia’s agricultural and agrifood industries.

Following the analysis of current laws and regulations, this chapter will suggest that clear ex ante guidance is required for food producers and traders as to when they can use regional names on food labels to make an origin claim. Food producers need clear criteria and guidance that they can follow to ensure that they only use regional names on food labels to make an origin claim on food products that have a clear and strong connection with the region claimed. Overall, the suggestion is that:

Much more work needs to be done to protect the regional identity and integrity of food lines originating from valued production areas such as South Australia’s Barossa Valley … the rest of the food industry has a lot of work to do to catch up with the sort of providence branding and regional integrity requirements expected in the wine industry.

Therefore, this chapter will include a detailed review of the Australian wine GI System. Protection of Australian regional names used on wines, and regulation of their usage on wine labels, is provided under the Australian wine GI system. This will highlight the vast differences that exist, under current Australian laws, in the regulation of how regional names are used on food labels to make origin claims, compared to how regional names are used on wine labels, in the form of GIs, to make origin claims. This review will illustrate that the Australian wine industry has been proactive about protecting ‘the regional integrity of its products’, but that the food industry has not. Thus, Australia does not ‘have the same level of stringency

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33 van Caenegem, above n 7, 5.
34 Stern and Makris, above n 8, 43.
35 Marshall, above n 18.
36 The Australian Wine Geographical Indications System is currently governed in accordance with the Australian Grape & Wine Authority Act 2013 (Cth) (‘AGWA Act 2013’) and the Australian Grape & Wine Authority Regulations 1981 (Cth) (‘AGWA Regulations 1981’).
37 Marshall, above n 18.
in other food categories … despite the premium market value some of these regions represent’. In highlighting these differences, the review of the Australian wine GI system will affirm that current laws and regulations are deficient in regulating the usage of regional names on food labels in the ways identified throughout this chapter.

The recommendation that will be made at the end of this chapter, and throughout the remainder of this thesis, is that a sui generis GI system for food be adopted in Australia to overcome the identified deficiencies that exist under current laws and regulations and the problems resulting from them. The review of the Australian wine GI system will offer insight on how GIs might be used on food labels as part of a comprehensive legal framework dedicated to ensuring that food producers and traders use regional names on food labels to make an origin claim only when their food product has a clear and strong connection with the region claimed.

2.2. Consumer Protection Laws

The consumer protection laws, as set out in the Australian Consumer Law (ACL), are the starting point of the discussion about the current patchwork of laws and regulations that regulate the usage of Regional Branding on food labels. Chapter 2 of the ACL includes general protections for consumers that create standards of business conduct in the market. One of these protections is found in section 18 of the ACL that includes a general ban on misleading and deceptive conduct in trade or commerce. Specifically, section 18 of the ACL provides that ‘a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.’ Conduct includes, but is not limited to ‘actions and statements such as advertisements, promotions, quotations, statements and any representations made by a person.’ Another protection is found in section 29 of the ACL that prescribes that it is unlawful for a business to make ‘false or misleading representations’ about goods or services when supplying, offering to supply, or promoting those goods or services. Whether a representation is considered false or misleading will depend upon the circumstances of the case.

In context of Regional Branding on food labels, the overall effect of these provisions for food producers and traders is twofold. First, under section 29(1)(a) of the ACL, it is illegal for food producers and traders to make false or misleading

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38 Ibid.

39 The full text of the Australian Consumer Law is located in Schedule 2 of the Competition and Consumer Act 2010 (Cth) (‘ACL’).

40 ACL s18.


42 ACL s 29.
‘premium or credence claims’ about their food products on food labels. Section 29(1)(a) of the ACL provides that:

A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services make a false or misleading representation that goods are of a particular standard, quality, value or grade.\(^{43}\)

Swiss Chocolate is an example of a premium or credence claim, as it promotes the chocolate as being of a perceived quality because it is made in Switzerland. Claims that give the impression that a product or one of its attributes has an additional benefit when compared to similar products can be made as long as they are not misleading and the business can support them. Therefore, a food producer should not label their chocolate as ‘Swiss’ chocolate unless the chocolate is actually made in Switzerland. To label it ‘Swiss’ chocolate when it has not been made in Switzerland would mislead consumers into believing that the chocolate is of a certain quality because it is Swiss.

Second, it is illegal for food producers and traders to make false or misleading claims on food labels about the place of origin of goods. Section 29(1)(k) of the ACL provides that:

A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services make a false or misleading representation concerning the place of origin of goods.\(^{44}\)

The recent focus of the consumer protection laws in relation to place of origin claims has been on Country of Origin Labelling (CoOL) claims such as ‘Made in Australia’. While the CoOL laws are not the focus of this thesis and research, a brief review of these laws is important to note the type of CoOL that is mandatory on food products in Australia under the ACL.

### 2.2.1. Country of origin labelling

In 2014–2015, the ACCC thoroughly investigated country of origin claims made on food labels. This investigation came following Patties Foods Pty Ltd.’s recall of ‘Nanna’s Mixed Frozen Berries’ and ‘Nanna’s Frozen Raspberries’ from Coles, Woolworths, IGA and other supermarkets nationally in February 2015, due to a potential Hepatitis A contamination. This incident brought into the spotlight country of origin claims made on food labels, specifically ‘Made in Australia’. It was not only the potential contamination that caused consternation among consumers, but the true origin of the fruit that they were purchasing. Consumers assumed that they were buying ‘Australian Made’ products because ‘Nanna’s’ is an

\(^{43}\) ACL s 29(1)(a).

\(^{44}\) ACL s 29(1)(k).
Australian food brand and its products were marketed using the slogan Nanna’s, the taste you can trust. However, the berries were not from Australia—they were grown in Chile and China before being packaged at a Chinese factory.

In relation to the country of origin claim provided on the product packaging, consumer group CHOICE’s spokesperson Tom Godfrey stated that:

*It was virtually impossible for consumers to know where their food was coming from. Claims like ‘packed in Australia using imported fruit’ or ‘made in Australia using local and imported ingredients’ are basically meaningless when it comes to trying to work out where your food is from. We think claims like ‘made in Australia using local and imported ingredients’ just try to evoke Australia … [but] it might not have any Australian ingredients in it at all.*

The confusion over the origin of the fruit caused the Commonwealth Minister for Agriculture, Barnaby Joyce, to call for the introduction of stricter guidelines in relation to CoOL.

In 2014–2015, the Australian federal government carried out research initiatives with a view to offering clearer laws relating to CoOL claims. These government initiatives culminated in a proposed new CoOL system in July 2015 (Draft CoOL Standard). The Draft CoOL Standard commenced under the ACL on 1 July 2016 as the *Country of Origin Food Labelling Information Standard 2016* (Cth) (*Standard*).

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46 Roxanne Allan, 'Bid to buy local is a lost cause', *The Advertiser* (Adelaide, South Australia), 21 February 2015, 23.


49 *Country of Origin Food Labelling Information Standard 2016* (Cth) (*Standard*).
products according to the requirements set out in the Standard. Until then, the existing requirements for CoOL will remain in place, as set out in the *Australia New Zealand Food Standards Code, Food Standards Australia New Zealand Act 1991* (Cth) (‘Food Standards Code’)\(^\text{50}\), as administered by the Food Standards of Australia and New Zealand. During this transition period, Businesses must either continue to comply with the labelling requirements of the Food Standards Code or adopt the new labelling requirements of the Standard.

Food standard 1.2.11 of the Food Standards Code is the relevant standard dealing with CoOL. Specifically, standard 1.2.11–2(3)(a) sets out the obligation on Businesses in relation to country of origin claims made on food labels, including that the country of origin information on a food label must identify the country or countries of origin of the food.\(^\text{51}\) This will be replaced by the Standard on 1 July 2018. Under the Standard, the type of country of origin claim that can be made on a food label will vary depending on where it was grown, produced, made or packed. For example, a food may only carry a ‘Grown in Australia’ or ‘Produced in Australia’, standard mark label if it contains exclusively Australian ingredients.\(^\text{52}\) In relation to ‘Made in’ country of origin claims, this will be determined by where the food product underwent its last substantial transformation. The focus is on where the production of food took place, rather than from where its ingredients were sourced.\(^\text{53}\)

The new labelling requirements under the Standard assist with reducing some of the confusion surrounding CoO\(\text{L}\) claims such as ‘Made in Australia from local and imported ingredients’, by requiring that Businesses identify on the food label what percentage of Australian ingredients are in a product. This requires food labels to carry a country of origin symbol (the kangaroo logo) and a bar graph that shows the amount of Australian ingredients in the product. For example, if a product made in Australia contains 50 per cent Australian ingredients, it will display the kangaroo logo with a bar graph half full, along with some wording to that effect.\(^\text{54}\)

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\(^\text{50}\) *Australia New Zealand Food Standards Code, Food Standards Australia New Zealand Act 1991* (Cth) (‘Food Standards Code’).

\(^\text{51}\) *Food Standards Code* standard 1.2.11-2(3)(a).


\(^\text{53}\) Ibid 7.

\(^\text{54}\) Australian Competition & Consumer Commission, above n 50, 13. The new mandatory CoOL that includes the Kangaroo logo and bar graph highlighting the percentage of Australian ingredients that are in a product:
However, the new laws do not require that Businesses identify the exact geographical location from where the Australian ingredients have been sourced. There is no legal requirement to include a more specific geographical location such as the name of a region, place or state, from where the ingredients have been sourced. Further, the new laws do not assist with identifying the source of non-Australian ingredients given that there is no legal requirement to do so. Accordingly, consumers will remain confused about the source of non-Australian ingredients and, more relevant to this research, about the specific geographical origin of Australian ingredients. At a time when consumer preferences favour eating local and authentic food and knowing the specific geographical origin of food, the new CoOL laws still do not deliver on this aspect.

This leads to a review of place of origin claims, and credence claims, to better understand how consumer protection laws currently regulate how food producers and traders use regional names on food labels to make such claims.

2.2.2. Place of origin labelling and credence claims

Currently, under consumer protection laws in Australia, if a food producer or trader uses a regional name to make a place of origin or credence claim on a food label ‘they are subject to the general requirement of accuracy (that is, not being misleading or deceptive) imposed by the ACL’. The onus is on food producers and traders to ensure that they comply with this general requirement of accuracy and that they can substantiate the claims they make on food labels. The ACCC does not regulate whether food producers comply with this requirement before they use regional names on food labels to make place of origin or credence claims. Rather, the ACCC and consumer protection laws rely on food producers and traders to ensure that they make accurate claims. It is only where a complaint is made about a place of origin or credence claim, and if that complaint is taken further and investigated by the ACCC that the ACCC steps in and regulates whether a food producer has complied with the general requirement of accuracy for the purposes of the ACL.

If consumers or food producers believe that a place of origin or credence claim made on a food label is misleading, they can make a complaint about the claim to the ACCC. ‘A food producer might believe that a rival food producer is misrepresenting the geographical origin or association of goods in a way that misleads consumers at large’ and lodge a complaint with the ACCC. In those instances, the ACCC has certain powers under the ACL and the Competition and Consumer Act 2010 (Cth) (CCA) to investigate place of origin and credence

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55 van Caenegem, Drahos and Cleary, above n 15, 15.


57 van Caenegem, Drahos and Cleary, above n 15, 14.

58 Competition and Consumer Act 2010 (Cth) (‘CCA’).
claims to determine whether the claims that a food producer has made on their food labels is false, misleading or deceptive for the purposes of sections 18 and 29(1)(a) or (k) of the ACL. For example, under section 219 of the ACL, the ACCC can issue substantiation notices. These require food producers and traders to disclose truthful information to substantiate certain claims made by another party about their place of origin or credence claim. Further, under section 228 of the ACL, the ACCC is able to take civil proceedings, normally in the Federal Court of Australia, against the food producer or trader for contravening sections 18 and 29(1)(a) or (k) of the ACL. If civil proceedings are not taken against food producers and traders and the ACCC in investigating a claim finds that a food producer or trader has made false, misleading or deceptive representations on their food labels the ACCC can require food producers and traders to provide undertakings under section 87B of the CCA.

The section 87B power is used by the ACCC as an alternative to litigation, in circumstances in which the offending food producer or trader is willing to cooperate with the ACCC and provide undertakings as an appropriate resolution in the circumstances. Such undertakings usually last for a period of three years and are enforceable in court. The ACCC requires that contravening food producers and traders undertake not to make false, misleading or deceptive representations on their food labels and take corrective action to amend false, misleading and deceptive representations made elsewhere such as on food producers’ and traders’ websites. As part of a section 87B undertaking, food producers and traders must also acknowledge that the ACCC will make the pursuant undertaking publicly available by including it on the ACCC’s public register of section 87B pursuant undertakings on its website. Food producers and traders are also required to acknowledge that the ACCC will make public reference to the undertaking including in news media statements and in ACCC publications. ‘The ACCC’s view is that all section 87B undertakings should be a matter of public record and open to public scrutiny’ given that one of the ACCC’s main aims in enforcing the

59 ACL s 219.

60 ACL s 228.

61 CCA s 87B.


63 Ibid., 4-5 and CCA s 87B.

64 Australian Competition & Consumer Commission, above n 52, 5.

65 Ibid.
ACL and CCA provisions is to deter future offending conduct that results in substantial consumer detriment.66

Despite these powers, it is important to emphasise that the ACCC only hears a small number of place of origin and credence claim cases on an infrequent basis. The chair of the ACCC, Rod Sims, acknowledges that:

*Each year the ACCC receives roughly 160,000 complaints and inquiries. From this pool, the ACCC must make a judgment on which matters merit an investigation. This process narrows the scope to about 500 initial investigations, around 140 of which are then conducted at an in-depth level … From this activity, around 35 go to court each year, around 30 court enforceable undertakings are accepted and infringement notices issued in around 30 matters.*67

Further, ‘of all of these matters only a fraction result from false claims of origin … [and] only a small fraction of cases of consumer deception about provenance branding (credence claims) will ever be taken forward by the ACCC.’68

In 2014–2015, when the ACCC gave priority to credence claims and place of origin and country of origin claims, the ACCC specifically focused on misleading claims relating to:

*Poultry and egg production claims—whether the chickens are free-range or free to roam, food premium claims—whether the bread is baked fresh or the products are premium such as extra virgin olive oil, country of origin claims—whether products are Australian made [and] representations, including marketing and labelling, that portray large manufacturers as small niche businesses.*69

The focus was on these types of claims because in the ACCC’s opinion: ‘these issues go to the heart of market efficiency. If consumers become sceptical as to claims concerning how products are made (e.g., free-range) or niche products, then innovation and competition will suffer’.70

Three of the claims that the ACCC investigated during 2014–2015 included those made by:

- Barossa Farm Produce (of which Saskia Beer was the sole director)

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66 Australian Competition & Consumer Commission, above n 50, 3.


68 van Caenegem, Drahos and Cleary, above n 15, 15.

69 Sims, above n 67, 189.

70 Ibid.
• Maggie Beer Products Pty Ltd
• Carlton United Brewery.

These claims are reviewed below and are useful to understand the limitations of the consumer protection laws, and the ACCC’s powers, in regulating how food producers use regional names on food labels to make place of origin or credence claims. Each of these investigations was resolved by the ACCC requiring that each party provide section 87B CCA undertakings, thus, making these matters subject to public scrutiny. At the time, these matters received substantial media attention most likely because the ACCC had limited capacity to hear place of origin and credence claims and ‘believes that the publicity surrounding a small number of high profile matters will provide a satisfactory deterrent effect’.

2.2.2.1 Claim 1: Black Pig

First, the ACCC investigated the credence/food premium claim made by Barossa Farm Produce in 2014 on its Black Pig labelled smallgoods. The ACCC determined that, in relation to the supply of Black Pig labelled smallgoods, Barossa Farm Produce had made representations that the pork used was free-range when it was not. Barossa Farm Produce also claimed on the labels that the pork was from ‘heritage Berkshire’ pigs or other ‘heritage’ black pig breeds (see Figure 2.2), when that was not the case.

Figure 2.2: Black Pig labeling


Further, the ACCC found that Barossa Farm Produce made representations on its website that it knew the origin of every animal used in the production of the Black Pig labelled smallgoods, when the company did not have this information or knowledge. Accordingly, the ACCC determined that this conduct was likely to

71 van Caenegem, Drahos and Cleary, above n 15, 15.

72 Undertaking to the ACCC given for the purposes of section 87B of ACL by Barossa Farm Produce Pty Ltd (ACN 095 717 347), Document Number D14/76549 (‘Barossa Farm Produce Undertaking Document Number D14/76549’).

73 Ibid [9, 10, 11, 13].
have contravened sections 18 and 29(1)(a) of the ACL and required Barossa Farm Produce to provide a section 87B CCA undertaking to amend its Black Pig labelled smallgoods. Barossa Farm Produce also undertook to not make any misrepresentations on its labels that it knew the origin of every animal used in the production of Black Pig labelled smallgoods when it did not have this knowledge.\textsuperscript{74}

\textbf{2.2.2.2 Claim 2: Carlton United Brewery}

The ACCC investigated the claim made by Carlton United Brewery (CUB) on the Byron Bay Pale Lager beers that CUB brewed and produced. The claims portrayed CUB (a large manufacturer) as a small niche business.\textsuperscript{75} The description on the back label of the beer claimed that:

\textit{The Byron Bay Brewing Co is located on Skinner’s Shoot Road in Byron Bay. We’re housed in a historic location, a birthplace of much of the fame and spirit of Byron Bay, which has attracted local and international musicians, artist and alternative thinkers since the ‘70s. Next time you’re in town, drop in and have a beer. Brewed in NSW by the Byron Bay Brewing Company and its Licensees.}\textsuperscript{76}

The ACCC determined that the overall representation made by the labels (see Figure 2.3) used on ‘Byron Bay Pale Lager’ marketed by CUB and designed in consultation with Byron Bay Brewing Company was likely to mislead consumers that the beer contained in the bottle had been brewed by Byron Bay Brewing Company at its small brewery in Byron Bay, New South Wales.

\textsuperscript{74} Barossa Farm Produce Undertaking Document Number D14/76549, [18 (b)].

\textsuperscript{75} Undertaking to the ACCC given for the purposes of section 87B of ACL by CUB Pty Ltd (ACN 004 056 106) (t/a Carlton & United Breweries), Document Number D14/51628 (‘CUB Undertaking Document Number D14/51628’).

\textsuperscript{76} Ibid [Annexure A].
However, CUB brewed the product at a brewery located in Warnervale, approximately 630 kilometres away by road from Byron Bay. The ACCC determined that the labels were likely to have contravened sections 18 and 29(1)(k) of the ACL. In response, CUB provided a section 87B CCA undertaking to not make false, misleading or deceptive representations regarding the scale of the brewery in which a product was brewed or concerning the place of origin of its products.

### 2.2.2.3 Claim 3: Maggie Beer Products

A third example is the ACCC’s investigation into place of origin claims made by Maggie Beer Products Pty Ltd on Maggie Beer ice creams (all flavours), extra virgin olive oil, rosemary and verjuice biscuits and aged red wine vinegar (Contravening Products):

- the ‘Maggie Beer’ logo depicts a pheasant with the words ‘A Barossa Food Tradition’
- the words ‘Made in Australia’ or ‘Product of Australia’
- the words ‘Maggie Beer Products, 2 Keith Street, Tanunda, South Australia 5352’

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77 CUB Undertaking Document Number D14/51628, [3.3, 3.4].

78 Ibid [5.1].

79 Undertaking to the ACCC given for the purposes of section 87B of ACL by Maggie Beer Food Products Pty Ltd (ACN 080 083 058), Document No. D14/110666, (‘Maggie Beer Food Products Undertaking Document No. D14/110666’), [8(a)-(c)].
The ACCC found that as ‘a result of these representations in close proximity on the labels, a reasonable consumer would have gained the overall impression that each of these products was manufactured in Tanunda, the Barossa Valley and/or South Australia, when in fact this was not the case.’\(^{80}\) In April 2013, this ‘overall impression’ was affirmed by representations that Maggie Beer Products made to the public during a ‘local fair’ held at a Woolworths supermarket in Mitcham, South Australia, that its ice cream and rosemary and verjuice biscuits were made in South Australia or were otherwise ‘local’ products, when that was not the case.\(^{81}\) The ice cream, extra virgin olive oil and rosemary and verjuice biscuits were made in Victoria, while the aged red wine vinegar was made in Queensland.\(^{82}\) The ACCC found that the place of origin claims and Maggie Beer Products’ conduct were likely to have been misleading and in breach of sections 18 and 29(1)(k) of the ACL.\(^{83}\)

Following the ACCC’s findings against Maggie Beer Products, Maggie Beer Products undertook to amend its labelling so that the place of manufacture for products made outside South Australia was made clear to consumers. Maggie Beer Products also undertook to delete the words ‘A Barossa Food Tradition’ from all ‘Maggie Beer’ branded products that were produced either in South Australia or interstate by a third-party manufacturer.\(^{84}\) Lastly, Maggie Beer Products undertook

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\(^{80}\) Ibid [8(c)].

\(^{81}\) Maggie Beer Food Products Undertaking Document No. D14/110666, [9].

\(^{82}\) Ibid [8(d)-(e) and 10(d)-(e)].

\(^{83}\) Ibid [13].

\(^{84}\) Ibid [20].
to publish an educative article in *Food Magazine* that it did on 2 September 2014.\(^8^5\)

### 2.2.3. Guidance from ACCC investigations— the ‘overall impression’ enquiry

These investigations illustrate that when the ACCC decides to investigate a place of origin or credence claim, it will assess the claim with a view to determining what is the ‘overall impression’ that the claim leaves in the mind of the consumer.\(^8^7\) The consumer protection laws ‘generally prohibit misleading or deceptive conduct based on the impression consumers [are] likely to gain from the way a food product [is] promoted or labelled.’\(^8^8\) The overall impression enquiry is in keeping with the consumer protection laws’ main concern of ensuring that place of origin and credence claims do not mislead consumers. This is on the basis that consumers rely on food labels to make choices when purchasing food products and do not have the means to investigate the claims at the point of sale. Therefore, food producers should ensure that they make accurate claims on food labels so that they do not interrupt market efficiencies.

While a food producer or trader might not intend to mislead consumers, intention is not necessary to contravene the ACL. Even a food producer or trader who does not intend to mislead consumers, or who is careless about the claim they make on their food labels, can still be liable under the ACL for making a misleading claim.\(^8^9\) This was seen in the investigation into Maggie Beer Products. Although Maggie Beer apologised for the claims made on the Contravening Products in the *Food

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85 Ibid [22].

86 Aofie Boothroyd, ‘Maggie Beer’s labelling lessons from the ACCC,’ (2 September 2014), *Food Magazine* <https://foodmag.com.au/maggie-beers-labelling-lessons-from-the-accc/>. In the article, Maggie Beer explained that the words ‘Maggie Beer A Barossa Food Tradition’ were used on all 204 Maggie Beer products, and were true claims of origin for 200 products that were all made in the Barossa Valley, but not true for the Contravening Products. While Maggie Beer initially created, made and tested the Contravening Products in the Farm Kitchen in the Barossa Valley, due to market demand for the Contravening Products, the company had to look interstate to manufacture the Contravening Products. Given their initial creation in the Barossa by Maggie Beer herself, Maggie Beer didn’t think that using these words would be misleading for consumers. She apologised in the article to any consumers who had been mislead by the wording noting: ‘I never, ever, want anyone to think that I set out to mislead so if anyone was misled, my apology is so heartfelt, but I truly believed that I was never doing anything wrong.’

87 Australian Competition & Consumer Commission, above n 52, 5.

88 Marshall, above n 18.

Magazine article, on the basis that she ‘never … set out to mislead’\textsuperscript{90} consumers about the place of origin of the Contravening Products, her lack of intention was not necessary to contravene the ACL. Rather, in determining whether there had been a contravention of the ACL by Maggie Beer Products, the ACCC’s key enquiry was on the overall impression that a reasonable consumer would have reached about the place of origin of the Contravening Products due to the claims made by Maggie Beer Products.

The Federal Court of Australia’s overall impression enquiry in \textit{Australian Competition and Consumer Commission v Kingisland Meatworks and Cellars Pty Ltd}\textsuperscript{91} further affirms that consumer protection laws are concerned with the overall impression that consumers are left with due to claims made by food producers on food labels. The \textit{Kingisland Case} is one of the leading Australian cases dealing with place of origin claims. The ACCC brought civil proceedings in the Federal Court of Australia against a meat retailing business based in Brighton, Victoria, named ‘Kingisland Meatworks & Cellars Pty Ltd’ (Kingisland Meatworks) and against Kingisland Meatworks’ sole director, Mr Mastromanno. The ACCC alleged that Kingisland Meatworks made false or misleading representations about the place of origin of the meat that it sold and that this constituted misleading or deceptive conduct that was likely to mislead sections 53(eb) and 52 of the \textit{Trade Practices Act 1974} (Cth), and the successor provisions of the ACL, namely sections 29(1)(k) and 18, respectively.

The ACCC alleged that Mr Mastromanno was ‘directly or indirectly knowingly concerned in or a party to the false or misleading representations and the misleading or deceptive conduct’.\textsuperscript{92} The ACCC also alleged that, since approximately July 2008, Kingisland Meatworks had promoted itself as ‘Kingisland Meatworks and Cellars’ or ‘Kingisland Meatworks’ on signage at its shop, in newspaper advertisements, by its internet domain name and on its website, as well as on its logo (Promotional Conduct). King Island, a small island in the Bass Strait between Victoria and Tasmania, has a reputation for its high-quality beef and the ACCC alleged that the Promotional Conduct carried out by Kingisland Meatworks represented that the meat sold at the business, or at least a significant proportion of it, was grown or raised on or was from King Island.\textsuperscript{93}

In response, Kingisland Meatworks did not deny that it had used the words ‘Kingisland Meatworks and Cellars’ or ‘Kingisland Meatworks’ to promote its business. Nor did it contend that any significant proportion of the meat it had sold

\textsuperscript{90} Boothroyd, above n 86. See footnote above n 86 for details of Maggie Beer’s apology included in the \textit{Food Magazine} article.

\textsuperscript{91} \textit{Australian Competition and Consumer Commission v Kingisland Meatworks and Cellars Pty Ltd [2012] FCA 859} (14 August 2012) (Murphy J) (‘\textit{Kingisland Case}’).

\textsuperscript{92} \textit{Kingisland Case} [1].

\textsuperscript{93} \textit{Kingisland Case} [2].
since 2002 was grown or raised on, or was otherwise from, King Island.\textsuperscript{94} Consequently, the Federal Court’s main enquiry was whether Kingisland Meatworks’ Promotional Conduct conveyed the representations that the meat it sold was primarily from King Island, or grown or raised on King Island. If it did convey this representation, then given that Kingisland Meatworks did not in fact sell meat that was grown or raised on or otherwise from King Island since 2002, the representation would be false or misleading as to the place of origin of the meats sold by Kingisland Meatworks.

In making this main enquiry, Murphy J explained that the Court needed to consider the following two issues:

1) whether the pleaded representations (namely that the meat sold at the business, or at least a significant proportion of it, was grown or raised on, or was otherwise from, King Island) were conveyed by Kingisland Meatworks’ Promotional Conduct

2) whether, as a matter of fact, the representations conveyed were false, misleading or deceptive or likely to mislead or deceive.\textsuperscript{95}

As the Promotional Conduct was not directed at a specific person, both issues needed to be considered by reference to the ‘class of consumers likely to be members of the target audience’.\textsuperscript{96} This involves ‘isolating a hypothetical reasonable member of the target audience’\textsuperscript{97} and considering:

*What meaning the ordinary or reasonable class member would ascribe to the [claim], excluding possible reactions to it that are extreme or fanciful. To consider the reaction of the reasonable class member is to consider the reaction of a significant proportion of the target audience or at least a not insignificant proportion.*\textsuperscript{98}

Murphy J considered that Kingisland Meatworks’ Promotional Conduct was directed to a ‘broad class of retail consumers of meat, delicatessen and wine products’\textsuperscript{99} that included:

*Wide range of persons, including the astute and gullible, the intelligent and not so intelligent, the well-educated and the poorly educated … and consumers with no, or only a passing, interest in the place of origin of meat*

\textsuperscript{94} *Kingisland Case [3].*  
\textsuperscript{95} *Kingisland Case [8].*  
\textsuperscript{96} *Kingisland Case [9].*  
\textsuperscript{97} *Kingisland Case [9].*  
\textsuperscript{98} *Kingisland Case [9].*  
\textsuperscript{99} *Kingisland Case [17].*
through to those that take a keen interest in the provenance of any meat that they purchase.\textsuperscript{100}

More specifically, the target audience included the following members in relation to the:

- Shop signage—potential consumers passing along Church St, Brighton, either on foot or by road
- Local newspaper advertisements—potential consumers in Melbourne suburbs around Brighton and Caulfield
- Kingsisland Meatworks’ domain name and website—potential consumers prepared to travel to the shop in Brighton to make a purchase, given that online purchases were not possible.\textsuperscript{101}

Murphy J also concluded that while the target audience was largely concentrated in the Melbourne bayside suburbs surrounding Brighton, it also included some potential consumers of ‘specialty or ‘upmarket’ butchery products across other parts of metropolitan Melbourne’.\textsuperscript{102}

The characteristics of the target audience, including the hypothetical reasonable consumer, are relevant to determining whether the representations alleged are conveyed. Knowledge that might influence the meaning that a reasonable consumer from the target audience deducts from the claim may be imputed to the target audience. On the facts of the Kingsisland Case, Murphy J found that all parties had knowledge, and agreed, that King Island had a reputation for meat production and for producing high-quality beef: ‘It is not controversial that, in terms of meat production, King Island produces only beef in commercial quantities and not other meats such as lamb, pork, turkey or squab’.\textsuperscript{103} Therefore, this knowledge was imputed to the reasonable consumer who was a member of the target audience.\textsuperscript{104}

Thus, the Federal Court considered the effect of the Promotional Conduct on a reasonable consumer who had the imputed knowledge that King Island had a reputation for producing high-quality beef. The focus question was whether Kingsisland Meatworks’ usage of the words ‘Kingsisland Meatworks and Cellars’, ‘Kingsisland Meatworks’ and ‘King Island’, in combination with the business’ logo, in the context in which they appeared (i.e., business signage, newspaper and website), conveyed to the reasonable consumer that the meat Kingsisland Meatworks sold, or at least a significant proportion of it, was grown or raised on, or

\textsuperscript{100} Kingisland Case [19].

\textsuperscript{101} Kingisland Case [17].

\textsuperscript{102} Kingisland Case [18].

\textsuperscript{103} Kingisland Case [21].

\textsuperscript{104} Kingisland Case [28].
was otherwise from, King Island.\textsuperscript{105} In determining the overall impression that these words left in the mind of a reasonable consumer member of the target audience, Murphy J found that:

\begin{quote}
By its shop signage, its newspaper advertisements, its use of the logo, and its use of its domain name and website Kingisland Meatworks conveyed the representation that all, or at least a significant proportion, of the meat that it sold was grown or raised on or was otherwise from King Island. This was not the case, as from July 2008 until February 2011 none of the meat it sold was sourced from King Island and thereafter only very limited sales were made.\textsuperscript{106}
\end{quote}

Having concluded that the Kingisland Meatworks conveyed the alleged representations, and had not sold meat sourced from King Island between July 2008 and February 2011, Murphy J also concluded that Kingisland Meatworks had made false or misleading representations concerning the place of origin of its meat goods.\textsuperscript{107} Specifically, Kingisland Meatworks had contravened section 53(eb) of the \textit{Trade Practices Act 1974} (Cth) for representations made up to 31 December 2010 and section 29(1)(k) of the ACL for representations made from 1 January 2011. Further, Kingisland Meatworks had engaged in misleading or deceptive conduct in contravention of section 52 of the \textit{Trade Practices Act} for conduct engaged in up to 31 December 2010 and section 18 of the ACL for conduct engaged in from 1 January 2011.

Overall, the \textit{Kingisland Case} and the ACCC investigations indicate that food producers and traders should consider the overall impression that a reasonable consumer is likely to be left with about the place of origin or credence attributes of food products due to the claims they make on food labels. Food producers should ensure that they are able to substantiate the claims made when a complaint is made about their claims and followed up with an investigation by the ACCC. By considering the overall impression enquiry, food producers and traders are more likely to give due consideration to whether their claims are accurate for the purposes of complying with the ACL. The ACCC’s investigations and the \textit{Kingisland Case} also illustrate that the ACCC and Federal Court can step in and require that food producers and traders take corrective action to amend place of origin or credence claims that are found to contravene sections 18 and 29(1)(a) or (k) of the ACL.

However, these investigations also highlight that current consumer protection laws, and the ACCC’s investigation into potentially false or misleading place of origin or credence claims, are deficient in the following five ways.

\textsuperscript{105} \textit{Kingisland Case} [31].

\textsuperscript{106} \textit{Kingisland Case} [65].

\textsuperscript{107} \textit{Kingisland Case} [66].
2.2.3.1 ACCC’s investigation into place of origin and credence claims depends upon complaints being lodged with the ACCC

Although the ACCC is concerned with false claims of origin and credence claims\(^{108}\), its investigation into place of origin and credence claims depends upon food producers and traders, consumers and/or consumer advocacy groups, lodging complaints with the ACCC about potentially false or misleading claims. In the absence of complaints being lodged with the ACCC, there is little regulation of whether place of origin and credence claims are accurate (i.e., not false, misleading or deceptive) for the purposes of the ACL. Rather, consumer protection laws and the ACCC rely on food producers and traders to ensure that they comply with the general requirement of accuracy under the ACL. The onus is on food producers to ensure that they do not make false or misleading place of origin or credence claims and that they can substantiate the claims that they make on food labels.\(^{109}\)

However, as the investigations above and the *Kingisland Case* illustrated, not all food producers comply with this requirement. The result is false or misleading claims being made on food labels and on food products that lack any clear connection with the place claimed. If potentially false or misleading claims remain unknown to, and are not investigated by, the ACCC, there is little chance that such claims will be amended. Accordingly, food producers will be able to use regional names on food labels to make origin claims on food products that might lack any clear connection with the region claimed.

Further, when a complaint is lodged with the ACCC, it is up to the ACCC to determine if it will go ahead and investigate. As the ACCC has limited capacity to hear place of origin and credence claims, many complaints are not investigated. For example, the ACCC has never investigated the complaint lodged in 2014 regarding the Barossa Almonds claim made by Virginia Farm Produce.\(^{110}\)

The overall effect of this deficiency is that potentially false or misleading place of origin or credence claims made on food labels are in many instances:

- unregulated by the ACCC as to whether they comply with sections 18 and 29(1)(a) or (k) of the ACL
- not investigated by the ACCC as to whether they are in fact false, misleading or deceptive in circumstances in which a complaint is lodged with the ACCC
- on food products that have no clear or strong connection with the place claimed.

\(^{108}\) Sims, above n 67, 184 and 189.

\(^{109}\) Australian Competition & Consumer Commission, above n 56.

\(^{110}\) Mattson, above n 23.
2.2.3.2 Many regional food producers are not willing to lodge a complaint with the ACCC

In most instances, it is regional food producers who want action to be taken against other food producers and traders who make place of origin or credence claims on food products that lack any clear or strong connection with the place claimed. This is because regional food producers, who are based in Australian regions and who invest time and money in growing local, seasonal food products and producing authentic regional food products, want to be able to use the relevant regional name on their food labels to make an origin claim. They want to use the regional name to identify to consumers that their food product originates from the region and that it has a clear and strong connection with the region. In making this investment in producing authentic regional food products, the producers contribute to the reputation that their region has for producing such food and to the value that accordingly exists in the regional name. Therefore, regional food producers want to use their relevant regional name to the exclusion of other food producers, who they believe should not be able to use the name if their food products are not closely associated with the region and are not made using a consistent volume of ingredients that originate from the region.

However, many regional food producers are not willing to spend the time and money to lodge a complaint with the ACCC about a potentially false or misleading place of origin or credence claim. Given the low number of place of origin and credence claims that are investigated by the ACCC, ‘it is a common perception among [regional food producers] that … there [is] little chance that individual complaints against false suggestions of origin [will] be pursued’ by the ACCC’. 111 Many of the South Australian interviewees confirmed this perception, disclosing that ‘small business[es] … don’t have the resources—time, money, or other resources, to defend what is [theirs]’. 112 Complaints that have been lodged with the ACCC and not investigated have left regional food producers feeling unsatisfied with the ACCC’s governance of place of origin and credence claims. For example, Chef Mark McNamara is disappointed that the ACCC has not investigated the Barossa Almonds claim, even though a complaint was lodged with the ACCC in 2014. 113 Regardless of the complaint, the almonds are still being sold with the label ‘Barossa Almonds’ at IGA and Foodland stores across South Australia and promoted elsewhere, such as at the Royal Adelaide Show. 114

This perception of the effectiveness of lodging a complaint with the ACCC influences the:

111 van Caenegem, Drahos and Cleary, above n 15, 15.

112 Interview with Jan Angas, Proprietor and Producer, Hutton Vale Lamb, (Tanunda, Barossa Valley, South Australia, 17 February 2014).

113 Mattson, above n 23.

114 Ibid.
• number of potentially misleading place of origin or credence claims that are brought to the ACCC’s attention
• extent of regulation that the ACCC carries out as to whether place of origin or credence claims comply with the general requirement of accuracy under the ACL.

The result is that food labels that include potentially misleading place of origin or credence claims remain unknown to the ACCC. There are food products that, in many instances, lack a clear and strong connection with the place claimed.

2.2.3.3 A place of origin or credence claim must be false, misleading or deceptive, or have the potential to mislead or deceive, for the ACCC and consumer protection laws to step in and order that the claims be corrected

When the ACCC investigates place of origin and credence claims, it will not step in and order that claims be corrected in the absence of a finding that a place of origin or credence claim is false, misleading or deceptive, or has the potential to mislead or deceive. When a claim falls short of being false, misleading or deceptive, food producers and traders will be able to use a regional name on a food label to make an origin claim on a food product even though the food product might only have a very weak connection with the named region. In this regard, flawed protection is offered under current consumer protection laws to the:

• value that exists in Australian regional names as identifiers of authentic regional food products that have a clear and strong connection with Australian regions115
• regional identity and reputation of Australian regions for producing quality regional food products116
• integrity of food lines originating from Australian regions.117

Regional food producers are dissatisfied that rival food producers can use Regional Branding in this way under current consumer protection laws and take advantage of their region’s reputation for producing quality regional food, towards which they have contributed. They are dissatisfied that rival food producers can take advantage of the value and brand that they have created in the relevant regional name to identify that their food products originate from the region and have a clear and strong connection with the region. Being able to use regional names on food products that only have a very weak and unclear connection with a region affects the value in Regional Branding for regional food producers, even if it falls short of being misleading. This deficiency means:

People can say ‘Barossa something’ on a food label even though nothing of the food product has ever come from [the Barossa]. People might put

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115 Stern and Makris, above n 8, 41.

116 Marshall, above n 18.

117 Ibid.
Regional food producers would prefer a legal framework that prescribes that, in instances when food producers use a regional name on food labels to make an origin claim, or on food products that have no clear connection with the named region, it is ipso facto a breach of law, regardless of whether the place of origin claim is misleading in the circumstances. This requires a legal framework that is dedicated to identifying, and protecting, the connection between food and origin, and ensuring that regional names are used on food labels to make an origin claim only where such a connection exists.

2.2.3.4 Lack of regulation exists under current consumer protection laws as to whether there is a connection between food and origin before food producers use a regional name on a food label to make an origin claim

Consumer protection laws are concerned with the effect that false, misleading and deceptive place of origin or credence claims might have on consumers or the competitive process, rather than protecting the connection between food and origin. This reflects the fact that consumers rely on food labels for information that they do not have the means to readily verify at the point of sale. Thus, consumers are willing to pay more for food products that are labelled with place of origin and credence claims assuming they are accurate. If false or misleading claims are made on food labels this can affect market efficiencies.

Where the ACCC investigates a potentially false or misleading place of origin or credence claim, and carries out the overall impression enquiry, the ACCC conducts a limited enquiry into the connection that the relevant food product has with the place claimed. The enquiry into the connection between food and origin:

- occurs after the place of origin or credence claim has already been made on the food label
- is ‘limited’, because the ACCC investigates the connection between the relevant food product and origin claimed in context of the overall impression that the claim has left in the mind of a reasonable consumer.

For example, in the investigation into Maggie Beer Products, the ACCC found that, due to the claims that Maggie Beer Products made on the contravening product labels, a reasonable consumer would have gained the overall impression that each of the products had been manufactured in Tanunda, the Barossa Valley or South Australia. Therefore, the ACCC inquired into the connection that the Contravening Products had with the places claimed for the limited purpose of determining whether the products had in fact been ‘manufactured’ in Tanunda, the Barossa Valley or South Australia. The ACCC found that the ice cream, extra virgin olive oil

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118 Interview with Jan Angas, Proprietor and Producer, Hutton Vale Lamb, (Tanunda, Barossa Valley, South Australia, 17 February 2014).

119 Lee, above n 89, 5.
oil and rosemary and verjuice biscuits were made in Victoria, while the aged red wine vinegar was made in Queensland. In context of where the products had been ‘manufactured’, the ACCC concluded that there was no connection between the products and Tanunda, the Barossa Valley or South Australia. Therefore, the claims were found to be misleading.

However, there was no regulation of this issue before Maggie Beer Products used the placenames on its food labels. Rather, the onus would have been on Maggie Beer Products to ensure that it complied with the general requirement of accuracy under the ACL in making the claims on the labels of the Contravening Products. Had there been no investigation into Maggie Beer Products by the ACCC, it is very likely that Maggie Beer Products would have maintained using the misleading claims on the labels on the Contravening Products. This is because the consumer protection laws and the ACCC do not regulate whether there is a connection between food and origin before food producers use regional names on food labels to make an origin claim. Further, in the absence of an investigation by the ACCC there is minimal regulation of whether there is a connection between food and origin when food producers use a regional name on a food label to make an origin claim. Rather, regulation only occurs when an investigation is made by the ACCC and only within a limited context.

2.2.3.5 Consumer protection laws do not provide sufficient ex ante guidance on when a regional name can be used on a food label

The ex ante guidance that consumer protection laws provide to food producers and traders who make place of origin or credence claims on food labels, is that food producers and traders must ensure that they comply with the general requirement of accuracy under the ACL. They should not make claims that are false, misleading or deceptive. However, what is lacking is ex ante guidance as to whether a food producer can use a regional name to make a place of origin claim on a food label when some of the ingredients they use to make a food product are sourced, or some of the food’s production takes place, outside the place claimed. For example, there is no guidance or clear criteria provided before a place of origin claim can be included on a food label under the consumer protection laws regarding whether:

- all, or only a significant percentage, of the manufacturing of a food product must take place in the place claimed
- all, or only the core ingredients, of a food product must be sourced from the place claimed.

Yet, it is these issues that food producers and traders require ex ante guidance on so that they have a clear understanding of when they can make place of origin or credence claims on food labels.

Instead of providing clear ex ante guidance on these issues, limited guidance on how to avoid making false or misleading claims is provided to food producers and traders after potentially false or misleading claims have been investigated by the ACCC. The guidance provided by the ACCC depends on the circumstances of each investigation. Whether a claim is false or misleading or not is determined on a case-by-case basis once the ACCC has carried out the overall impression enquiry. However, given that the ACCC has limited capacity to investigate place of origin or
credence claims, the amount of guidance provided to food producers after investigations is also limited.

2.2.4. Problems caused by deficiencies

In the absence of a complaint being lodged with the ACCC about a potentially false, misleading or deceptive claim and being followed up with an investigation by the ACCC, potentially false, misleading and deceptive claims remain unregulated on food labels of food products that might lack any clear connection with the region claimed.

When a complaint is made to the ACCC about a potentially false, misleading or deceptive claim, and is investigated, in the absence of a finding that a claim is false, misleading or deceptive the ACCC will not step in and order that claims be corrected. If a place of origin or credence claim falls short of being misleading or deceptive, then food producers can use Regional Branding on a food label to make an origin claim, even though the food products only have a very weak or unclear connection with the region claimed. Food producers who use Regional Branding in this way, are taking advantage of, and thereby free-riding on, the:

- reputation that Australian regions have for producing quality regional food
- value that accordingly exists in the relevant regional names.

Food producers who using Regional Branding in this way, and free-ride, cause the following problems:

1) consumers cannot rely on, or trust, food labels that include Regional Branding to obtain accurate information about the origin of food products
2) regional food producers are being deterred from making additional investment in producing Regionally Branded food products
3) the value that exists in Australian regional names as identifiers of authentic regional food products that have a clear connection with Australian regions is not being adequately protected
4) Australia risks losing the assets that it has in Australian regional names, affecting Australia’s regionality and Australia’s agricultural and agrifood industries.

Each of these problems also exists due to the deficiencies under current passing off and trademark laws and regulations in Australia. These problems will be discussed in detail further in this chapter, following the analysis of the passing off and trademark laws and regulations.

2.3. Passing Off: Traditional and Extended

2.3.1. Traditional

A relevant area of law that must be considered is passing off (both traditional and extended). When a rival food producer makes deceptive use of the same or similar Regional Branding on a food label as a regional food producer, a regional food producer might choose to rely on the doctrine of traditional passing off (passing
off) to take legal action against the rival food producer.\textsuperscript{120} A regional food producer might take this legal action to defend and protect the reputation attached to food product that features Regional Branding. In \textit{ConAgra Inc v McCain Foods (Aust) Pty Ltd},\textsuperscript{121} Gummow J confirmed that there are three main elements that a court must consider when determining if an action in passing off will be successful in the circumstances.\textsuperscript{122} The following three elements are often referred to as the ‘classical trinity’, following Lord Oliver’s statement of the elements in \textit{Reckitt & Colman Products Ltd v Borden Inc}:\textsuperscript{123}

1) a regional food producer must have goodwill and a reputation attached to their food products

The court must consider is whether a regional food producer who takes action in passing off (Complainant) has goodwill and a reputation attached to their food products. The concepts of goodwill and reputation are treated as ‘synonymous’\textsuperscript{124} in Australia following Lockhart J’s explanation in \textit{ConAgra}, in which he affirmed:

\begin{quote}
Reputation is the key business facet that passing off protects. In my view, the ‘requirement’ of goodwill was not meant to have a different meaning to reputation and its inclusion only serves to complicate the matter.\textsuperscript{125}
\end{quote}

At a practical level, and in the present context, this first element requires the Complainant to prove to the court that they have a reputation in some feature of their food product’s get-up that consumers ‘have become accustomed to rely on’\textsuperscript{126} to identify their food products. This might be a name, mark or get-up style. In the context of this research, the key feature of Regional Branding of food products is the regional name that food producers include on food labels to denote a connection between the food and region named. The general rule is that the ‘more inherently distinctive’ the product name or mark, the better the chances of success in establishing reputation.\textsuperscript{127} This is because most placenames are considered descriptive terms and courts are cautious in confirming reputation exists in a descriptive term: ‘Although it cannot be said that there is a category of descriptive

\begin{footnotesize}
\textsuperscript{120} van Caenegem, Drahos and Cleary, above n 15, 13.

\textsuperscript{121} \textit{ConAgra Inc v McCain Foods (Aust) Pty Ltd} (1992) 33 FCR 302 (‘\textit{ConAgra}’).

\textsuperscript{122} \textit{ConAgra} 356 (Gummow J).

\textsuperscript{123} \textit{Reckitt & Colman Products Ltd v Borden Inc} [1990] 1 WLR 491 (‘\textit{Reckitt}’), 499.

\textsuperscript{124} Robert Burrell and Michael Handler, \textit{Australian Trade Mark Law} (Oxford University Press, 2010), 387.

\textsuperscript{125} \textit{ConAgra} 340 (Lockhart J).

\textsuperscript{126} Burrell and Handler, above n 124, 388.

\textsuperscript{127} Ibid, 390.
\end{footnotesize}
marks that can never be protected by passing off … plaintiffs will almost invariably struggle where the mark is purely descriptive.\textsuperscript{128}

The court’s approach to cases involving descriptive geographical terms, such as regional names, tends to be that ‘the more obscure the place and the less the place has a natural connection with the goods or services supplied, the easier it will be to demonstrate the requisite reputation’.\textsuperscript{129} In \textit{Montgomery v Thompson},\textsuperscript{130} the respondents produced beer in Stone, a small town in the Country of Stafford. Stone was ‘a town of six or seven thousand inhabitants, for upwards of a century’.\textsuperscript{131} The respondents had run the only brewery in Stone for a long time and had developed a considerable reputation in the beers that were known to the market, and the public, under the terms ‘Stone Ales’ or ‘Stone Ale’. The appellants had only recently come to the area and labelled their beer ‘Stone Ale’ and ‘Stone Ales’.\textsuperscript{132} The respondents asserted that these terms were ‘exclusively applied to a particular quality of beer, and anyone else asking for ‘Stone Ale’ or ‘Stone Ales’ would desire to be supplied, and expect to be supplied, with the ale manufactured by the respondents’.\textsuperscript{133}

The House of Lords concluded that the appellant, in using the terms ‘Stone Ale’ and ‘Stone Ales’ on beer that it produced in the brewery that it had only recently established in Stone, was trying to pass off the ‘belief that the ales he sold were those which … had become known to the market and the public’.\textsuperscript{134} The House of Lords found that the appellant was obtaining the advantage of the reputation that the respondent’s ales had acquired.\textsuperscript{135} An injunction was granted, restraining the appellant from carrying on the business of a brewery at Stone under the title ‘Stone Brewery’ or ‘Montgomery’s Stone Brewery’ ‘or under any other title so as to represent that the [appellant’s] brewery is the brewery of the [respondent]’.\textsuperscript{136} Further, the appellant was restrained from ‘selling or causing to be sold any ale or beer not of the [respondent’s] manufacture under the term ‘Stone Ales’ or ‘Stone Ale’, or in any way so as to induce the belief that such ale or beer is of the [respondent’s] manufacture’.\textsuperscript{137} Given that Stone was a small town, and that the

\textsuperscript{128} Ibid.

\textsuperscript{129} Ibid.

\textsuperscript{130} \textit{Montgomery v Thompson [1891] AC 217 (HL) (‘Montgomery’)}.

\textsuperscript{131} \textit{Montgomery [45] (Lord Herschell)}.

\textsuperscript{132} \textit{Montgomery [45-55] (Lord Herschell)}.

\textsuperscript{133} \textit{Montgomery [50] (Lord Herschell)}.

\textsuperscript{134} \textit{Montgomery [5] (Lord Herschell)}.

\textsuperscript{135} \textit{Montgomery [5] (Lord Herschell)}.

\textsuperscript{136} \textit{Montgomery [5-10] (Lord Herschell)}.

\textsuperscript{137} \textit{Montgomery [10] (Lord Herschell)}.
respondents had run the only brewery in the town for a long time, the respondents had developed a considerable reputation in the beers. Therefore, the respondents could establish a reputation attached to their beers that were known to the market, and the public, under the terms ‘Stone Ales’ or ‘Stone Ale’.

Conversely, when a food label includes the name of a region that is well known and that has a natural connection with food products, a Complainant would find it more difficult to establish a reputation attached to its food product. For example, when a Complainant uses ‘Barossa Valley’ or ‘Adelaide Hills’ as part of its Regional Branding, they would have a considerable evidentiary onus to establish reputation in either of those names.\(^{138}\) A Complainant would need to establish that consumers have come to see the regional name ‘Barossa Valley’ or ‘Adelaide Hills’ associated exclusively with the Complainant. However, as the Barossa Valley and Adelaide Hills are both well known as premium food destinations that have a strong connection with food products, many food producers use these names on their food products. The effect of this extensive usage is that courts are reluctant to grant one food producer a monopoly in using a regional name only on their food products. Rather:

\[
\text{Consideration of public policy will make the court reluctant to allow a person who chooses to embody in his trade name words of well-known signification and descriptive of the articles or services offered by him to claim anything like a monopoly in the use of such words in a trade name.}\(^{139}\)
\]

On this basis, unless a Complainant could show that their Regional Branding had acquired a ‘subsidiary or secondary meaning that it has come to connote in the minds of the public not only the nature or quality of the goods or services offered but also the identity of the person offering them’,\(^ {140}\) it is unlikely that a court would consider that a Complainant has a reputation attached to their food product for the purposes of an action in passing off. Subsequently, a Complainant would not be able to pursue an action in passing off.

Placenames are generally not sufficiently distinctive to attract a remedy in passing off, and the evidentiary onus to prove distinctiveness is considerable. Therefore, the practical reality is that many food producers and traders cannot rely on an action in passing off to defend the reputation attached to food products that feature Regional Branding:

\[
\text{Proving a sufficient reputation, and also consumer deception, is the central requirement of passing off. This often proves to be an onerous requirement, expensive to prove and relatively uncertain in terms of outcome, making this}
\]

\(^{138}\) van Caenegem, Drahos and Cleary, above n 15, 13.


\(^{140}\) My Kinda Town 37 [10] (Slade J).
a less than attractive legal option for rural businesses which are often SMEs [small-to-medium enterprises] with little capacity for a protracted legal battle.\textsuperscript{141}

Whether or not the court considers that a Complainant has a reputation attached to its food product is a paramount consideration that is inextricably linked to the second element of an action in passing off.\textsuperscript{142} Therefore, if a court considers that the Complainant does not have a reputation attached to the food product this will affect the Complainant’s chances of pursuing and succeeding in an action in passing off.

2) a rival food producer’s usage of a similar name, mark or get-up misleads consumers

If a court considers that the Complainant has reputation attached to its Regional Branding food product, the court must consider whether a rival food producer’s or trader’s (Rival) use of a similar name, mark get-up or style has misled consumers into thinking that the Rival’s food products emanate from the Complainant. In this instance, the court considers factors such as:

- the similarity between the Complainant’s and the Rival’s marks
- the extent of the Complainant’s reputation
- the nature of the goods in question
- the context in which those goods are sold or provided
- how consumers would respond in making purchasing decisions.\textsuperscript{143}

Essentially, for the Rival’s conduct to amount to misrepresentation, the conduct must ‘cause a mental response amongst consumers that is capable of influencing their purchasing behaviour’\textsuperscript{144} and must lead them into error. Overall the court is looking for whether consumers would conclude that some legitimate commercial connection exists between the Complainant and the Rival.\textsuperscript{145} In this sense, an action in passing off is based on much the same premise as the consumer protection laws:

\textit{The touchstone of both areas of law is the effect of the \textquote{Rival’s} behaviour on consumers: are they led to the erroneous conclusion by the \textquote{Rival’s} conduct that some legitimate commercial connection exists between the \textquote{Rival and Complainant}?}\textsuperscript{146}

\textsuperscript{141} van Caenegem, Drahos and Cleary, above n 15, 14.

\textsuperscript{142} Burrell and Handler, above n 124, 386.

\textsuperscript{143} Ibid 404.

\textsuperscript{144} Ibid 405.

\textsuperscript{145} van Caenegem, Drahos and Cleary, above n 15, 14.

\textsuperscript{146} Ibid.
However, other aspects of a Rival’s behaviour may ‘dispel any risk of consumers being [misled] by the use of a mark including a geographical term’. These include ‘the prominent display of a disclaimer or of the [Rival’s] own mark, or the proper identification of the actual place of origin of goods bearing the mark’.

Therefore, a court will consider the overall conduct of the Rival in determining whether a Rival’s use of a similar name, mark get-up or style to that which the Complainant uses on their food products has misled consumers into thinking that the Rival’s food products emanate from the Complainant or that some legitimate commercial connection exists between the Complainant and the Rival.

3) the Complainant has suffered, or is likely to suffer, damage

The court will consider whether the Complainant has suffered, or is likely to, suffer damage as a result of the Rival’s misrepresentation: ‘An integral part of the tort of passing off is that the [Complainant] establish that there is a real and tangible risk of damage, which must be more than a mere possibility’. There are many types of harm that the Complainant might suffer as a result of the Rival’s misrepresentation. These include:

- loss of business and sales through diversion of trade
- harm to reputation
- loss of an opportunity to exploit reputation.

The last type of harm is one that commentators have suggested ‘be approached with most care’. The advice is that, in cases in which this type of harm is found to exist, courts must determine whether there has been a change in consumer behaviour due to the misappropriation. It is not enough for a court to merely find that misappropriation has occurred, the court must also consider whether the Rival’s behaviour is likely to lead to a change in consumer behaviour and thus, whether the Complainant has suffered a loss.

Accordingly, Australian courts will contemplate whether the Complainant can prove that:

There is a real likelihood that consumers will respond differently towards the [Rival] because of [the Rival’s] conduct. That is, the [Complainant] must establish to the court’s satisfaction that something of the

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147 Ibid.
148 Ibid.
149 Stern and Makris, above n 8, 42.
150 Burrell and Handler, above n 124, 421.
151 Ibid.
[Complainant’s] reputation attaches to the [Rival] and is carried into the marketing of the [Rival’s] product.\textsuperscript{152}

\subsection*{2.3.1.1 Misappropriation}

The court must be satisfied that a Complainant has established that:

\begin{itemize}
  \item something of the Complainant’s reputation attaches to the Rival
  \item that aspect of the Complainant’s reputation is carried into the marketing of the Rival’s food product.
\end{itemize}

The court must then go onto examine whether the Rival’s behaviour (the misappropriation) has led to a change in consumer behaviour and the Complainant suffering a loss. This is because passing off laws in Australia protect the reputation of an individual trader. Therefore, there must be loss caused to the reputation of an individual trader due to the Rival’s misappropriation, rather than simply protecting against misappropriation on its own. It is not enough that there is merely misappropriation by the Rival. It must lead to a change in consumer behaviour towards the Complainant’s food product and a loss suffered by the Complainant.

This was affirmed in \textit{McIlhenny Co v Blue Yonder Holdings Pty Ltd}\textsuperscript{153} decided in the Federal Court of Australia. The plaintiff was the maker of ‘Tabasco’ sauce and was denied an injunction to restrain the defendant from using the term ‘Tabasco’ in advertisements for the defendant’s exhibition design services. Lehane J held that:

\begin{displayquote}
Although the defendant had clearly ‘sought to take advantage of a well-known characteristic of the [plaintiff’s] product’ (specifically its reputation for being ‘hot’), there had been no misrepresentation because consumers would not conclude that there was any commercial connection between the parties.\textsuperscript{154}
\end{displayquote}

Consequently, it was not sufficient for the makers of ‘Tabasco’ to show that their sauce had a reputation for being ‘hot’ and that the defendants drew on this when marketing their goods. Passing off laws in Australia do not protect against food producers taking advantage of the goodwill and reputation attached to goods or services. They are concerned with whether the misrepresentation made by a rival trader has likely led to a change in consumer behaviour. Australian courts must be satisfied that ‘there is a real likelihood that consumers will respond differently towards the [Rival] because of [the Rival’s] conduct’.\textsuperscript{155}

\textsuperscript{152} Ibid 422.

\textsuperscript{153} \textit{McIlhenny Co v Blue Yonder Holdings Pty Ltd} (1997) 39 IPR 187 (FCA) (‘McIlhenny’).

\textsuperscript{154} Burrell and Handler, above n 124, 419.

\textsuperscript{155} Ibid.
Court decided that consumers did not conclude that there was any commercial relationship between the parties. Therefore, the Court determined that there was no change in consumer behaviour or loss suffered by the plaintiff.

This approach is quite different to that of the European courts who would apply anti-dilution protection in circumstances similar to those of McIlhenny. European courts offer anti-dilution protection to Complainants when the only damage suffered by them due to a Rival’s misappropriation is the dilution of their mark. For example, if a Rival in Australia used a European GI term on their food product such as ‘Toscano’ (a Protected Geographical Indication [PGI], as will be further discussed in Chapter 5) for extra virgin olive oil, this would arguably be a misrepresentation by the Rival to consumers that the olive oil is connected with the Toscano PGI. Dilution of the Toscano PGI on its own would be enough for a European court to apply anti-dilution protection even though the Consortium might not be able to show any loss suffered as a result of the Rival’s misappropriation of the Toscano PGI. Conversely, an Australian court would not apply anti-dilution protection. An Australian court would only protect against misappropriation in this instance if the Consortium could prove that it suffered actual loss such as loss of sales of Toscano PGI extra virgin olive oil in Australia, due to the Rival’s misappropriation of the Toscano PGI:

Unless the Consorzio di tutela dell’Olio di Oliva Toscano, which is the Italian Consortium which represents all the Olio Toscano producers and is responsible for protecting the Toscano PGI, is able to show that it intends to use the Toscano PGI in respect of olive oil holders, actual loss suffered will be very difficult to show. Arguably, in this instance, the only damage suffered by the Consortium is dilution of the Toscano PGI. However, [Australian] case law has generally indicated that dilution is not enough to satisfy the requirement for damage in respect of the tort of passing off. As a result, the tort of passing off offers very little protection to GIs, even in the instance where [Rivals] attempt to ‘free-ride’ on the goodwill and reputation associated with GIs. If anti-dilution protection was granted by Australian courts, then the plaintiff in McIlhenny would more than likely ‘have a strong argument that the defendant had sought to free-ride on the plaintiff’s reputation, or that there had been blurring or possibly even tarnishment’ due to the defendant’s use of the term ‘Tabasco’.

Showing this misappropriation of reputation would be enough to warrant damages being awarded to the plaintiff. There would be no requirement for the plaintiff to go on and show a change in consumer behaviour due to the defendant’s misappropriation to establish damage.

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156 Stern and Makris, above n 8, 42.
157 Ibid.
158 Burrell and Handler, above n 124, 419.
However, under Australian courts’ current application of passing off laws, once a Complainant has established misappropriation of reputation, Australian courts then evaluate whether:

- there has been a change in consumer behaviour due to a Rival’s misappropriation
- the Complainant has thereby suffered damage such as loss of business and sales through diversion of trade.

If a Complainant is unable to prove damage, they will not succeed in an action in passing off.

2.3.1.2 Challenges for regional food producers

From the analysis of the three elements of an action in passing off, it is evident that a regional food producer would face the following three main challenges in trying to satisfy the elements:

1) regional names are considered descriptive terms

The key feature of a regional food producer’s food product is the inclusion of a regional name—the Regional Branding. As most placenames are considered descriptive terms, a regional food producer would find it difficult to satisfy a court that a reputation attaches to food product with Regional Branding. This is especially the case when the Regional Branding includes regional names such as ‘Barossa Valley’ and ‘Adelaide Hills’. As both these regions have a strong connection with food products, and are used extensively by food producers on food labels, these factors will under determine a regional food producer’s ability to rely on an action in passing off to defend the reputation that attaches to its food products.

2) passing off protects the reputation of individual traders

The three elements of an action in passing off illustrate that passing off laws are concerned with protecting the reputation of an individual trader. The focus is on the damage that the reputation of an individual trader suffers, or is likely to suffer, due to a misrepresentation made by a rival trader. In most instances, a regional food producer uses the same regional name on their food products, as do other regional food producers from the relevant region. All these regional food producers contribute to the reputation that the relevant region has for producing quality food products. They all contribute to the value that accordingly exists in the regional name. This contribution is based on the investment (i.e., time and money) that each of them makes in producing authentic regional food products. Therefore, a regional food producer collectively shares in its region’s reputation with other regional food producers. It is their region’s reputation that they seek to protect and that the usage of the regional name is reserved only for food producers whose food products have a clear connection with the region. Therefore, an action in passing off is inadequate to protect this collective reputation because it is concerned with protecting the reputation of individual traders.
3) a regional food producer might not be able to prove that they have suffered damage.

A regional food producer might not be able to prove that they have suffered damages due to a Rival’s misappropriation of the same regional name on the Rival’s food product. Regional food producers might claim that because the Rival has used the regional name on food products that lack a clear and strong connection with the named region it is a misappropriation of the relevant regional name that affects the reputation of the relevant region. Consequently, the Rival’s use of the regional name on food products that lack any clear and strong connection with the claimed region means that the Rival is attempting to take advantage of the region’s reputation and the value that accordingly exists in the regional name. A regional food producer might seek protection against this misuse of the regional name by a Rival. However, in the absence of a regional food producer suffering damage due to a Rival’s misappropriation (i.e., loss of sales of the regional food producer’s food products) a regional food producer will not succeed in an action in passing off.

Therefore, it is clear that in the absence of a regional food producer being able to satisfy the three elements of an action in passing off, an action in passing off offers regional food producers very little protection against rival food producers using Regional Branding on food products that only have a weak and unclear connection with the region claimed. To successfully overcome the challenges presented by an action in passing off, a regional food producer would need to incur considerable amounts of time and money in providing sufficient evidence to a court: ‘For many businesses (certainly SMEs) suing in passing off is thus little more than a theoretical possibility given the costs and risks involved’. 159 Few food regional producers and traders rely on an action in passing off, given the considerable evidentiary burden that is both costly and time consuming. 160

2.3.2. Extended

Although currently only applied by European courts, it is useful to briefly overview some of the cases that have developed extended passing off to understand the differences between extended passing off and passing off under the traditional doctrine.

Extended passing off is an expansion of the doctrine of traditional passing off that began in 1960 as a response to the Spanish Champagne decision. 161 In A history of Australia’s wine GI legislation, Stern notes: ‘Unlike the conventional tort, in the ‘extended’ version the misrepresentation relates not to the individual trade or commercial source of the product but to membership in a class of products which

159 van Caenegem, Drahos and Cleary, above n 15, 15.
160 Ibid.
161 J.Bollinger v Costa Brava Wine Co Ltd [1960] Ch 262 (‘Spanish Champagne’).
suggests that it has certain qualities.\textsuperscript{162} Extended passing off protects the reputation in a class of goods or products that is shared collectively among a group of traders rather than protecting the reputation of an individual trader.

The Court in the \textit{Spanish Champagne} decision considered whether a group of Champagne traders could collectively share in the reputation attached to ‘Champagne’ made in the Champagne district of France. Before this extension occurred:

\begin{quote}
There was considerable doubt whether any one or more persons could either sue, either individually or jointly, alleging passing off by the use of the word Champagne notwithstanding its great reputation, since it did not represent the wine of any one producer exclusively, and it was not wholly, and in some cases not at all, part of a reputation and goodwill which any particular producer or his predecessors had built up. Any person may set up business as a producer of Champagne provided he does so in the Champagne district of France and complies with the stringent regulations.\textsuperscript{163}
\end{quote}

In \textit{Spanish Champagne}, a dozen Champagne producers from the Champagne district of France sought an injunction to prevent the importation and sale in the United Kingdom of sparkling wine from Spain under the labels ‘Champagne’ and ‘Spanish Champagne’. It was held that the term ‘Champagne’ meant:

\begin{quote}
Sparkling wine that was produced in the Champagne district of France by the Champagne houses and that the use of the term ‘Spanish Champagne’ in relation to Perelada sparkling wine from Spain was likely to mislead people who were not knowledgeable about Champagne into thinking that the defendant’s wine was Champagne.\textsuperscript{164}
\end{quote}

The Court held that there was reputation in a class of goods (i.e., Champagne) defined by its geographic origin (i.e., the Champagne district of France). Significantly, the court held that it did not matter that the ‘persons truly entitled to describe their goods by the name and description are a class producing goods in a certain locality and not merely one individual. The description is part of their goodwill and a right of property’.\textsuperscript{165} As long as the group or class of traders could be identified, the group could pursue the action.

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\textsuperscript{165} \textit{Spanish Champagne} 284 (emphasis added).
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In *Spanish Champagne*, the goodwill and reputation in the term ‘Champagne’ was claimed by an identifiable group of traders (i.e., the dozen Champagne producers taking the action). Therefore, it did not matter that it was a class of traders pursuing the action rather than an individual trader, as was typically the case in an action under the traditional doctrine of passing off. The court determined that the defendants had damaged the reputation and goodwill in the term ‘Champagne’ that was collectively shared among the dozen Champagne producers taking the action, by using the term on the ‘Perelada sparkling wine from Spain’.166

This was a defining decision in that the court:

- provided protection to a class of goods (i.e., Champagne) defined by their geographical origin (i.e., the Champagne district of France)
- recognised that a class of traders collectively shared in the reputation attached to the goods (i.e., Champagne).

Thus, this case was the beginning of the extension of passing off and the introduction of the concept of collective goodwill and reputation.

Since *Spanish Champagne*, extended passing off has been used to prevent the terms ‘Spanish Champagne’, ‘Champagne cider’, ‘elderflower Champagne’, ‘sherry’, ‘old English Advocaat’, ‘white whiskey’, ‘Swiss Chalet’ and ‘vodka’ from being used on products that were not Champagne, sherry from Jerez, Advocaat, whiskey, Swiss chocolate or vodka.

The approach to extended passing off focused on protecting classes of goods defined by their geographic origin until the *Advocaat* case in 1979.167 This House of Lords decision was important in the development of extended passing off because it:

- endorsed the doctrine of extended passing off applied in *Spanish Champagne* and subsequent cases
- extended how the class of goods to which protection was provided could be defined.

The *Advocaat* case was concerned with the Dutch Advocaat product, a Dutch alcoholic beverage made from eggs, sugar and brandy. The first plaintiff made Warnink’s Advocaat in the Netherlands, and the second plaintiff distributed Warnink’s Advocaat in the United Kingdom (UK). Warnink’s Advocaat was the premier brand of Dutch Advocaat in the UK at the time, with limited sales in the UK of Advocaat from other sources. Most of the Advocaat made in the Netherlands and sold in the UK comprised of hens’ eggs, sugar and a colourless spirit called ‘brandewijn’. The defendants sold a product that was made from dried egg powder and fortified sweet wine under the description ‘Keeling’s Old English Advocaat’.

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167 Erven Warnink BV v J. Townend & Sons Ltd [1979] A.C. 731 (‘Advocaat’).
The House of Lords held that the defendant was passing off their Advocaat product as that of the plaintiff’s. In applying the test for passing off, Lord Diplock in the House of Lords identified five characteristics that are required for a valid cause of action in passing off:

(1) a misrepresentation, (2) made by a trader in the course of trade, (3) to prospective customers of his or ultimate consumers of goods and services supplied by him, (4) which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence) and (5) which causes actual damage to the business or goodwill of the trader by whom the action is brought (in a quia timet action) will probably do so.\textsuperscript{168}

Lord Diplock noted that these five characteristics were in existence in \textit{Spanish Champagne}. While these five characteristics have been noted here, ‘the extent to which Lord Diplock intended his formulation to be of general application is perhaps uncertain’.\textsuperscript{169} Whether or not the five elements should be applied in context of extended passing off only, and the ‘classical trinity’ reviewed above in context of traditional passing off cases, is an ongoing issue of debate.\textsuperscript{170} However, it is clear that Australian courts apply the ‘classical trinity’ in determining matters taken under the traditional doctrine of passing off, as was discussed in Section 2.3.2.

Other than identifying the five characteristics required for a valid cause of action in passing off, the House of Lords also endorsed that \textit{Spanish Champagne} extended the traditional doctrine of passing off given the large class of traders among whom the goodwill attaching to the description ‘Champagne’ was shared. On this point, Lord Diplock noted ‘the principle must be the same whether the class of which each member is severally entitled to the goodwill which attaches to a particular term as descriptive of his goods, is large or small’.\textsuperscript{171}

Further, the House of Lords extended the way in which the class of goods that could be protected under extended passing off could be defined. Instead of defining a class of goods merely by their geographic origin, the House of Lords decided that a class of goods could also be defined by ‘alternative methods’.\textsuperscript{172} Such methods included defining a class of goods based on the ingredients used to make a product, irrespective of their origin.\textsuperscript{173} While a geographical limitation on where the

\textsuperscript{168} \textit{Advocaat} 742 (Lord Diplock).

\textsuperscript{169} Burrell and Handler, above n 122, 383.

\textsuperscript{170} Ibid 454.

\textsuperscript{171} \textit{Advocaat} 744 (Lord Diplock).

\textsuperscript{172} \textit{Advocaat} 745 (Lord Diplock).

\textsuperscript{173} \textit{Advocaat} 747-748 (Lord Diplock).
ingredients originate from might ‘make it easier’\textsuperscript{174} to define the class of goods, their qualities and the consequential harm to the goodwill attached to the goods, shared geographical origin of the ingredients was not necessary under this alternative method of defining a class of goods.\textsuperscript{175} To define a class on this basis, the court explained that it is necessary to ‘define with reasonable precision the type of product that has acquired the reputation’.\textsuperscript{176} The House of Lords identified that drinks described by the term ‘Advocaat’ were all made using ‘egg and spirit drink [and] in broad conformity with an identifiable recipe’.\textsuperscript{177} Thus, the class of traders who had the right to describe their product as Advocaat consisted of those traders who had supplied ‘on the English market an egg and spirit drink in broad conformity with an identifiable recipe.’\textsuperscript{178} That class of traders shared collectively in the reputation attached to the Advocaat drinks.

Another significant case in the development of extended passing off is Tattinger v Allbev Ltd (Elderflower Champagne).\textsuperscript{179} The defendants sold sparkling elderflower cordial described as ‘Elderflower Champagne’ in get-up similar to the plaintiff’s Champagne. The elderflower cordial sold for one-third to one-quarter of the cost of the plaintiff’s Champagne. The Court of Appeal found that the ‘real injury to the Champagne houses’ goodwill’ was the erosion of the distinctiveness of the name ‘Champagne’.\textsuperscript{180} It was held that if the defendants were able to continue to call their product ‘Elderflower Champagne’, the ‘effect would be to demolish the distinctiveness of the word ‘Champagne’, and that would inevitably damage the goodwill of the Champagne houses’.\textsuperscript{181}

\textit{The word ‘Champagne’ has an exclusiveness which is impaired if it is used in relation to a product (particularly a potable product) which is neither Champagne nor associated or connected with the businesses which produce Champagne. The impairment is a gradual debasement, dilution or erosion of what is distinctive. The consequences of debasement, dilution or erosion are not demonstrable in figures of lost sales by that they will be incrementally damaging to goodwill is … inescapable.}\textsuperscript{182}

\begin{itemize}
\item \textsuperscript{174} \textit{Advocaat} 747-748 (Lord Diplock).
\item \textsuperscript{175} Gangjee, above n 166, 122.
\item \textsuperscript{176} \textit{Advocaat} 747-748 (Lord Diplock).
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\item \textsuperscript{178} \textit{Advocaat} 747-748 (Lord Diplock).
\item \textsuperscript{179} \textit{Tattinger v Allbev Ltd} [1993] F.S.R. 641 (‘Elderflower Champagne’).
\item \textsuperscript{180} \textit{Elderflower Champagne} 669 (Peter Gibson L.J.).
\item \textsuperscript{181} \textit{Elderflower Champagne} 669-670 (Peter Gibson L.J.).
\item \textsuperscript{182} \textit{Elderflower Champagne} 673-674 (Mann L.J.).
\end{itemize}
This was a crucial decision, as the Court of Appeal recognised erosion of the distinctiveness of a name as a type of harm that extended passing off could protect against. This was a significant extension of passing off under the traditional doctrine. Its practical effect was that even in the absence of proof of damage such as the plaintiff’s actual loss of sales of the ‘Champagne’ product (due to the defendant’s misappropriation of the term ‘Champagne’ on the defendant’s elderflower cordial), the Court recognised that continued usage of the term ‘Champagne’ by the defendant was on its own sufficient as a type of harm that extended passing off would protect against. The erosion or dilution that the defendants would cause to the term ‘Champagne’ over time by continually using it on elderflower cordial was a type of harm that needed to be protected against.

In *Chocosuisse Union des Fabricants Suisses de Chocolat v Cadbury Ltd* \(^{183}\) ('Swiss Chocolate') the second and third plaintiffs were manufacturers of Swiss chocolate. The defendant sold a honey-flavoured milk chocolate bar containing small pieces of almond nougat under the name ‘Swiss Chalet’ in packaging that included a picture of the Matterhorn and an alpine chalet. The court held that even though the term ‘Swiss chocolate’ was descriptive of chocolate made in Switzerland, ‘to a significant section of the public it denoted a group of products of distinctive reputation’.\(^ {184}\) It did not matter that the public had different views of what the features comprising the distinctive quality were. What was relevant was that a significant section of the public *perceived* that the chocolate was of a certain quality. The court determined that the class of goods protected was comprised of chocolates produced in Switzerland according to Swiss food regulations. The court did not define the class of products more narrowly.\(^ {185}\) Therefore, this case further developed extended passing off in that the court applied it to a class of goods defined by their *perceived* distinctive quality.

The last case reviewed is *Diageo v Intercontinental Brands (ICB) Ltd (Diageo)*.\(^ {186}\) In *Diageo*, the plaintiff was one of the world’s leading producers of alcoholic drinks. The plaintiff had marketed SMIRNOFF vodka in the UK since the 1950s and SMIRNOFF vodka had always been the best-selling brand of vodka in the UK. The defendant also produced a range of alcoholic drinks. Since April 2005, the defendant had marketed one of their drinks under the brand name VODKAT. In July 2008, the plaintiff brought proceedings for passing off. The relevant term that was reviewed was ‘vodka’. The High Court of Justice (Chancery Division) considered whether the term ‘vodka’ denoted a defined class of goods with a reputation and protectable goodwill. Arnold J explained that the court needed to

\(^ {183}\) *Chocosuisse Union des Fabricants Suisses de Chocolat v Cadbury Ltd* [1998] RPC 117 ('Swiss Chocolate').

\(^ {184}\) *Swiss Chocolate* 128 (Laddie J).

\(^ {185}\) *Swiss Chocolate* 135 (Laddie J).

\(^ {186}\) *Diageo* (Arnold J).
consider the following two main questions to determine whether the term ‘vodka’ denoted a defined class of goods with a reputation and protectable goodwill:

1) Does ‘vodka’ denote a clearly defined class of goods?
2) Does that class of goods have a reputation giving rise to a goodwill among a significant section of the public?

At the time the case was heard, the class of goods was defined by Council Regulation No. 1576/89/EEC of 29 May 1989. ‘Vodka’ was defined to be mean:

A spirit drink produced by either rectifying ethyl alcohol of agricultural origin or filtering it through activated charcoal, possibly followed by straightforward distillation or an equivalent treatment, so that the organoleptic characteristics of the raw materials used are selectively reduced. The product may be given special organoleptic characteristics, such as mellow taste, by the addition of flavouring.\(^{187}\)

The Regulation prescribed that ‘vodka’ drinks needed to contain a minimum of 37.5 per cent alcohol by volume.\(^{188}\) Since at least 1990, most vodka products sold in the UK had complied with that definition and ‘an even more overwhelming proportion of the quantity of vodka sold has complied’.\(^{189}\) Therefore, the court decided that the term ‘vodka’ denoted a clearly defined class of goods.

In determining whether ‘vodka’ products had a reputation and protectable goodwill, the court concluded that the evidence ‘clearly’ established that the:

Alcohol-consuming public in the UK, and in particular the vodka-consuming public, have come to regard the term ‘vodka’ as denoting a particular class of alcoholic beverage. They may not know precisely what it is, what it is made from or where it is made, but they use the term ‘vodka’ to get what they want and to distinguish it from other similar products and in particular from other spirits such as gin, rum and whisky. [Accordingly] … vodka has acquired a reputation as a ‘drink with recognisable qualities of appearance, taste, strength and satisfaction’.\(^{190}\)

Evidence was cited that showed that the recognisable qualities of vodka among consumers were ‘clear, tasteless, distilled, high strength spirit’.\(^{191}\) Thus, the Court decided that there was a clearly defined class of goods with a reputation and goodwill to which the term ‘vodka’ could be applied.

\(^{187}\) Diageo [66] (Arnold J).

\(^{188}\) Diageo [67] (Arnold J).

\(^{189}\) Diageo [149] (Arnold J).

\(^{190}\) Diageo [155] (Arnold J).

\(^{191}\) Diageo [156] (Arnold J).
The defendant’s marketing of VODKAT amounted to a misrepresentation that it was ‘vodka’ on the basis that there was evidence to support actual confusion among a substantial number of members of the public that the VODKAT product was vodka. In considering the issue of damages suffered by the plaintiff as a result of the defendant’s misrepresentation, the Court considered whether erosion of the distinctiveness of the term ‘vodka’ was a harm that should be protected against as determined by the Court of Appeal in the Elderflower Champagne case. The Court in Diageo held that the defendant’s marketing of VODKAT was likely to erode the distinctiveness of the term ‘vodka’. The defendant’s use of the term VODKAT would likely cause the term ‘vodka’ to cease being a term ‘reserved for 37.5 per cent alcohol by volume spirits, and will come to be seen as a term applicable to lower strength products which include fermented alcohol’. The Court noted that there was evidence that this was already starting to happen. Therefore, Diageo confirmed that extended passing off protects against dilution or erosion of the distinctiveness of a term.

The overview of the above cases highlights that extended passing off is different to an action in passing off under the traditional doctrine in the following main ways:

- it protects the reputation and goodwill in a class of goods that is collectively shared among a class of traders rather than protecting the reputation of individual traders
- a class of goods can be defined by their geographical origin (Spanish Champagne), by their ingredients (Advocaat) or by their perceived distinctive quality (Swiss Chocolate)
- there is no need to establish that the class of goods protected possess actual distinctive or superior quality (Swiss Chocolate)
- dilution or erosion of the distinctiveness of a term is a type of harm that extended passing off will protect against even in the absence of any proof of actual loss of sales of the relevant product bearing the term due to the dilution (Elderflower Champagne, Diageo).

2.3.2.1 Application

While extended passing off appears to have more of a practical application than an action under the traditional doctrine of passing off to regional food producers in context of the research, it has not yet been applied by Australian courts. Before reviewing why Australian courts have not yet applied it, following are the reasons why extended passing off appears to have more of a practical application:

1) it protects the reputation in a class of goods that is collectively shared among a class of traders

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Extended passing off protects the reputation in a class of goods that is collectively shared among a class of traders. This would allow a group of regional food producers all from the same region to take an action against a rival food producer. The basis of their action would be that the rival is using the same Regional Branding as the regional food producers on food products, but on food products that lack a clear connection with the named region.

2) regional food producers could potentially obtain protection for the reputation in a class of goods that feature Regional Branding

European courts have protected the reputation in a class of goods defined by their geographical origin, on the basis of their ingredients or perceived distinctive quality. Potentially, regional food producers could obtain protection for the reputation in a class of food products that feature Regional Branding on one of these bases. However, the cases reviewed above highlight that for a court to provide this protection to a class of goods involves the review of the following questions: Does the term ‘Barossa Valley’ or ‘Adelaide Hills’ denote a clearly defined class of goods? Does that class of goods have a reputation that gives rise to goodwill among a significant section of the public?  

Therefore, regional food producers would first need to satisfy a court that the terms ‘Barossa Valley’ or ‘Adelaide Hills’ denote a clearly defined class of goods. They would need to identify the food products with reasonable precision, following Advocaat. This could be based on the food products meeting one of the following criteria:

- made in, or from ingredients produced in, the Barossa Valley or Adelaide Hills
- made of particular ingredients
- having a perceived distinctive quality because they are produced in the Barossa Valley or Adelaide Hills.

If regional food producers could satisfy this requirement, they would then need to provide a court with evidence that demonstrates that the identified class of goods has a reputation that gives rise to goodwill among a significant section of the public. Following the court’s review of evidence on this aspect in Diageo, this would require regional food producers to cite significant evidence that consumers can distinguish the relevant food product labelled with ‘Barossa Valley’ or ‘Adelaide Hills’ from other similar products. Consumers do not need to know precisely what the product is made from or where it is made, but they must be able to distinguish it from other similar products.

The evidentiary requirements under extended passing off would present a similar burden for regional food producers, as would an action in passing off under the traditional doctrine. Extended passing off protects against dilution or erosion of the distinctiveness of a term, including a geographical term. This provides more

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195 See, eg, Diageo.

196 Advocaat 747-748 (Lord Diplock).
protection for regional food producers than an action in passing off under the traditional doctrine. Unlike an action in passing off, regional food producers would not need to cite evidence of actual loss of sales of their food products due to a rival food producer’s misappropriation of the same or similar Regional Branding on the Rival’s food products. A Rival using the same or similar Regional Branding and misrepresenting that their food products originate from the region claimed when they lack a clear connection with the named region would be sufficient harm on its own.

Overall, while extended passing off appears to have more of a practical application for regional food producers in context of the research for these reasons, the evidentiary requirements might discourage some regional food producers from taking an action.

### 2.3.2.2 Reasons Australian courts have not applied extended passing off

As mentioned, while extended passing off has been applied in the European cases reviewed above, Australian courts have not yet applied it and there is some uncertainty as to its practical application. For example, Laddie J’s reasoning in *Swiss Chocolate* has not been unanimously accepted. Laddie J determined that it did not matter that the public had different views of what the features comprising the distinctive quality of the chocolate were. What was relevant was that a significant section of the public *perceived* that the chocolate was of a particular quality. Burrell and Handler have noted that ‘while this reasoning is sound, where distinctiveness is based on reputation alone it might be difficult to determine the boundaries of the class of traders entitled to use the product description’.\(^{197}\) Thus, it might have been more advantageous to define the class of products more narrowly. For example, the class of products could have been limited to chocolate products that were made: in Switzerland, in accordance with Swiss regulations, without vegetable fat and with a particular texture.\(^{198}\) This was the Court of Appeal’s decision in the *Swiss Chocolate* litigation in which the Court of Appeal disagreed with Laddie J’s findings.\(^{199}\)

Another uncertainty surrounding extended passing off is whether it should require that a rival trader’s conduct cause a diversion of trade from a competitor, when the complainants claim that they collectively hold goodwill. Commentators such as Burrell and Handler suggest that a key consideration in an action under the traditional doctrine of passing off is whether the Rival’s conduct is likely to cause a change in consumer behaviour.\(^{200}\) This is particularly relevant in context of the development of extended passing off in *Elderflower Champagne* that was

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\(^{197}\) Burrell and Handler, above n 124, 455.

\(^{198}\) Ibid.

\(^{199}\) *Chocosuisse Appeal* [19990 RPC 826, 839-40 (Chadwick LJ) cited in Burrell and Handler, above n 122, 455.

\(^{200}\) Ibid.
confirmed in Diageo. The Court of Appeal in Elderflower Champagne recognised ‘erosion of the distinctiveness of a name’ as a type of harm that extended passing off could protect against. However, many commentators including Burrell and Handler are uncertain that erosion or dilution of the distinctiveness of a product name alone should be a separate type of harm. The specific concern is:

Where the UK extended passing off cases … seem to stray into recognising dilution as a stand-alone head of damage, creating at least the appearance that they are prepared to grant injunctions to prevent ‘dishonest trading’ or ‘cashing in’ on the reputation of the plaintiff without any evidence that a change in consumer behaviour is likely.201

The current approach by Australian courts in an action in passing off under the traditional doctrine is that a court must consider whether a Rival’s conduct ‘cause[s] a mental response amongst consumers that is capable of influencing their purchasing behaviour’202 and leads them into error. Overall, a court examines whether consumers would conclude that there is some business association between the complainant and Rival that leads them into error and into purchasing the Rival’s product over that of the complainant. This approach was confirmed by the Federal Court of Australia in McIlhenny Co v Blue Yonder Holdings Pty Ltd.203 As discussed in Section 2.3.1, McIlhenny the Federal Court of Australia emphasised that it was not sufficient for the plaintiff-complainant (the makers of ‘Tabasco’) to show that its sauce had a reputation for being ‘hot’ and that the defendant-Rival drew on this when marketing its goods. Australian courts must be satisfied that ‘there is a real likelihood that consumers will respond differently towards the [Rival] because of [the Rival’s] conduct’.204 The Federal Court in McIlhenny decided that consumers did not conclude that there was any commercial relationship between the parties. Therefore, the Court determined that there was no change in consumer behaviour or loss suffered by the complainant-plaintiff.

Burrell and Handler suggest that if extended passing off were to apply in Australia, then Australian courts should take the same approach in determining if the complainants have suffered damage due to the Rival’s conduct. Where there is no evidence that dilution of the distinctiveness of a name leads to a change in consumer behaviour, a court should not award damages under an action in extended passing off in Australia.

The application of extended passing off by Australian courts in the future is uncertain. In the absence of it being applied, regional food producers are left with the option of taking action in passing off under the traditional doctrine. However, at

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201 Burrell and Handler, above n 122, 456 (emphasis added).

202 Ibid.

203 McIlhenny Co v Blue Yonder Holdings Pty Ltd (1997) 39 IPR 187 (FCA) (‘McIlhenny’).

204 Ibid.
a practical level, very few regional food producers rely on an action in passing off to protect the reputation that attaches to their food products that feature Regional Branding.

2.3.3. Conclusion

Regional food producers would most likely want to pursue an action in passing off as a class of traders who use their relevant region’s name on their food labels to make an origin claim. All regional food producers who invest time and money in making authentic regional food products using locally sourced ingredients and produce their food products within the region would want to use their relevant region’s name on their food labels. Based on their contribution to their relevant region’s reputation, and the value that accordingly exists in the regional name, it would be relevant to all regional food producers to pursue an action against a rival producer to protect the value that exists in their region’s name and their region’s reputation.

Regional food producers would pursue an action in passing off on the basis that a rival food producer is using the regional name to make an origin claim on food products that lack any clear connection with the region. By using the regional name, the rival is attempting to ‘pass off’ some connection between the Rival’s food products and the named region. Regional food producers would claim that the Rival is most likely doing this to take advantage of the reputation that the region has for producing quality regional food and the value that accordingly exists in the regional name.

However, current passing off laws in Australian raise challenges for regional food producers. This is because:

- regional food producers are a class of traders, not individuals
- regional food producers would be seeking protection of the reputation and goodwill attached to the Regional Branding of food products that is collectively shared among them, rather than protecting the reputation of individual traders
- the prominent feature of Regional Branding of food products is the regional name. These are considered descriptive terms to which courts are reluctant to attach reputation
- regional food producers might not be able to prove that they have suffered damage, such as actual loss of sales of their food products, due to a Rival’s misappropriation of the same regional name. It is likely that the harm regional food producers would claim is that the Rival is using the regional name on food products that lack a clear connection and thus, undermine the value that exists in the regional name.

To overcome these challenges, and pursue an action in passing off, regional food producers are faced with a considerable evidentiary burden. Therefore, many do not rely on an action in passing off to protect the reputation that attaches to the Regional Branding of their food products. In the absence of being able to pursue an action in passing off, current passing off laws in Australia are deficient in that they do not adequately protect against food producers using regional names on food
labels to make origin claims on food products that lack a clear and strong connection with a region.

2.4. Trademark Laws

A further way that regional food producers may seek to protect the value that exists in the regional name that they use on their food labels is by obtaining trademark registration of their Regional Branding under the Trade Marks Act.205 While other food producers and traders can also apply for trademark registration of their Regional Branding, in this instance the focus is on regional food producers. This section explores whether trademark laws protect the value that exists in regional names as identifiers of authentic regional food that has a strong and clear connection with Australian regions. It also explores whether trademark laws protect against other food producers and traders using regional names as part of their branding when there is no clear or strong connection between the food product and the region named in the trademark.

Therefore, this section will review how regional food producers might apply for trademark registration of their Regional Branding. The first part will review an application for a standard trademark, while the second part will review an application for a certified trademark.206 Although trademark laws offer some potential protection for Regional Branding, this is a blunt instrument because, in practice, trademark laws do not adequately protect the value that exists in Australian regional names as identifiers of authentic regional food products that have a clear connection with Australian regions. This discussion will explain that trademark laws are deficient in that they allow food producers and traders to use regional names as part of a trademark, even though there is no clear connection between their food product and the region named in the trademark.

205 Note that references to the Trade Marks Act 1995 (Cth) in this thesis are to Trade Marks Act 1995 (Cth) (Compilation No. 36, including amendments up to Act No. 61, 2016 and Registered in 27 February 2017) unless otherwise indicated.

206 A further option is registration for a collective trade mark. Collective trade marks are used in relation to goods or services dealt with or provided in the course of trade by members of an association, to distinguish those goods or services from others provided by people who are not members of the association. For example, the association could be a group of regional food producers of a particular food. Collective trade marks indicate only a connection with an association and not origin with a certain placename. Unlike certification trade marks (as will be explained in this chapter), collective trade marks do not indicate or certify origin of food and therefore are not the focus of this research. The registration of a collective mark that refers to a regional association does not prevent others in the regional area from indicating the true origin of goods or using the regional name as part of their Regional Branding.
2.4.1. Application for a standard trademark

Currently in Australia, a regional food producer (applicant) can apply to the Trade Marks Office to have their Regional Branding registered as a standard trademark under the Trade Marks Act. A registered trademark provides the registered owner with exclusive legal proprietary rights in their brand name and a monopoly right to use that mark to the exclusion of all others. Section 17 of the Trade Marks Act defines a trademark as a ‘sign used, or intended to be used, to distinguish goods or services dealt with or provided in the course of trade by a person from goods or services so dealt with or provided by any other person’.207 At a practical level, a trademark is a badge of origin. A trademark identifies for consumers from which business or registered trademark owner the associated goods and services originate and assists consumers with distinguishing them from other similar goods and services on the market.

When applying for a standard trademark, the applicant must identify the goods or services in relation to which they intend to use the trademark. There are currently 45 classes of goods and services under the Trade Marks Act (i.e., 34 classes of goods and 11 classes of services).208 The Trade Marks Office considers a trademark application in the context of the classes of goods and services specified on the trademark application. The relevant classes of goods for food products are classes 29 to 31 inclusive. Once applied for, a trademark examiner reviews the application in accordance with section 31 of the Trade Marks Act and considers whether there are any grounds for rejection of an application as set out in sections 39 to 44 of the Trade Marks Act. The two grounds of rejection considered in this instance are those most relevant to trademark applications that include geographical names. These are section 41, in which a trademark does not distinguish the applicant’s goods or services and section 43, in which a trademark is inherently confusing or deceptive when used in relation to the goods or services in question. Each ground of rejection is explored, followed by an explanation of the deficiencies that exist under these sections and trademark laws in general when it comes to protecting Australian regional names.

2.4.1.1 Section 41: Trademark does not distinguish the applicant’s goods or services

One of those grounds of rejection includes that the trademark does not distinguish the applicant’s goods or services under section 41 of the Trade Marks Act. Section 41(1) provides that a trademark application ‘must be rejected if the trademark is not capable of distinguishing the applicant’s goods or services in respect of which the trademark is sought to be registered from the goods or services of other persons’.209

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207 Trade Marks Act 1995 s 17.


209 Trade Marks Act 1995 s 41(1).
A trademark is taken to be incapable of distinguishing the applicant’s designated goods or services from those of another trader if either section 41(3) or (4) applies.

Section 41(3) applies when:

\( a) \) the trademark is not to any extent inherently adapted to distinguish the designated goods or services from the goods or services of other persons and \( b) \) the applicant has not used the trademark before the filing date in respect of the application to such an extent that the trademark does in fact distinguish the designated goods or services as being those of the applicant.\(^{210}\)

Therefore, section 41(3) applies when trademarks have no inherent adaptation to distinguish.

Section 41(4) applies when the trademark:

\( a) \) is to some extent, but not sufficiently, inherently adapted to distinguish the designated goods or services of other persons and \( b) \) the trademark does not and will not distinguish the designated goods or services as being those of the applicant having regard to the combined effect of the following: i) the extent to which the trademark is inherently adapted to distinguish the goods or services of other persons, ii) the use, or intended use, of the trademark by the applicant [and] iii) any other circumstances.\(^{211}\)

Therefore, section 41(4) applies when trademarks are considered to have limited adaptation to distinguish.

‘Note 1’ accompanies section 41 and specifies that the types of marks that are not inherently adapted to distinguish goods or services are mostly trademarks that:

\textbf{Consist wholly of a sign that is ordinarily used to indicate}: (a) the kind, quality, quantity, intended purpose, value, geographical origin, or some other characteristic, of goods or services or (b) the time of production of goods or the rendering of services.\(^{212}\)

‘Note 1’ forms part of the Trade Marks Act\(^ {213}\) and is useful to understand the contents and legal consequences of section 41. The Note is particularly relevant for

\(^{210}\) Trade Marks Act 1995 s 41(3).

\(^{211}\) Trade Marks Act 1995 s 41(4).

\(^{212}\) Trade Marks Act 1995 Note 1 to s 41(4)(b) (emphasis added).

\(^{213}\) Intellectual Property Australia, \textit{Trade Marks Office Manual of Practice and Procedure}, (‘\textit{TM Manual}’), Part 22 s 41, paragraph 6.1, Effective Date 15 October 2014. Note that prior to the \textit{Acts Interpretation Amendment Act 2011} (Cth), notes accompanying sections in the \textit{Trade Marks Act} were not part of the \textit{Trade Marks Act}, but courts could choose to take them into account when deciding on the meaning of a provision. The \textit{Acts Interpretation
a regional food producer. This is because they most often use Regional Branding to make an origin claim on their food products. The Note provides guidance that when a trademark applied for and consists wholly of a sign such as a regional name and is ordinarily used to indicate one or more of the factors listed in Note 1(a) or (b) including geographical origin of the applicant’s goods (food products), the trademark will not be considered capable of distinguishing the applicant’s goods or services from those of another trader under section 41(3) of the Trade Marks Act.214

The Trade Marks Office Manual of Practice & Procedure (TM Manual) notes that:

> Although many geographical names have a degree of inherent adaption to distinguish, traders will general not be able to obtain a monopoly on the name of a place or region with a reputation for the designated goods or services unless overwhelming evidence of use is forthcoming.215

The TM Manual emphasises that a trademark that includes a geographical name (such as a regional name) that has an ‘obvious or potential connection with the goods or services’216 in respect of which it is to be registered will have no inherent adaptation to distinguish under section 41(3) of the Trade Marks Act. This includes geographical names of ‘big cities where the likelihood of a connection with most goods or services is high but also tourist destinations with very small populations where the good or services relate to tourism’.217 Further, trademarks that include the names of Australian towns or localities that have a reputation for certain specialised goods or services might also lack inherent adaptation to distinguish.218

Accordingly, if the applicant sought trademark registration of its Regional Branding that consisted wholly of the name ‘Barossa’, a trademark examiner would reject the application under section 41(3) of the Trade Marks Act on the grounds that the trademark lacks inherent adaptation to distinguish the applicant’s food products from those of other food producers and traders. The trademark would not be viewed as a badge of origin of the applicant’s food products. This is because the Barossa has an obvious connection with food products and has a reputation for producing quality regional food products. The term ‘Barossa’ carries geographical significance. Many food producers and traders use the name ‘Barossa’ as part of their Regional Branding to make an origin claim on their food products. Therefore, by the applicant using the name ‘Barossa’ in their trademark, this would not

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216 Ibid, paragraph 15.1, Effective Date 17 July 2017.

217 Ibid.

218 Ibid, paragraph 15.2, Effective Date 17 July 2017.
distinguish the applicant’s food products from other food producers’ or traders’
food products that also include the name ‘Barossa’. This is notwithstanding that the
applicant’s food products might have a clear and strong connection with the
Barossa Valley on the basis that the food products are made using locally sourced
ingredients and are made in the Barossa Valley.

When a trademark examiner decides that a trademark lacks inherent adaptation to
distinguish the applicant’s goods from those of another trader under section 41(3),
or that the trademark has limited adaptation to distinguish under section 41(4), the
examiner will issue an Examiner’s Report to the applicant notifying them that their
trademark application cannot be accepted.219 However, an applicant might be able
to overcome the grounds for rejection in one of the following ways:

1) by filing evidence of use of the trademark prior to the filing date of the
   trademark application
2) by applying for a composite trademark that is comprised of a regional
   name plus another word(s) or device, logo, drawing or embellishment.

2.4.1.2 Filing evidence of use of the trademark

The applicant might be able to overcome a section 41(3) or 41(4) ground of
rejection by filing evidence of use of the trademark prior to the filing date of their
trademark application.220 The type and amount of evidence that the applicant will
need to provide the Trade Marks Office will be different depending on which
ground of objection is raised in the Examiner’s Report.

When the applicant’s trademark consists wholly of a regional name, such as
‘Barossa’, it is very likely that the trademark will be considered to have no inherent
adaptation to distinguish under section 41(3). Therefore, the applicant will be
required to provide evidence that demonstrates that at the time the applicant filed
the trademark application, the trademark did distinguish the applicant’s food
products from those of other food producers and traders. Any use after the filing
date and information about intended use will not help the applicant.221 Further, the
evidence must show use in Australia before the filing date. Evidence of use
overseas alone will not be sufficient.222 In this respect, the evidence required of an
applicant in relation to overcoming a section 41(3) ground of rejection is:

   Much more stringent than the evidence requirements for other trademarks
   which are to some extent inherently adapted to distinguish … it places a

219 Trade Marks Act 1995 s 31(b).


221 TM Manual, Part 23, paragraph 5.2, Effective Date 15 December 2016 and see also IP
Australia, ‘Providing section 41 evidence’, last updated 7 June 2016 (online)
https://www.ipaustralia.gov.au/trade-marks/understanding-trade-marks/trade-marks-

222 Ibid.
heavy onus on the applicant to demonstrate that the trademark designates only its goods or services in the mind of the relevant buying public and that the sign has attained a secondary meaning that being one of trade source.\textsuperscript{223}

Overall, the applicant must provide the Trade Marks Office with evidence that establishes that the trademark was ‘distinctive in fact’ as at the filing date of the trademark application.\textsuperscript{224} At a practical level, this requires the applicant to show that as at the filing date of the application, the public regarded the trademark as distinctive of the applicant’s food products and as a badge of origin for the applicant’s food products.\textsuperscript{225} The applicant must illustrate that, due to the way in which they have used their trademark in connection with food products up until the filing date the public view it as a trademark or badge of origin of the applicant’s food products, rather than merely a description of the geographical origin of the food products. The applicant must convince the Trade Marks Office that the significance and meaning of the regional name in the trademark has moved beyond indicating the geographical origin of the food products to a badge of origin of the applicant’s food products.

This requirement of the applicant proving that the trademark was ‘distinctive in fact’ as at the filing date, was explained in the Federal Court case of \textit{Blount Inc v Registrar of Trade Marks (Oregon)}.\textsuperscript{226} This is an important trademark case that is cited throughout the TM Manual in respect of the evidence threshold that an applicant is required to meet to overcome the objection of a trademark on the grounds of section 41(3).\textsuperscript{227} In \textit{Oregon}, the applicant had sold chainsaw accessories, workshop equipment and hand tools bearing the trademark ‘Oregon’ that was a composite trademark (the word ‘Oregon’ and an oval device). The applicant had failed to obtain registration of the trademark under the Trade Marks Act because of the geographic significance of the word ‘Oregon’. In the Federal Court, the applicant challenged the decision of a delegate of the Registrar of Trade Marks that the trademark may not be registered under the Trade Marks Act. In considering whether the trademark was inherently capable of distinguishing under the Trade Marks Act, Branson J explained that registration of a trademark with no inherent adaptation to distinguish could be achieved on the basis that the trademark was ‘distinctive in fact’, that is, ‘distinctive of the applicant’s goods’.\textsuperscript{228} To determine if a trademark is distinctive in fact, the consideration that must be made is ‘whether the applicant has established that, because of the extent to which the applicant has

\textsuperscript{223} \textit{TM Manual}, Part 23, paragraph 5.2, Effective Date 15 December 2016.

\textsuperscript{224} \textit{TM Manual}, Part 22 s 41, paragraph 6.2, Effective Date 15 October 2014.

\textsuperscript{225} Ibid.

\textsuperscript{226} \textit{Blount Inc v Registrar of Trade Marks} (1998) 40 IPR 498 (‘Oregon’).

\textsuperscript{227} See \textit{TM Manual}, Part 22 s 41, paragraph 6, Effective Date 15 October 2014 and \textit{TM Manual}, Part 23, paragraph 5, Effective Date 15 December 2016.

\textsuperscript{228} \textit{Oregon} 503 (Branson J).
used the trademark before the filing date in respect of the application [the trademark] does distinguish the designated goods as being those of the applicant.' 229

Branson J noted that this question was ‘entirely one of fact’. 230

In making this observation, Branson J noted that this was a departure from the way in which trademarks that lacked inherent capacity to distinguish were treated under the Trade Marks Act. 231 Under the Trade Marks Act, ‘it was established that certain marks could never be regarded as entitled to registration even though they were, as a matter of fact, plainly distinctive of the applicant’s goods’. 232 These included trademarks comprised of geographical names. Under the Trade Marks Act, the test of whether a trademark had capacity to distinguish the goods or services of one person from the goods or services of another was ‘more demanding’ than it was under the version of the Trade Marks Act before the Federal Court as at the date of the hearing of Oregon than it is today under the latest version of the Trade Marks Act. 233

Branson J noted that the test under the 1955 Act was that which was formulated by Kitto J in Clark Equipment Co v Registrar of Trade Marks (Clark Equipment). 234 In Clark Equipment, Kitto J had to determine whether the name ‘Michigan’ used for heavy earth-moving machines was ‘adapted to distinguish’ the applicant’s goods under the 1955 Trade Marks Act. Kitto J held that ‘adaptation to distinguish’ is to:

Be tested by reference to the likelihood that other persons, trading in goods of the relevant kind and being actuated only by proper motives—in the exercise, that is to say, of the common right of the public to make honest use of words forming part of the common heritage, for the sake of the

229 Oregon 508 (Branson J).

230 Oregon 508 (Branson J).

231 In 1995, new trade mark legislation was adopted in Australia by the Commonwealth Parliament in accordance with its World Trade Organisation/TRIPS Agreement obligations resulting in the Trade Marks Act 1995 (Cth). Branson J had to consider the application of both the 1955 Act and the 1995 Act given that the applicant had firstly failed to obtain registration of the trade mark under the Trade Marks Act 1955 (Cth) and secondly was before the Federal Court challenging the decision of a delegate of the Registrar of Trade Marks that the trade mark may not be registered under the Trade Marks Act 1995 (Cth).

232 Oregon 503 (Branson J).

233 Note that section 41 of the latest version of the Trade Marks Act 1995 (Cth) (Compilation No. 36, including amendments up to Act No. 61, 2016 and Registered in 27 February 2017) is different to the version of section 41 before the Federal Court in Oregon. However, the ‘distinctive in fact’ test still applies under the latest version of the Trade Marks Act under section 41. This is confirmed in the Trade Marks Office Manual of Practice & Procedure, Part 22, s 41, paragraph 6.

234 Clark Equipment Co v Registrar of Trade Marks (1964) 111 CLR 511 (‘Clark Equipment’).
signification of which they ordinarily possess—will think of the word and want to use it in connexion with similar goods in any manner which would infringe a registered trademark granted in respect of it.\textsuperscript{235}

Kitto J held that ‘Michigan’ was a geographically descriptive word that other traders in similar goods would want to use to describe the origin of their goods.\textsuperscript{236} Thus, ‘Michigan’ was not ‘inherently adapted to distinguish’ to any extent. The emphasis was on whether other traders of similar goods and services would also have a legitimate interest in using the trademark to describe the origin of their goods.

With the enactment of the new trademark legislation in 1995, trademarks that were, as a matter of fact, distinctive of the applicant’s goods or services could be registered. Citing the \textit{Recommended Changes to the Australian Trade Marks Legislation} report (Report) prepared by the working party to review the trademarks legislation,\textsuperscript{237} Branson J emphasised that the Commonwealth Parliament intended with the enactment of the \textit{Trade Marks Act} that a trademark that lacked inherent adaptation to distinguish could be accepted if there was evidence that proved that the trademark was ‘distinctive in fact’.\textsuperscript{238} Branson J cited the following passage from the Report:

\begin{quote}
It is presently possible [under the \textit{Trade Marks Act} 1955] to establish that a mark is distinctive in fact and yet it will be held in law to be not registrable, as there is a requirement that a mark possess some degree, however small, of inherent adaptedness to distinguish. Marks falling into this category are typically geographical names and laudatory or descriptive words and therefore likely to be used by other traders in the legitimate description of their goods or services. Once a particular trader can show, for example, that a word is distinctive in fact of his products, then it should not legitimately be used as a trademark by a competitor. A competitor should, however, be entitled to make bona fide use of the word in its descriptive sense.\textsuperscript{239}
\end{quote}

The Commonwealth Parliament’s intention under the \textit{Trade Marks Act} was that it ‘should no longer be the case that a trademark which is ‘100 per cent distinctive in

\textsuperscript{235} Clark Equipment 513 (Kitto J).

\textsuperscript{236} Clark Equipment 516-517 (Kitto J).


\textsuperscript{238} Oregon 503 (Branson J).

\textsuperscript{239} \textit{Recommended Changes to the Australian Trade Marks Legislation}, AGPS, July 1992, 41 cited in Oregon 503 (Branson J).
fact’ should not be able to achieve registration’, because other traders might also have a legitimate interest in using the same trademark in respect of similar goods or services. In support of this intention, Branson J cited the following recommendation made in the Report: ‘inherent distinctiveness, or acquired distinctiveness or a combination of both, should establish that a mark is capable of distinguishing the specified goods or services and justify registration’. Even though the words ‘distinctive in fact’ do not appear in section 41 of the Trade Marks Act, the TM Manual cites the Report as authority of the fact that registration of a mark with no inherent adaptation to distinguish can occur if there is evidence to support that the trademark is distinctive in fact. Further, the TM Manual cites Branson J’s reference to the term ‘distinctive in fact’ in Oregon: ‘Her Honour makes it clear that the term is an appropriate one to use in relation to trademarks with no inherent adaptation to distinguish’.

In applying the ‘distinctive in fact’ test in Oregon, Branson J first considered whether the composite trademark that included the word ‘Oregon’ and an oval device was inherently adapted to distinguish the designated goods from the goods of other persons. In making this determination, Branson J had ‘to bear in mind that the word ‘Oregon’ is the name of a state of the United States (US) and also the common name in Australia for timber from a Douglas fir’. Given that the word ‘Oregon’ carried these meanings, Branson J had to consider whether the composite mark when viewed as a whole took away from the geographical significance that the word ‘Oregon’ carried and its significance as a type of timber. Branson J held that ‘the particular way in which the applicant’s trademark presented the word ‘Oregon’ did not give it inherent adaptability to distinguish the designated goods, the word ‘Oregon’ alone lacking such inherent adaptability’. In Branson J’s opinion, the use of the upper case letters and the oval device in the composite mark whether viewed singly or together did not give the trademark ‘a significance other than its ordinary geographic significance or its significance in respect of a particular kind of timber’. On this basis, Branson J found that the composite trademark was not inherently adapted to distinguish the designated goods from the goods of another person.

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240 Oregon 508 (Branson J).


243 Ibid.

244 Oregon 506 (Branson J).

245 Oregon 507 (Branson J).

246 Oregon 507 (Branson J).

247 Oregon 507 (Branson J).
Branson J went on to consider if the composite trademark was ‘distinctive in fact’. Branson J confirmed that the question to be considered was entirely one of fact and emphasised that the question:

*Did not involve consideration of the question whether the word ‘Oregon’ is one ‘which other traders are likely, in the ordinary course of their businesses and without any improper motive, to desire to use upon or in connexion with their goods’ [as per Kitto J in Michigan]. Such a question is concerned with the issue of whether a word is adapted to distinguish one trader’s goods from the goods of all others, not with the issue of whether the trademark does in fact distinguish one trader’s goods from the goods of all others.*

Rather, the question was whether the applicant had established that the trademark did distinguish the designated goods as being those of the applicant because of the extent to which the applicant had used the trademark before the filing date.

Thus, the applicant provided evidence of use of the composite trademark in Australia in respect of its goods since mid-1978, as well as evidence of considerable promotion in Australia of its goods and the composite trademark since 1979. In considering this evidence, Branson J referred to Jacobs J in *British Sugar Plc v James Robertson & Sons Ltd* to emphasise that evidence of promotion and use alone does not demonstrate distinctiveness. However, Branson J confirmed that:

*Common sense suggests that significant promotion and use of a trademark among people concerned with the relevant market will have a tendency to enhance, rather than diminish, the trademark’s capacity to distinguish the goods in respect of which it is used from the goods of others. Certainly, the absence of evidence of promotion and use is likely to assume significance where the distinctiveness resulting from use is in issue.*

The applicant also provided affidavit evidence from consumers, wholesalers and retailers of its goods to prove to the Federal Court that ‘persons concerned with relatively small-scale power cutting equipment … associate the word ‘Oregon’ in relation to such equipment with a particular range of chainsaw chains, bars and other chainsaw accessories’. After considering the evidence of use adduced by the

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248 *Oregon* 508 (Branson J).

249 *Oregon* 508 (Branson J).

250 *Oregon* 508 (Branson J).


252 *Oregon* 509 (Branson J).
applicant, Branson J held that the applicant had established that because of the extent to which it had used the trademark before the filing date of the trademark application, the trademark did distinguish ‘certain goods of the applicant from the goods of other persons’. In respect of those certain goods, the trademark applications were not rejected.

The shift to the ‘distinctive in fact’ test under the Trade Marks Act has made it possible for applicants to overcome the section 41(3) ground of rejection that a trademark has no inherent adaptation to distinguish including when the trademark wholly consists of a geographical name. *Oregon* is an important case that confirms that an applicant might be able to overcome the problem that their trademark has no inherent adaptation to distinguish by providing evidence of use of the trademark before the date of filing the trademark application. If that evidence establishes that the trademark did distinguish the applicant’s food products from other food producers’ and traders’ food products as at the filing date, then it is likely that the trademark will be accepted on the ground that it is distinctive in fact. By being able to file evidence of use to demonstrate that a trademark is distinctive in fact, ‘it has become easier to obtain registration for placenames as trademarks, even in cases where others might wish to use these names in a legitimate way in relation to their own goods’.

Further, *Oregon* provides the following guidance for applicants in relation to the evidence of use that they must file to support the conclusion that their trademark is distinctive in fact. Applicants should provide evidence:

- that illustrates that as at the filing date of the trademark application consumers had come to regard the trademark as a badge of origin of the applicant’s goods or services
- from which it can be concluded that the meaning of the regional name in the trademark has moved beyond its geographical significance to that of a badge of origin of the applicant’s food products
- of promotion and use of the trademark among ‘people concerned with the relevant mark [as this] will have a tendency to enhance, rather than diminish, the trademark’s capacity to distinguish the goods in respect of which it is used from the goods of others’.

The TM Manual incorporates these guidance notes form *Oregon* in Parts 22 and 23. In particular, Part 23 notes that the applicant should provide the following evidence: when they started using the trademark and details of how long they have used the mark, advertising expenditure and annual turnover figures, actual uses of...

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253 *Oregon* 509 (Branson J).

254 van Caenegem, above n 7, 7.

255 *Oregon* 509 (Branson J) and also cited in *TM Manual*, Part 22 s 41, paragraph 6.2.

the mark such as on marketing and promotional material and packaging of products, indication of market share, indication of customer base and declarations of persons of standing within the relevant trade. If the applicant cannot provide sufficient evidence of use, the application will be rejected under either section 41(3) or 41(4) of the Trade Marks Act depending on which one is relevant in the circumstances. This is notwithstanding that the applicant’s food products have a clear and strong connection with the region named in the trademark.

### 2.4.1.3 Applying for a composite trademark

‘Note 1’ to section 41 specifies that the types of marks that are not inherently adapted to distinguish goods or services are mostly trademarks that:

> Consist wholly of a sign that is ordinarily used to indicate: a) the kind, quality, quantity, intended purpose, value, geographical origin, or some other characteristic, of goods or services or b) the time of production of goods or the rendering of services.

The words *consist wholly* in Note 1 to section 41 ‘are a reminder’ that when the trademark is a composite trademark (i.e., geographical name plus other words and/or a drawing, logo, label or other embellishment), or ‘is represented in a manner that is striking or unusual’, a trademark might be accepted for registration notwithstanding that it also includes a geographical name. However, a composite trademark will not automatically make a trademark capable of distinguishing because it contains a registrable element. Rather, whether a composite trademark distinguishes the applicant’s food products will depend on ‘the relative proportions of the elements within the trademark [when] taken as a whole’. For trademarks that include a geographical name, the emphasis is on whether the trademark ‘when taken as a whole’ has a significance other than its ordinary geographic significance and is capable of distinguishing the applicant’s designated food products in the marketplace. This requires consideration of the overall impression that the trademark creates on potential purchasers.

This was illustrated in *Oregon*. Branson J considered whether the applicant’s composite trademark (i.e., the word ‘Oregon’ and an oval device) when viewed as a

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258 *Trade Marks Act 1995* Note 1 to s 41(4)(b) (emphasis added).


260 Ibid.

261 *TM Manual*, Part 22 s 41, paragraph 26, Effective Date 15 October 2014.

262 Ibid.

263 Ibid.
whole had a significance other than its ordinary geographic significance (i.e., as a state of the US) or its significance in respect of a particular kind of timber (i.e., the common name in Australia for timber from a Douglas fir). In assessing whether the composite mark was distinctive, Branson J held that the particular manner in which the applicant’s trademark presented the word ‘Oregon’ did not give it inherent adaptability to distinguish the designated goods, ‘the word ‘Oregon’ alone lacking such inherent adaptability’. In Branson J’s opinion, the use of the upper case letters and the oval device in the composite mark did not, whether viewed singly or together, give the trademark ‘a significance other than its ordinary geographic significance or its significance in respect of a particular kind of timber’. On this basis, Branson J found that the composite trademark was not inherently adapted to distinguish the designated goods from the goods of another person. Branson J then went on to consider whether the trademark was distinctive in fact.

Therefore, the other words or device included in the composite mark with a geographical name must make the trademark as a whole capable of distinguishing. A recent consideration by the Trade Marks Office of a composite trademark including the geographical name ‘Barossa Valley’ was Barossa Valley Estate Pty Ltd v Australian Vintage Limited. Barossa Valley Estate opposed Australian Vintage’s application for the Barossa Valley Wine Company logo composite trademark (see Figure 2.5).

264 Oregon 506 (Branson J).
265 Oregon 507 (Branson J).
266 Oregon 507 (Branson J).
267 Oregon 507 (Branson J).
The application was in respect of alcoholic beverages in class 33. Australian Vintage’s application was accepted by the Trade Marks Office, with an endorsement that all wines sold under the trademark originate from the Barossa Valley GI area and all alcoholic beverages sold under the trademark be produced in the Barossa Valley area. Barossa Valley Estate attempted to argue that the trademark lacked distinctiveness under section 41 of the Trade Marks Act on the basis that it include a geographical name and other traders would have a legitimate need to use the words ‘Barossa Valley Company’ for the same goods (i.e., alcoholic beverages) as those covered under Australian Vintage’s application. The Hearing Officer applied Oregon and considered that, while the words ‘Barossa Valley Wine Company’ and the letter ‘B’ in the composite trademark lacked inherent adaptation to distinguish, ‘the combination of these elements in the manner shown in the trademark application imparts sufficient overall distinctiveness’. The Hearing Officer could not foresee any reason why another trader would wish to use the overall design and stylisation of Australian Vintage’s trademark. Accordingly, Barossa Valley Estate’s opposition of the trademark failed on the grounds that it lacked inherent adaptation to distinguish.

This decision illustrates that by adding other words or logos and devices to a regional name it is easier for the applicant to obtain registration of their Regional Branding, even in cases in which others might wish to use the same regional name in a legitimate way in relation to their own goods. It is an ‘example of relatively

269 Note that the wording of section 41 of the Trade Marks Act before the Hearing Officer was the wording prior to the repeal and amendment of section 41 on 15 April 2013. The wording is different to section 41 in the current version of the Trade Marks Act (Compilation No. 36, including amendments up to Act No. 61, 2016 and Registered in 27 February 2017).


272 van Caenegem, above n 7, 7.
minor differences being sufficient to distinguish trademarks containing descriptive terms’. The applicant might use additional words that denote the product category of the goods to which the trademark is attached such as ‘cheese’ or terms such as ‘company’. An applicant might also include a logo or device as part of the trademark. Overall, the Trade Marks Office reviews whether the composite trademark when viewed as a whole is a badge of origin that consumers identify with to distinguish their food products from other food producers’ and traders’ food products. By adding other words or a device to a regional name, it is possible to take away from the geographical significance that a regional name carries, and achieve trademark registration.

Some examples of composite trademarks that are currently registered in Australia, in classes 29 to 31 inclusive, that include the words ‘Barossa’ and ‘Barossa Valley’ plus an additional word or device include ‘Barossa Valley Cheese Co’, ‘Barossa Valley Ice Cream’, ‘Farmers Barossa Almonds’, ‘Barossa Crème Potatoes’ and ‘Barossa Fine Foods’ (see Figures 2.6, 2.7 and 2.8).

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Figure 2.6: Barossa Valley Cheese Co. Trade Mark number 954175274

Source:

Figure 2.7: Barossa Valley Ice Cream Trade Mark number 1789289

Source:
http://www.thepapercupcompany.com/assets/images/db_images/db_046_3oz_Ice_Cream_Barossa_Valley1.jpg

Farmers Barossa Almonds Trade Mark number 1439410 (words only)

Barossa Crème Potatoes’ Trade Mark number 1611797 (words only)

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275 IP Australia ATMOSS trade mark search (online) https://search.ipaustralia.gov.au/trademarks/search/view/1789289?&s=537612e9-f05a-4752-8e75-2058e7969d50.


277 IP Australia ATMOSS trade mark search (online) https://search.ipaustralia.gov.au/trademarks/search/view/1611797?&s=e5b95308-f89d-4b03-a43c-0632ada5812c.
Figure 2.8: Barossa Fine Foods Trade Mark number 1438647

Source: https://search.ipaustralia.gov.au/trade
marks/search/view/1438647?si=e5b95308-f89d-4b03-a43c-0632ada5812c.

All these composite trademarks are registered and confirm that it is possible to obtain trademark registration for placenames as trademarks, even in cases in which other food producers and traders might want to use the same regional name. These trademarks illustrate that the other term added to a regional name as part of a composite trademark can be descriptive of the goods to which the trademark is attached. For example, ‘ice cream’, ‘cheese’, ‘almonds’ and ‘crème potatoes’ are all descriptive of the food products to which the relevant trademarks attach. When viewed as a whole, the trademarks have been accepted by the Trade Marks Office for registration on the basis that they are inherently capable of distinguishing the registered owner’s food products from those of other food producers and traders.

Overall, the Trade Marks Act ‘has come to recognise that over time a real placename can acquire sufficient distinctiveness by being used in trade to become a registered trademark, because due to its standing in the eyes of consumers it becomes very difficult to imagine any other trader expecting to be able to use it as a branding device without improper motive’.

2.4.1.4 Section 43: Trademarks likely to deceive or cause confusion

The second ground of rejection of a trademark considered is section 43 of the Trade Marks Act. Under section 43, a trademark application can be rejected if it has a false connotation that is inherent in some aspect or term of the mark. Section 43 provides:

An application for the registration of a trademark in respect of particular goods or services must be rejected if, because of some connotation that the trademark or a sign contained in the trademark has, the use of the

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278 IP Australia ATMOSS trade mark search (online) https://search.ipaustralia.gov.au/trade
marks/search/view/1438647?si=e5b95308-f89d-4b03-a43c-0632ada5812c.

279 van Caenegem, Drahos and Cleary, above n 15, 10.

280 Note that a connotation giving rise to a section 43 ground for rejection may not be obvious during the examination period of a trade mark application and might only become apparent during the opposition period of a trade mark application. In those instances, a section 43 ground can be raised during the opposition period. See eg TM Manual Part 29 s 43, paragraph 3.4, Effective Date 1 October 2014.
A trademark in relation to those goods or services would be likely to deceive or cause confusion.\textsuperscript{281}

For a trademark to be rejected under section 43, ‘it is necessary for a decision maker to be clearly satisfied that the use of the trademark would be likely to deceive or cause confusion’\textsuperscript{282} in the mind of the relevant buying public.\textsuperscript{283} There must be some connotation within the trademark, when used in relation to the specified goods or services, that would reasonably be expected to cause deception or confusion in the mind of consumers. The TM Manual notes that deception or confusion could arise regarding the:

\begin{quote}
Character of the goods and/or services including their composition, nature or other properties, quality or quantity of the goods and/or services, \textit{geographical origin of the goods and/or services}, intended use or purpose of the goods and/or services and connection in the mind of the buying public with a person or organisation.\textsuperscript{284}
\end{quote}

In connotations regarding the ‘geographical origin of the goods or services’, the presence of a regional name in a trademark on its own does not mean that section 43 will automatically apply. Rather, whether section 43 applies in the circumstances depends on the prominence, and context, of the regional name in the trademark and whether there is ‘a real and obvious danger of the buying public being deceived and/or confused by the connotation. A possibility of confusion or a suggestion that deception might occur is not sufficient’.\textsuperscript{285} A trademark examiner ‘must ensure that they are considering [the trademark application within the context of] the current marketplace … remembering there will be signs in that marketplace which have kept their connotations over long periods of time’.\textsuperscript{286}

The Federal Court of Australia considered these section 43 issues in \textit{Bavaria NV v Bayerischer Brauerbund eV (Bavaria)}.\textsuperscript{287} In that case, Bavaria NV applied for trademark registration of the composite trademark in Figure 2.9 in class 32, having used it in Australia in relation to beers since 1988.

\begin{thebibliography}{99}
\bibitem{281} \textit{Trade Marks Act 1995} s 43.
\bibitem{282} \textit{TM Manual} Part 29 s 43, paragraph 1, Effective Date 1 October 2014.
\bibitem{283} \textit{TM Manual} Part 29 s 43, paragraph 3, Effective Date 1 October 2014.
\bibitem{284} Ibid (emphasis added).
\bibitem{285} \textit{TM Manual} Part 29 s 43, paragraph 3.1, Effective Date 1 October 2014.
\bibitem{286} \textit{TM Manual} Part 29 s 43, paragraph 3.3, Effective Date 1 October 2014.
\bibitem{287} \textit{Bavaria NV v Bayerischer Brauerbund eV} [2009] FCA 428 (‘Bavaria’).
\end{thebibliography}
Figure 2.9: Bavaria Holland Beer labeling

Source: http://4.bp.blogspot.com/_CHG2GRbeET8/SNJ2DDOjSbl/AAAAAAAAIRs/ppf4mypCif2E/s200/bavaria-beer.jpg

The trademark contained a reference to ‘Bavaria’. Bavaria is a German state whose capital, Munich, is known as Bavaria’s brewing centre and hosts the annual Oktoberfest festival. In brewing its beers, Bavaria BNV used a special ‘Bavarian’ method that originated in Germany in the nineteenth-century. However, BNV’s beers were not made in Bavaria or in Germany but in the Netherlands.

The Bavaria Brewery Association, Bayerischer Brauerbend eV (BBA), opposed Bavaria BNV’s application on behalf of 240 Bavarian breweries. BBA based its opposition on several grounds, one of which was section 43 of the Trade Marks Act. In respect of the section 43 opposition, BBA claimed that because of the reference to ‘Bavaria’ in the trademark, two connotations arise from the trademark: i) that the beer sold under the trademark originated from Bavaria and ii) that the beer sold under the trademark had various characteristics of beer brewed in Bavaria.288 While BBA referred to both alleged connotations, the submissions of both parties focused only on the first of these connotations.289

The Delegate of the Registrar of Trade Marks (Delegate) upheld BBA’s opposition to the registration of BNV’s trademark on the grounds of section 43. Given the prominence of the word ‘Bavaria’ in the trademark, the Delegate decided that the trademark was likely to deceive or cause confusion among consumers that the beer originated from Bavaria. The Delegate came to this conclusion because she was of the view that it was common knowledge for a substantial number of Australians that ‘Bavaria’ meant more than just the name of a German state and that ‘a substantial number of Australians [would] associate ‘Bavaria’ with beer, both the brewing and drinking thereof’ 290 Therefore, consumers seeing the beer labels on which the word ‘Bavaria’ was a prominent feature were likely to be deceived or confused by the trademark as to the geographical origin of the beer. Thus, the

288 Bavaria [81] (Bennett J).

289 Bavaria [82] (Bennett J).

290 Bavaria [83] (Bennett J).
Delegate concluded that the section 43 ground of opposition had been made. BNV appealed to the Federal Court of Australia.

In deciding whether the trademark carried the connotation that BNV’s beer originated from Bavaria, Bennett J considered two main questions:

1) Did the word ‘Bavaria’ have a connotation with the state of Bavaria in Germany?
2) Would the consumer be deceived or confused by the word ‘Bavaria’ and any connotation that it referred to the state in Germany and think that BNV’s beer was of Bavarian origin?

On whether the word ‘Bavaria’ had a connotation with the state of Bavaria in Germany, Bennett J accepted that the ordinary beer consumer in Australia would be aware that Bavaria is a state in Germany as a matter of common knowledge. However, Bennett J explained that whether a consumer of BNV’s beers would be led by the trademark to believe that the beer came from or had originated from Bavaria and thus, had a particular quality or certain characteristics, depended on the overall impression conveyed by the trademark. Bennett J placed significant emphasis on the evidence provided by BNV in the form of surveys that suggested that Australian beer consumers thought brands ‘such as Stella Artois, Heineken and Becks’ were from ‘Europe’ rather than specific European countries. Based on this evidence, Bennett J took a contrary view to the Delegate and concluded ‘that consumers would not make a connection between the trademark with reference to ‘Bavaria’ on one hand and the German state or the origin of the beer on the other’. There was no evidence of any actual confusion or misunderstanding by consumers of the origin of BNV’s beer. While Bennett J noted that such evidence was not essential, the lack thereof was of some significance. Overall, Bennett J was not satisfied that:

- the relevant Australian consumer would associate BNV’s beer with Bavaria
- the trademark connoted more than a European origin of the beer

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291 Bavaria [83] (Bennett J).
292 Bavaria [88] (Bennett J).
293 Bavaria [94] (Bennett J).
294 Bavaria [94] (Bennett J).
295 Bavaria [104] (Bennett J).
296 Bavaria [106] (Bennett J).
297 Bavaria [107] (Bennett J).
• the trademark connoted that the beer had characteristics attributable to a Bavarian origin.298

Therefore, Bennett J found that the ground of opposition under section 43 of the Trade Marks Act did not succeed.

This decision has been criticised on the basis that the prominence of the term ‘Bavaria’ on the mark was somewhat brushed aside by the Federal Court.299 Even though Bennett J found that the placing of the word ‘Bavaria’ on the label/trademark drew attention towards the word ‘Bavaria’ and away from the smaller sized ‘Holland’,300 Bennett J concluded that the reasonable consumer would not fail to ‘observe the three references to ‘Holland’ [in the trademark] which at least neutralise[d] the connotation with the state of Bavaria’.301 If consumers were interested in the source of the beer, ‘an examination of the label bearing the trademark would indicate an origin in Holland’.302 Therefore, the Federal Court took the view that ‘a premium beer drinker is brand savvy, attentive and particular and would see the other elements in the label mark, inter alia the words ‘Holland Beer’ in smaller script in a surrounding scroll’.303 However, it is questionable whether this is a realistic analysis of how an average beer consumer would see the label. It is likely that on seeing the beer label consumers would be drawn to the prominent feature ‘Bavaria’ and question whether that meant that the beer originated from Bavaria.

The Federal Court’s description of the ordinary Australian beer consumer has also been criticised. The Court constructed the relevant consumer of beer as someone who would be careful to scrutinise the label of the beer to determine the origin of the beer.304 Further, the Federal Court concluded that the consumer would have only ‘seen the sign ‘Bavaria’ as merely indicating the product [was] of indeterminate ‘European’ origin because that is how other European beer brands whose names do not contain geographical references [were] perceived’.305 Once again, it is questionable whether this is a realistic objective analysis of an ordinary Australian consumer of beer. Many Australian beer consumers would be interested

298 Bavaria [108] (Bennett J).

299 Burrell and Handler, above n 124, 152.

300 Bavaria [34] (Bennett J).

301 Bavaria [89] (Bennett J).

302 Bavaria [89] (Bennett J).

303 van Caenegem, above n 7, 8.

304 Burrell and Handler, above n 122, 152.

305 Ibid.
to know the specific geographical origin of the beer they consume and would have knowledge about the specific European origin of European beers. This construction of the average Australian beer consumer aligns more with the Delegate’s construction of the relevant consumer. The Delegate found that, for a substantial number of Australians, it was common knowledge that ‘Bavaria’ meant more than just the name of a German state and that ‘a substantial number of Australians [would] associate ‘Bavaria’ with beer, both the brewing and drinking thereof’. Thus, the Delegate decided that consumers on seeing the beer label, on which the word ‘Bavaria’ was a prominent feature, were likely to be deceived or confused by the trademark as to the geographical origin of the beer.

*Bavaria* illustrates that whether a trademark will be rejected on the grounds of section 43 depends on:

- the prominence and context of the geographical name in the trademark
- the connotation that the geographical name carries
- whether other factors in the trademark dispel the connotation
- whether there is a real and obvious danger of the buying public being deceived or confused by the connotation.

Whether a trademark application that includes the name ‘Barossa’ to be used in relation to food products is rejected under section 43 depends on whether there is a real and obvious danger of the buying public being deceived or confused by the connotation or secondary meaning that the trademark carries. The prominence and context of the word ‘Barossa’ will be important in deciding whether the trademark is likely to deceive or cause confusion and whether other factors in the trademark dispel the connotation. Such factors might include reference to the actual geographical origin of the food products in the trademark (such as references to ‘Holland’ on the beer labels in *Bavaria*) or other relevant factors in the trademark such as a logo or device and other words that take away from the prominence of the word ‘Barossa’ and the connotation that it carries. A trademark examiner must assess whether there is a real and obvious danger of an ordinary consumer being deceived or confused by the connotation in context of the marketplace at the time of the trademark application. A possibility of confusion or a suggestion that deception might occur is not enough.

In this sense, the enquiry under section 43 is similar to that made under consumer protection laws. This is because the review under section 43 is about determining whether the ordinary consumer on seeing the trademark ‘would gain the impression that the goods actually originated in the place mentioned’ in the trademark.

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306 *Bavaria* [83] (Bennett J).

307 *TM Manual* Part 29 s 43, paragraph 3.1, Effective Date 1 October 2014.

308 *TM Manual* Part 29 s 43, paragraph 3, Effective Date 1 October 2014.

309 *TM Manual* Part 29 s 43, paragraph 3.1, Effective Date 1 October 2014.

310 van Caenegem, above n 7, 8.
Section 43 is not concerned with regulating whether the goods actually do originate from the place named in the trademark, but rather with regulating whether there is a real and obvious danger that consumers will be deceived or confused about the origin of the goods. Van Caenegem notes: ‘This is a relatively subtle judgment and therefore many trademarks incorporating placenames escape what might otherwise appear to be a justifiable application of the section 43 standard’.  

If there is no real or obvious danger of the buying public being deceived or confused by the connotation within the trademark, then:

*Trademark laws allow the registration of trademarks incorporating placenames quite readily, on the basis of fairly sparse evidence of acquired distinctiveness, and by a rather subtle reading and application of section 43. This interpretation allows that the placename might create a certain impression as to origin, which other elements of the mark as actually registered, then dispel.*

This was evident in *Bavaria*. Although the prominence of the word ‘Bavaria’ suggested that the beer originated from Bavaria, Bennett J found that other elements of the trademark dispelled this impression of the origin of the beer. The three references to ‘Holland’ in the trademark neutralised the connotation with the state of Bavaria. Based on this and the other evidence discussed above, the Federal Court concluded that there was not a real and obvious danger that ordinary Australian beer consumers would be deceived or confused by the connotation within the trademark. However, ‘it is to be questioned whether the consumer mind in reality operates in such a subtle fashion and is not simply pushed in one direction by the most recognisable and striking part of the mark—which is commonly the (well-known) placename that is included’.

For example, consumers seeing a trademark that includes the name ‘Barossa’ in relation to food products would most likely be drawn to the reference to ‘Barossa’, particularly if it is a prominent part of the trademark. This would likely create a certain impression in consumers’ minds about the origin of the food products. Even more so, if the name ‘Barossa’ is used in relation to food products that consumers might know are grown or produced in the Barossa. However, this impression might be dispelled by other factors in the trademark that neutralise the connotation made within the trademark that the food originates from the Barossa. When the trademark viewed as a whole does not suggest origin in the place named in the trademark, then it is unlikely that the trademark will be rejected under section 43. While there might be a possibility of confusion among consumers about the origin of the food or a suggestion that deception might occur that is not sufficient for the purposes of section 43. In the absence of there being a real and obvious danger of the buying public being deceived or confused by the secondary meaning within the trademark, a trademark that includes the name Barossa will not be rejected under section 43 of

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311 Ibid.

312 Ibid.

313 Ibid 9.
the Trade Marks Act. Thus, trademarks that include regional names can be accepted for registration even though the food products to which they attach lack any clear connection with the region named in the trademark.

In some instances, to avoid a section 43 ground of rejection, a condition or endorsement might be imposed on the trademark registration by the Trade Marks Office. The endorsement might be necessary because the trademark inherently suggests that the goods, in relation to which the trademark is to be used, originate from the place named in the trademark. In these instances, the Trade Marks Office will include an endorsement against the registered trademark requiring the trademark owner to ensure that the goods in relation to which the trademark is used are produced in the place named in the trademark. For example, in relation to the trademark ‘Byron Bay Blonde Ale’ Trade Mark number 1252120, the following endorsement is included on the trademark registration because the trademark inherently suggests that beer is produced in Byron Bay:

*It is a condition of registration that in instances where the trademark is used on beer that is not brewed by the applicant or that is not brewed in Byron Bay, the product or packaging to which the trademark is attached will include further information specifying the place of manufacture and/or the company that brewed the beer.*

2.4.2. Deficiencies with sections 41 and 43 of the Trade Marks Act and trademark laws in general

The above analysis of sections 41 and 43 of the Trade Marks Act discloses that neither of these sections regulate whether there is a connection between food and origin when a trademark includes a regional name and is used in relation to food products. A trademark examiner does not consider whether the food product in relation to which the trademark is going to be used is connected to the region named in the trademark. This is because the connection between food and origin, and protecting that connection, is not a consideration under trademark laws. Instead, trademark laws regulate whether a trademark is a badge of origin of the registered owner’s goods and services with which consumers identify to distinguish the owner’s goods and services from those of other traders. Thus, food product trademarks are badges of origin of who made or produced the food products, as opposed to marks of geographic origin. They do not identify for consumers which food products are truly local or authentic regional food products that have a clear and strong connection with the region named in the trademark.

Further, the analysis of sections 41 and 43 of the Trade Marks Act illustrates that ‘despite the law’s principled reservations concerning the registration of trademarks that consist of or incorporate placenames, registration of such marks is common in the food and agricultural industries as the legal standards are quite

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314 IP Australia ATMOSS search (online) [https://search.ipaustralia.gov.au/trade\nmarks/search/view/1252120?q=1252120]
accommodating’. 315 Although both sections 41 and 43 require trademarks that include geographical names be carefully considered before accepted for registration, the basis of that consideration is not about regulating whether the food products are connected to the region named in the trademark. Under section 41, the consideration is about whether the trademark is inherently capable of distinguishing the food producer’s food products from those of other traders. Food producers (both regional and non-regional) and traders can achieve trademark registration of their Regional Branding by overcoming section 41 grounds of rejection by one of the following:

- providing sufficient evidence of use of the trademark prior to the filing date of the trademark application that shows that the trademark was a badge of origin of their food products as at the filing date
- applying for a composite trademark that includes a regional name plus other words, devices or logos that when viewed as a whole is distinctive.

Therefore, ‘through long use and promotion even a placename as such might achieve registration as a trademark. But even without such extensive use a placename can be registered with relative ease, certainly where it has not yet been adopted for this purpose by any other trader and is not claimed ‘as such’. 316

Further, when there is no real and obvious danger of the buying public being deceived or confused by a connotation within the Regional Branding such as that the food originates from the region named in the trademark, the trademark will not be opposed under section 43 of the Trade Marks Act. Once again, food producers and traders can readily achieve this under current trademark laws due to ‘a rather subtle reading and application of section 43’ as explained above.317

Trademark applications that overcome section 41 and 43 grounds of rejection by one of these methods will result in registration of trademarks that include regional names. This is regardless of whether the food products to which the trademark is attached have any connection with the named region. A trademark that includes a regional name can be registered ‘without the [food products] [ever being produced in the region]’. 318 There is no requirement that the food producer and trademark owner source the ingredients to make the food product from the region. Nor is there any requirement that the food producer produce the food products within the region. Thus, trademark laws are deficient in a similar way to consumer protection laws and passing off laws, as are the problems that arise as a result of these deficiencies. By allowing food producers and traders to use a regional name on food products that lack a clear connection with the region, trademark laws enable food producers and traders to take advantage of: the reputation that a region has for producing quality regional food and the value that accordingly exists in the regional

315 van Caenegem, Drahos and Cleary, above n 15, 11.
316 Ibid (emphasis in original).
317 van Caenegem, above n 5, 8-9.
318 van Caenegem, Drahos and Cleary, above n 15, 10.
name as an identifier of authentic regional food that has a clear connection with that named region. This effects both the reputation of the region and the value that exists in the regional name—particularly when the regional name is used on food products that are of an inferior quality to authentic regional food products. Further, consumers are unable to identify from trademarks or brands which food products are qualitatively connected to the region named in the mark and which are not without independent investigation. They can only identify from which food producer or trader the food originates. Each of these problems will be further explored in this chapter.

In Chapter 6, I explain (in the context of discussing ‘Barossa Fine Foods’ trademark) that a regional food producer, as an ‘aggrieved person’ can apply to the Trade Marks Office to have the Trade Marks Register rectified pursuant to section 88(2)(c) of the Trade Marks Act 1995. Section 88(2)(c) provides that an application pursuant to section 88(1) of the Trade Marks Act, to have a prescribed court order that the Trade Marks Register be rectified by cancelling or removing a trade mark, or by entering any condition or limitation affecting the registration of a trademark, may be made “because of the circumstances applying at the time when the application for rectification is filed, the use of the trade mark is likely to deceive or cause confusion.” Section 88(2)(c) is tested on the grounds of whether there is a ‘real, tangible danger of consumers entertaining a reasonable doubt’ or being ‘caused to wonder’ about the existence of a particular state of affairs, as a result of the use of the trademark. There are no limitations prescribed in section 88(2)(c) as to the reasons why the usage of a trademark is likely to deceive or cause confusion.

However, pursuant to section 89 of the Trade Marks Act, the court may decide not to grant an application for rectification made pursuant to section 88(2)(c) where the registered owner of the trademark satisfies the court that the ground relied on by the applicant has not arisen through any act or fault of the registered owner. Therefore, while section 88(2)(c) of the Trade Marks Act provides a potential avenue for regional food producers to have the Trade Marks Register rectified on the basis that a trade mark that includes a regional name used on food products to make an origin claim is likely to deceive or cause confusion, it does not provide as much of an automatic right against misuse of a regional name on food products as does a registered GI. A GI that is used on food products that do not have a connection with the GI area is ipso facto an infringement of the GI as explained throughout this chapter, in particular in parts five and six.

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319 Trade Marks Act 1995 (Cth) s 190 identifies a ‘prescribed court’ for the purposes of the Trade Marks Act as each of the following: the Federal Court, the Federal Circuit Court; the Supreme Court of a State; the Supreme Court of the Australian Capital Territory; the Supreme Court of the Northern Territory; and the Supreme Court of Norfolk Island.

320 Trade Marks Act 1995 s 88(2)(c).

321 Burrell and Handler, above n 124, 272.

322 Trade Marks Act 1995 s 89.
Trademarks that include regional names have become easier to register, thus, ‘a policy concern … is that a standard trademark is private property and thus allows, to a certain degree determined by the particular mark’s character, the privatisation of place’.323 If a trademark includes a regional name plus other words or a device (composite trademark), ‘then the rights of the trademark owner vest not in the [regional name] as such but in its particular unique and distinctive rendering, or combination with other words and/or device elements’.324 For regional food producers, this means that by being the registered owner of a trademark that includes a regional name, they have limited monopoly rights over the regional name in context of the trademark as a whole. It provides them with an opportunity ‘to acquire some legal protection for the goodwill accumulated in [their] locally produced food product’.325 If another food producer or trader uses as a trademark Regional Branding that is substantially identical with, or deceptively similar to, the regional food producer’s registered trademark, they can enforce their right to take infringement action under section 120 of the Trade Marks Act.

However, this opportunity also exists for other food producers and traders who obtain trademark registration of their Regional Branding. Even though their food products most likely lack a clear connection with the region named in the trademark, under the guise of a registered trademark owner these other food producers and traders will be able to take advantage of the reputation that exists in the region for producing quality regional food and the value that accordingly exists in the regional name. They can benefit from their trademark registration by being able to use a regional name in context of their trademark on food products that lack a clear connection with the named region. They can also take infringement action against other food producers and traders who use as a trademark Regional Branding that is substantially identical with, or deceptively similar to, the food producer’s registered trademark. By enabling any food producer or trader to register their Regional Branding as a trademark on the basis that it has acquired distinctiveness, and regardless of whether their food products have a clear and strong connection with the named region, trademark laws do not adequately protect the reputation that Australian regions have for producing quality regional food, nor the value that accordingly exists in Australian regional names.

Registration of a standard trademark provides trademark owners with proprietary rights in their trademark, the right to use the trademark, authorise others to use the trademark and obtain relief for infringement of their trademark.326 Section 120(1) of the Trade Marks Act provides that a registered trademark is infringed if a person (defendant) uses, as a trademark, a sign that is substantially identical with, or deceptively similar to, the trademark in relation to the goods or services in respect

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323 van Caenegem, Drahos and Cleary, above n 15, 11.

324 Ibid 10.

325 van Caenegem, above n 7, 9.

326 Trade Marks Act 1995 ss 20(1) and (2).
of which the trademark is registered.\textsuperscript{327} A registered trademark is also infringed if the defendant uses as a trademark a sign that is substantially identical with, or deceptively similar to, the trademark in relation to:

- goods of the same descriptions as that of goods (registered goods) in respect of which the trademark is registered
- services that are closely related to the registered goods
- services of the same descriptions as that of services (registered services) in respect of which the trademark is registered
- goods that are closely related to the registered services.\textsuperscript{328}

If the defendant can establish that their use of the sign is not likely to deceive or cause confusion, then they will not have infringed the trademark. Further, section 120(3) provides that a registered owner of a well-known trademark can take infringement action against a person who uses, as a trademark, a substantially identical or deceptively similar sign in relation to goods or services unrelated to those in respect of which the well-known trademark is registered.\textsuperscript{329}

For the purposes of section 120 of the Trade Marks Act, the defendant must use the sign as a trademark, that is, as a badge of origin of their goods. Use that is merely descriptive or decorative will not infringe.\textsuperscript{330} Section 122(1)(b)(i) of the Trade Marks Act provides that a person who uses a sign (descriptive term such as a regional name) in good faith to indicate the geographical origin of goods will not infringe the rights of a registered trademark owner whose trademark also includes that descriptive term.\textsuperscript{331} In effect, this good faith defence ‘provides a second line mechanism to preserve the freedom of traders to use descriptive terms. Even if a trader is able to secure trademark protection for a descriptive sign on the basis of acquired distinctiveness, this defence allows traders to continue to use the sign in its original descriptive sense’.\textsuperscript{332} Thus, this good faith defence undermines a registered trademark owner’s proprietary rights in the regional name that is included in their trademark.

Overall, standard trademark registration is a blunt instrument. While providing registered trademark owners legal proprietary rights in their trademark that is a

\textsuperscript{327} Trade Marks Act 1995 s 120(1).

\textsuperscript{328} Trade Marks Act 1995 s 120(2).

\textsuperscript{329} Trade Marks Act 1995 s 120(3).


\textsuperscript{331} Trade Marks Act 1995 s 122(1)(b)(i).

\textsuperscript{332} Burrell and Handler, above n 124, 362.
badge of origin of their food products, trademark laws do not adequately regulate the usage of Australian regional names in context of trademarks used on food products. Trademark laws allow food producers and traders to register their Regional Branding as trademarks on the basis that they have acquired distinctiveness or are distinctive composite trademarks. However, trademark laws do not regulate whether there is any connection between the region named in the trademark and the food products in relation to which the trademark will be used. This deficiency in trademark laws allow food producers and traders to take advantage of the reputation that certain Australian regions have for producing authentic regional food products and the value that accordingly exists in Australian regional names. Therefore, standard trademarks are not badges of geographic origin of food, but, rather, are badges of who has produced the food.

This can be contrasted to certification trademarks that can be used to certify the geographical origin of food products. CTMs are generally filed by a representative body from an industry group that wants to regulate a scheme that identifies a characteristic of particular goods or services. In the context of food products, certification trademarks can certify the geographical origin of food products, as explored in the next section of this chapter.

2.5. CTMs

2.5.1. CTMs and protection of GIs in Australia

Under the TRIPS Agreement, Australia must provide a mechanism for the protection of GIs in Australia. There are two main ways to protect GIs in Australia. First, registration of GIs as a CTM and second, protection of GIs for wines or grape products in accordance with the provisions of the Australian Grape and Wine Authority Act 2013 (Cth). Section 6 of the Trade Marks Act defines GIs as:

\[ A \text{ sign that identifies the goods as originating in a country, or in a region or locality in that country, where a given quality, reputation or other characteristic of the goods is essentially attributable to their geographical origin.}^{333} \]

A CTM is defined in section 169 of the Trade Marks Act as:

\[ A \text{ sign used, or intended to be used, to distinguish goods or services: (a) dealt with or provided in the course of trade and (b) certified by a person (owner of the certification trademark), or by another person approved by that person, in relation to quality, accuracy or some other characteristic, including (in the case of goods) origin, material or mode of manufacture; from other goods or services dealt with or provided in the course of trade but not so certified.}^{334} \]

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334 Trade Marks Act 1995 s 169.
CTMs serve a similar purpose to GIs, in that they can be used to certify the geographical origin of goods and the quality or some other characteristic of goods. However, this analysis of CTMs explains that the protection certification trademarks provide to the connection between food and origin is much more limited than the protection provided by GIs.

CTMs are the main way to protect a GI for goods other than wines or grape products in Australia.\textsuperscript{335} Before the Australian wine GI system was implemented some European wine GIs were registered as certification trademarks. While they can still be protected as CTMs, the Australian wine GI system provides wine GI users a less onerous task in obtaining protection of their GI and the connection that exists between their wine and origin. As explained below, the application process to obtain a CTM is rather onerous for applicants. Further, in contrast to GIs, certification marks cannot be: descriptive of origin or the category of goods in relation to which they are used or privately owned.\textsuperscript{336} This analysis also explores the main differences between certification trademarks and GIs to demonstrate why, at a practical level, many international food producers and agrifood businesses do not use certification trademarks to protect their food GIs. European food producers and agrifood businesses are of the opinion that certification trademarks do not provide them with incentives to protect their food GIs. This is because CTMs provide them with much less protection for their GIs compared with the protection afforded under the European Food GI system. This is discussed further throughout Chapter 5.

2.5.2. Application for a certification trademark

A certification trademark is defined in section 169 of the Trade Marks Act as:

\begin{quote}
A sign used, or intended to be used, to distinguish goods or services: (a) dealt with or provided in the course of trade and (b) certified by a person (owner of the certification trademark), or by another person approved by that person, in relation to quality, accuracy or some other characteristic, including (in the case of goods) origin, material or mode of manufacture; from other goods or services dealt with or provided in the course of trade but not so certified.\textsuperscript{337}
\end{quote}

While most sections of the Trade Marks Act apply in determining whether a certification trademark can be registered, some sections do not, including section 41.\textsuperscript{338} Instead, section 177 of the Trade Marks Act replaces section 41 and sets out the criteria to be applied for deciding whether a certification trademark is capable of distinguishing the certified goods or services.\textsuperscript{339} In determining whether a

\begin{itemize}
\item \textsuperscript{335} \textit{TM Manual}, Part 35, paragraph 2.2, Effective Date 1 November 2016.
\item \textsuperscript{336} van Caenegem, Drahos and Cleary, above n 15, 12.
\item \textsuperscript{337} \textit{Trade Marks Act 1995} s 169.
\item \textsuperscript{338} \textit{TM Manual}, Part 35, paragraph 3, Effective Date 1 November 2016.
\item \textsuperscript{339} \textit{TM Manual}, Part 35, paragraph 3.4, Effective Date 1 November 2016.
\end{itemize}
certification trademark is capable of distinguishing the certified goods or services, the following two main factors must be taken into account in accordance with section 177(2):

1) the extent to which the certification trademark is inherently adapted to distinguish those goods or services
2) the extent to which, because of its use or of any other circumstances, the certification trademark has become adapted so to distinguish those goods or services.\(^\text{340}\)

If the certification trademark is not capable of distinguishing the certified goods and or services, the applicant must file evidence of use that shows that the certification trademark has become adapted to distinguish. Evidence of actual use, not intended use, of the certification trademark is relevant for the purposes of section 177(2)(b). The applicant might also file evidence of ‘other circumstances’ such as the extent to which the certification trademark has been advertised and made known in the relevant market and proposals for implementation of the certification scheme relevant to the trademark.\(^\text{341}\)

Overall, the applicant must provide evidence that establishes that the certification trademark has acquired distinctiveness through the applicant’s actual use of the trademark in the relevant market.

In relation to certification trademarks that include regional names and certify the origin of food products, certification marks must be distinctive rather than just describing the origin. To be distinctive, a certification trademark ‘should normally consist of more than just a placename or placename and category of goods, as the descriptive geographical term must remain free for all to use’.\(^\text{342}\) CTMs are private rights and ‘should not stand in the way of any producer within the area [named in the certified trademark] indicating where [their] goods originate, or branding the goods as originating in [that] particular place’.\(^\text{343}\) This requirement of distinctiveness undermines the viability of certification trademarks as an alternative to registered GIs. A GI is descriptive of origin, because ‘a GI is an accurate representation of an actual fact, originating within a very carefully delineated space’.\(^\text{344}\) A GI is a public right available to food producers located within the delineated GI area to use on their food products in compliance with the relevant GI system and ‘as a public instrument its rules are mandatory, carrying penalties for non-compliance’.\(^\text{345}\)

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\(^{340}\) Trade Marks Act 1995 s 177(2).

\(^{341}\) TM Manual, Part 35, paragraph 4.1, Effective Date 1 November 2016.

\(^{342}\) van Caenegem, Drahos and Cleary, above n 15, 12.

\(^{343}\) Ibid.

\(^{344}\) van Caenegem, above n 7, 10.

\(^{345}\) van Caenegem, Drahos and Cleary, above n 15, 12.
A certification trademark is usually applied for by a representative body from an industry group that wants to regulate a scheme that identifies a characteristic of particular goods or services.\(^{346}\) An applicant for the registration of a certification trademark must file a copy of the rules governing the use of the trademark with the Trade Marks Office.\(^{347}\) For an application for a certified trademark certifying the geographical origin of food products, the rules must specify the:

- requirements that [the food products] must meet for the certification trademark to be applied to them
- process for determining whether [the food products] meet the certification requirements
- attributes that a person must have to become an approved certifier approves to assess whether [the food products] meet the certification requirements
- requirements that a person, who is the owner of the certification trademark or an approve user, must meet to use the certification trademark in relation to [food products]
- other requirements about the use of the certification trademark by a person who is the owner of the certification trademark or an approved user
- procedure for resolving a dispute about whether goods and/or services meet the certification requirements
- procedure for resolving a dispute about any other issue relating to the certification trademark.\(^{348}\)

If the Trade Marks Office is satisfied that the certification trademark application meets the requirements of the Trade Marks Act and that there are no grounds for rejecting it, then the Trade Marks Office must send the application and rules to the ACCC for inspection.\(^{349}\) The ACCC will review the application and rules in accordance with section 175 of the Trade Marks Act. Under section 175(2) of the Trade Marks Act, the ACCC must be satisfied that the:

- attributes a person must have to become an approve certifier are sufficient to enable the person to assess competently whether goods and/or services meet the certification requirements
- rules … would not be to the detriment of the public and are satisfactory having regard to the prescribed criteria.\(^{350}\)


\(^{347}\) *Trade Marks Act 1995* s 173(1).

\(^{348}\) *Trade Marks Act 1995* s 173(2).

\(^{349}\) *Trade Marks Regulations 1995* (Cth) reg 16.12.

\(^{350}\) *Trade Marks Act 1995* s 175(2).
In considering whether or not the rules are detrimental to the public, the ACCC makes an independent assessment of the rules and considers how effective they are in ensuring the specified standards are met. If the ACCC is satisfied that the rules meet these requirements, it must give a certificate to that effect and send a copy of the certificate and certification trademark rules to the Trade Marks Office. The certification trademark application would then be accepted and proceed to registration in the absence of any oppositions being filed against it. Any subsequent variation of the rules must be approved by the ACCC in accordance with section 178 of the Trade Marks Act.

Therefore, the application process for obtaining a certification trademark is an onerous and time consuming one for applicants. Applicants invest considerable time and money in applying for a certification trademark and developing the rules that will apply in relation to how the certification trademark is to be used. ‘The collaborative process of developing rules that will apply to the use of the mark, obtaining approval and then enforcing and policing the mark’ are often disincentives for applicants considering a certification trademark. In addition, given the involvement of the ACCC in obtaining a registered certification trademark, the cost of obtaining a certification trademark is escalated because of the need to draft rules. Further, if the ACCC determines that the rules are detrimental to the public and are not satisfactory, then the ACCC will require that the applicant redraft the rules and the applicant will incur further costs.

For these reasons, there are not many certification trademarks currently registered in Australia by Australian organisations that certify geographical origin of food. Only four certification trademarks certifying the geographical origin of food products have been applied for by Australian based organisations (see Figures 2.10, 2.11, 2.12 and 2.13). Only two of these are registered.

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352 *Trade Marks Act 1995* s 175(2).

353 van Caenegem, Drahos and Cleary, above n 15, 45.

354 *Trade Marks Act 1995* s 175(2).

355 van Caenegem, Drahos and Cleary, above n 15, 45.
Figure 2.10: Mornington Peninsula Produce CTM No. 1666917 (Registered)

Figure 2.11: Northern Rivers Food CTM No. 1362223 (Registered)

Figure 2.12: YV Yarra Valley CTM No. 997102 (Never Registered-Lapsed-Accepted)
Source: https://search.ipaustralia.gov.au/trademarks/search/images/997102?i=0

Figure 2.13: YV Yarra Valley Dandenong Ranges CTM No. 997105 (Lapsed-Accepted)
Source: https://search.ipaustralia.gov.au/trademarks/search/images/997105?i=0
The YV Yarra Valley CTM No. 997102 in Figure 2.12 was intended to be used for several goods and services in the tourism, food, wine and agribusiness sectors. Although the trademark application was accepted by the Trade Marks Office, the application lapsed and was never registered. The producers involved with developing the trademark and the rules regulating its usage have noted that the certification trademark was not a ‘durable success’ mainly because of the collaborative process of developing the rules for the certification trademark. While ‘the initial desire to create a regional approach to product quality brought together small and big players from tourism, wine, food and agribusiness and cooperation among these different interested parties was good, in developing the certification trademark rules ‘the large number of players involved led to different views about what the brand should aim to achieve. Ultimately the aims of improving the quality of products and increasing product development were not met. The brand ‘became more like a tourist logo—you could use it for a fee.’ Therefore, the certification trademark was never registered despite the time and money the producers invested in creating the trademark and the rules that governed its usage.

Another main reason why there are only a couple of registered certification trademarks in Australia by Australian organisations that certify geographical origin of food, is that certification trademarks are limited in the protection that they provide the registered owner and approved users of the mark. A registered owner of a certification trademark has the exclusive right to use, and to allow other persons to use (i.e., approved user), the certification trademark in accordance with the rules governing its use. However, certification trademarks are entirely voluntary and do not stop other food producers and traders who are uninvolved with the CTM from using a region’s name as part of their branding. CTMs only bind those who volunteer to participate in their usage and do not mandate how other traders use the placename that is the subject of the CTM: ‘Only the use of the particular certification mark, rather than the placename as such, is governed by the rules [of the CTM] and protected against misuse as a registered mark.’

For example, the Mornington Peninsula Shire, in collaboration with its Food Industry Advisory Body, developed the ‘Mornington Peninsula Produce’ brand and logo (see Figure 2.14).

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356 van Caenegem, Drahos and Cleary, above n 15, 45.

357 Ibid.

358 Ibid.

359 Trade Marks Act 1995 s 171.

360 van Caenegem, Drahos and Cleary, above n 15, 45 (emphasis in original).

361 Mornington Peninsula Shire, Code of Practice including rules governing the use of the Mornington Peninsula Produce (‘Rules’).
To use the certification trademark, all approved users must undertake that Mornington Peninsula is the region of origin of each significant ingredient or significant component of the goods[^362] and all or virtually all of the processes involved in the production or manufacture of the goods must take place in the region.[^363] Rule 5 of the rules governing the usage of the certification trademark requires that applicants who want to use the certification trademark need to complete a Statutory Declaration that attests that the applicant’s produce is of regional origin. Applicants are required to include a product list of each and all their goods on which they seek to use the certification trademark. The certification trademark can be used across a range of food and wine products in accordance with classes 29 to 33 inclusive of the trademark classes of goods and services[^365]. Therefore, these rules clearly establish that there must be a connection between food, wine and the Mornington Peninsula for all approved users to be able to use the certification trademark. These requirements must be met to certify the origin of the food and wine to which the certification trademark is attached.

However, the registration and existence of the ‘Mornington Peninsula Produce’ certification trademark does not prevent the use of the name ‘Mornington Peninsula’ in relation to goods or businesses situated in the region. Further, it does not prevent the registration of a standard trademark that includes the term. As discussed in Section 2.4.2, a good faith defence might also apply to a defendant who uses the name ‘Mornington Peninsula’ in good faith in relation to food products to indicate the actual place of origin of the food products. The certification trademark only binds those who volunteer to participate in the usage of the certification trademark. It does not mandate how other traders use ‘Mornington Peninsula’ in relation to their goods and services. Therefore, certification trademarks only provide limited protection to the connection between food and origin. They provide protection to the connection between the food and origin that are the subject of the respective certification trademark. The registered trademark owner of the certification trademark only regulates that the food products of the

[^362]: Rules 2, Rule 3(c) and map of Region set out in Annexure 1 to Rules.
[^363]: Rules 2, Rule 3(a) and (b).
[^364]: Rules 4, Rule 5(a).
[^365]: Rules 3, Rule 3(e). The classes of goods include classes 29 to 33 inclusive.
approved users of the certification trademark are connected to the place named in the certification trademark. The requirements for how food is to be connected to the relevant origin are set out in the rules relating to the certification trademark. Therefore, the connection between food and origin, and the protection provided to that connection, is subjective and contextual within the ambit and rules of the particular mark. CTMs do not provide a broader protection to the connection between food and origin.

Conversely, a GI is a public right determined by boundary delineation: ‘As a boundary delineation device, [a GI] identifies who in a broader region is or is not part of a community of shared commercial fate’. 366 To use the GI on food products, a food producer must ensure that the food product originates from the GI area or complies with criteria relating to the GI. Thus, ‘Any use of the GI on a product that does not emanate from the designated area, and/or does not comply with the particular specification, is ipso facto an infringement’. 367 For example, if ‘Barossa Valley’ was a registered GI for food, a requirement could be that food producers can only use the GI their smallgoods in which 85 per cent of the meat used to make the smallgoods originates from the Barossa Valley. It must come from animals that are bred in the Barossa Valley to ensure that there is a connection between the food product and the GI area. If a food producer used the ‘Barossa Valley’ GI on smallgoods that were not made in accordance with that product specification and; therefore, were not connected to the Barossa Valley, then that usage would ipso facto be an infringement without:

• any need of having to prove trademark use of the term ‘Barossa Valley’
• any good faith defences available to the food producer
• any requirement to prove misrepresentation.

All that is required for an infringement of the GI is for a food producer to use the GI on smallgoods that are not connected to the Barossa Valley in accordance with the criteria relevant to the GI being used on smallgoods. Further, if ‘Barossa Valley’ were a food GI, then no other food producer or trader would be able to obtain trademark registration for a trademark that incorporated the term ‘Barossa Valley’ for any goods (i.e., trademark classes of goods) relating to smallgoods. Therefore, GIs provide a much stronger protection to the connection between food and origin than do certification and standard trademarks.

2.5.3. Deficiencies of certification trademarks

CTMs are not a viable option to protect the connection between food and origin given the onerous application process and the limited scope of protection provided by certification trademarks for their registered owners. CTMs do not adequately protect the reputation that certain Australian regions have for producing quality regional food nor do they protect the value that accordingly exists in Australian regional names. Further, the differences between the protection provided by certification trademarks and GIs mean that certification trademarks do not provide

366 van Caenegem, Drahos and Cleary, above n 15, 45.

367 van Caenegem, above n 7, 10.
incentives to international food producers and agrifood businesses to obtain registration and protection of their GIs. As is explored later in this chapter, the difference in the scope of protection provided to wine GIs as GIs under the Australian wine GI system compared to the protection provided to food GIs under certification trademarks emphasises that certification trademarks are not a viable alternative to GI protection for food GIs.

2.6. Conclusion on Trademark Laws

Trademark laws are not concerned with identifying and protecting the connection between food and origin. Nor are they concerned with regulating that regional names are only used on food products that have a clear and strong connection with the region named in the trademark. Despite trademark laws’ initial reservation about registering geographical location names as trademarks, the ability to register these names as part of distinctive composite standard trademarks, or to prove that a trademark has acquired distinctiveness in the marketplace, has made it easier to obtain trademark registration of regional names. However, the protection afforded to the regional name is very limited under trademark laws. The protection is not about ensuring that the regional name is only used in relation to food products that have a clear and strong connection with that region. The protection is about allowing the registered trademark owner the right to use the trademark that includes a regional name in relation to their goods as a badge of origin. This is regardless of whether the trademark owner’s food products have a clear connection with the region named in their trademark.

Registration as a standard trademark or certification trademark does not prevent other food producers and traders from using the same regional name in relation to food products. As a standard trademark, there can be several trademarks registered that all include the same regional name used in relation to food products, provided they are each inherently adapted to distinguish each trademark owner’s food products. Whether the food products are connected to the region named in the trademark is not a consideration. Further, trademark registration does not stop other food producers and traders from using the regional name that is part of a registered trademark in good faith to identify the geographical origin of their food products. Similarly, registration as a certification trademark does not prevent the use of the regional name that forms part of the trademark in relation to goods or businesses situated in the region. It also does not prevent the registration of a standard trademark that includes the regional name. Therefore, trademark laws do not adequately protect the value that exists in Australian regional names.

This can be distinguished from trademarks that include regional names and are applied for in class 33 for wines. Those trademark applications are reviewed by the Trade Marks Office in accordance with provisions of the Trade Marks Act and additional requirements as set out in the Australian Grape and Wine Authority Act (AGWA Act).368 The AGWA Act protects certain terms used in relation to wines, namely Australian regional names that are protected as GIs under the Register of

368 Australian Grape and Wine Authority Act 2013 (Cth) (‘AGWA Act 2013’).
Protected Geographical Indications and Other Terms. Trademarks that include Australian regional names to be used on wines are reviewed to consider whether the wine is connected to the named region as required under the AGWA Act and the Australian wine GI system. Therefore, in relation to class 33 trademark applications, there is regulation of the connection between the regional name and the wine to which the regional name is attached before a trademark is accepted for registration. This regulation is reviewed later in this chapter to emphasise:

- the difference that currently exists under Australian trademark laws in relation to the regulation of regional names used in respect of wines in class 33, as opposed to the regulation of regional names used in respect of food products in classes 29 to 31 inclusive
- that Australian trademark laws have been amended to cater for wine GIs and have recognised GI protection as a viable alternative to protect wine GIs, as opposed to protecting them as certification trademarks.

Therefore, as is explored further in this chapter, the existence of the Australian wine GI system serves as a reminder that Australian trademarks laws could be amended to cater for food GIs in the future and to recognise and protect the value that exists in Australian regional names as food GIs.

2.7. Deficiencies in Current Australian Laws

The main deficiency identified in relation to consumer protection laws, passing off laws and trademark laws is that none of these laws adequately regulate whether there is a connection between food and origin before food producers and traders can use Australian regional names on food products to make an origin claim. The analysis of each of these laws has identified that this is primarily because none of these laws are concerned with protecting the connection between food and origin. Consumer protection laws are concerned with protecting consumers against false, misleading or deceptive representations made on food labels, relating to country and place of origin claims and credence claims. Passing off laws are concerned with protecting the reputation that attaches to food producer’s food products. Trademark laws are concerned with ensuring that trademarks are distinctive and act as badges of origin of those who made the food products in relation to which the trademark is used. While some of these laws touch on a region’s reputation for producing food, none of them consider protecting a region’s reputation on the basis that it produces authentic and quality regional food. Nor do they adequately protect the value that accordingly exists in Australian regional names as identifiers of authentic and quality regional food products that originate from that region and have a clear and strong connection with that region.

Thus, these laws allow food producers and traders to use their Regional Branding in a way that falls short of being misleading or deceptive or involving passing off, even though their food products do not have a clear or strong connection with the region named in their Regional Branding. Food producers who use Regional Branding in this way are taking advantage of, and free-riding on, the:

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• reputation that Australian regions have for producing authentic quality regional food
• value that accordingly exists in the relevant regional names.

Further, as none of the current laws are primarily concerned with identifying and protecting the connection between food and origin, there is no law that provides food producers and traders with sufficient *ex ante* guidance as to when they can make an origin claim on their food products.

These deficiencies cause the following four main problems:

1) consumers cannot rely on, or trust, food labels that include Regional Branding to obtain accurate information about the origin of food products
2) regional food producers are being deterred from making additional investment in producing food products with Regional Branding
3) the value that exists in Australian regional names as identifiers of authentic regional food products that have a clear connection with Australian regions is not being adequately protected
4) Australia is risking losing the assets that it has in Australian regional names that is affecting Australia’s regionality and Australia’s agricultural and agrifood industries.

Each of these problems represents a type of harm that results from food producers using Regional Branding on food products that lack a clear connection with the region named in their Regional Branding. It is very important to identify and articulate precisely these types of harm, because it is an issue of contention whether the law should intervene to protect against free-riding if the practice is not causing any identifiable harm.\(^{370}\) In support of the law intervening to protect against free-riding, some commentators have suggested that the type of harm caused by free-riding is a type of ‘progressive harm’ often referred to as ‘blurring’. In applying this concept, the argument is that if nothing is done to stop individual cases of free-riding, the value that exists in Australian regional names for the purposes of identifying authentic regional food products that have a strong and clear connection with the named region will be eroded over time.\(^{371}\) However, this line of argument

\(^{370}\) Michael Handler, ‘Rethinking GI extension’ in Dev S. Gangjee (ed), *Research Handbook on Intellectual Property and Geographical Indications* (Edward Elgar Publishing, 2016) 146, 164. The vast body of literature that considers whether the law should intervene to protect against free riding has been admirably summarised by Michael Handler on pp 163-171. In particular see, eg; C Haight Farley, “Why We Are Concerned about the Trade Mark Dilution Law” (2006) 16 *Fordham Intellectual Property, Media & Entertainment Law Journal* 1175, 1184 “the main problem with dilution law is that it provides a remedy without a supportable theorization of the harm” and querying whether the harm of dilution in fact exists.

has been criticised for failing to identify the precise harm that would result in the absence of legal protection against free-riding and why the harm is inevitable.\footnote{Ibid 165.}

Therefore, the four types of harm are explored to identify precisely the harm that is resulting, and that will continue to result, in the absence of legal protection against free-riding and why the harm is inevitable.

2.7.1. Consumers cannot rely on, or trust, food labels that include Regional Branding to obtain accurate information about the origin of food products

Consumers cannot rely on, or trust, food labels that include Regional Branding to obtain accurate information about the origin of food products. Consumers cannot decipher from food labels if the food has a strong and clear connection with the region claimed. Without further investigation, it is difficult for consumers to determine if the food product is in fact local or authentic.\footnote{Food South Australia Inc, above n 12, 47-49.} Although consumer protection laws are meant to ensure market efficiencies, they inadequately regulate the connection between food and origin. This harms consumers’ ability to rely on, or trust, food labels that include Regional Branding to obtain accurate information about the origin of food products. Further, as trademarks are not badges of geographical origin of food products, consumers cannot rely on trademarks or brands to determine which food products have a connection with the regions named in a trademark. Rather, consumers can only rely on trademarks as badges that identify which food producer or business made the relevant food product.

This lack of trust and reliance of food labels affects consumers’ purchasing behaviour. For example, many consumers have turned to shopping at farmers’ markets to purchase food directly from food producers so that they can determine firsthand who grows and makes the food that they purchase.\footnote{Australian Food News, \textit{More Australians shopping for fresh vegetables at farmers’ markets, ‘local’ food trend grows}, (24 March 2014), \url{http://www.ausfoodnews.com.au/2014/03/24/more-australians-shopping-for-fresh-vegetables-at-farmers%E2%80%99-markets-%E2%80%98local%E2%80%99-food-trend-grows.html}.} Meeting with the food producer enables consumers to engage in responsible purchasing and satisfy their preferences for buying local and authentic food, as they know where their food comes from.\footnote{Abernethy, above n 11.} However, this is not a practical choice for all consumers. Consumers should be able to rely on, and trust, food labels that include Regional Branding to determine the origin of food when purchasing their food products from any retail outlet. They should not have to conduct an independent investigation into the origin of the food to make an informed choice about its origin. However, in the absence of adequate governance and laws regulating that food is connected to a region before Regional Branding is included on a food label, consumers will
continue to be unable to rely on food labels at the point of sale to make an informed choice about the specific origin of food.

2.7.2. Regional food producers deterred from investing

The South Australian fieldwork confirmed that regional food producers invest considerable time and money in making authentic regional food products. For example, regional food producers might continue to use traditional methods, often small-scale and intensive, use non-staple low volume local ingredients or implement more expensive production methods (such as high-quality feed regimes) that result in a more flavoursome and/or attractive product. Therefore, regional food producers want to use Regional Branding on their food products to:

- identify ‘the additional investment that [they make] in producing food products with special quality characteristics and [to] promot[e] these characteristics to consumers’;
- identify the specific geographical origin of their food products;
- make an origin claim that reflects the strong connection that their food products in fact have with a region.

These are the values and benefits that regional food producers seek from using their relevant region’s name on their food labels.

However, many regional food producers are being deterred from making an additional investment in producing food products with Regional Branding. This is on the basis that other food producers and traders are using the same regional name on food labels to make origin claims on food products that most often:

- do not have a clear or strong connection with the region claimed;
- are mass-produced and more cheaply produced than authentic regional food products;
- are of an inferior quality than authentic regional food.

Regional food producers question their investment in producing food products with Regional Branding, due to this kind of commercial behaviour:

\[ Why \text{ a region ever put into the value of a regional brand if anyone can use it? In the wine industry, not everyone can use the regional brand because of the parameters that have been set, but in the food industry you can still say ‘Barossa something’ having never come from here. } \]

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376 van Caenegem, above n 7, 5.

377 Ibid.

378 Ibid.

379 Interview with Jan Angas, Proprietor and Producer, Hutton Vale Lamb, (Tanunda, Barossa Valley, South Australia, 17 February 2014).
If current laws do not adequately protect against other food producers and traders using a regional name on food products that have no clear connection with the region, then there is no incentive for regional food producers to invest in producing food products with Regional Branding. The value and benefit that regional food producers seek from attaching regional names to their food products is for the regional name to serve as an identifier that their food products are authentic ‘local’ food products that have a real connection with the named region. The wine industry benefits from Regional Branding in the form of wine GIs and regional food producers want their regional name and their Regional Branding to be something of value.

Consumers are unable to distinguish food products with Regional Branding that are authentic regional food products and those that are not. This makes regional food producers question the value and benefit that they receive from investing in producing food products with Regional Branding. In this regard, many of the South Australian interviewees noted that:

*Governments have helped and forced the Australian food industry to become all about food manufacturing and making generic products. But what [regional food producers] want is for governments to promote real regional food and create incentives for locals to create it … The traditional way of making smallgoods, like Graham Linke does in the Barossa Valley, should be benchmarked. But, instead our government has not created incentives for local food to be made and has homogenised the flavour.*

There is a lack of incentives for regional food producers under current laws and regulations to keep on investing in producing food products with Regional Branding. Specifically, there is a lack of laws that adequately identify and protect the connection that exists between food and origin and the unique flavour that food has depending on its origin. For example, current consumer protection laws do not provide any incentive to regional food producers to use Regional Branding to the exclusion of all other food producers, on the basis that their food product has a clear and strong connection with the region claimed. In many instances, the connection between food and origin is never reviewed under consumer protection laws when place of origin claims are made on food labels. Instead, consumer protection laws are ‘homogenising the flavour’ of food by enabling many food producers to use the same regional name on food products that vary in quality, authenticity and the degree of connection that they have with the region claimed on the food label. Allowing the same regional name as regional food producers use on authentic regional food products to be used on mass-produced, more cheaply made and inferior-quality food products seriously undermines the value and benefit that regional food producers seek from including Regional Branding on their food products.

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380 Interview with Jan Angas, Proprietor and Producer, Hutton Vale Lamb, (Tanunda, Barossa Valley, South Australia, 17 February 2014) (emphasis added).

381 Interview with Jan Angas, Proprietor and Producer, Hutton Vale Lamb, (Tanunda, Barossa Valley, South Australia, 17 February 2014).
While trademark laws provide legal proprietary rights in a trademark to regional food producers as registered trademark owners, they do not protect against other food producers using the same regional name in a trademark on food products. As long as the trademark is distinctive, another food producer and trader can use the same regional name on food products. Further, in some instances, good faith defences under trademark laws allow food producers and traders to use the same regional name in good faith to identify the geographical origin of food products. Therefore, trademark laws only offer regional food producers limited incentives to obtain trademark registration, given that trademarks are not legal identifiers of food products that are qualitatively connected to a region that regional food producers have invested time and money in producing.

Without a legal framework that ensures that food producers only use Regional Branding on food products that have a clear and strong connection with a region, regional food producers will continue to be deterred from making the additional investment in food products with Regional Branding. This is a harm that must be protected against, given the absence of legal intervention that prevents:

- food producers and traders taking advantage of Australian regional names in the context of Regional Branding and regions’ reputation
- food producers and traders confusing consumers as to which food products with Regional Branding do have a clear and strong connection with the region named on the food label.

Without protection, the outcome will be an ‘underinvestment in the creation or development’\(^{382}\) of food products with Regional Branding.

2.7.3. The value that exists in Australian regional names as identifiers of authentic regional food products that have a clear connection with Australian regions is not adequately protected

Current laws do not adequately protect the value that exists in Australian regional names as identifiers of authentic regional food products that have a clear connection with Australian regions. By allowing food producers to use Australian regional names on food products that vary in: quality, authenticity and the connection that they have with the region claimed, the value that exists in Australian regional names as identifiers of authentic regional food products that have a clear connection with Australian regions will be lost. The more food producers use regional names on food products that only have a weak connection with the named region, or that have no connection with the region, the more the value in Australian regional names will be undermined. Continued misuse of Australian regional names at a national level by Australian food producers and traders will also encourage food producers and traders located outside Australia to also use Australian regional names on food products that have no clear connection with Australian regions.

\(^{382}\) Handler, above n 370, 169.
It will be very difficult to deter food producers and traders based within and outside Australia to not use Australian regional names on food products that are similar to those that are well known from those areas, if Australia does not adopt a legal framework dedicated to ensuring that Australian regional names are only used on food products that have a clear and strong connection with Australian regions. There are many regional names in Australia that deserve protection from misuse: ‘For example, Jindi, Milawa and King Island cheeses are all well-known both in Australia and, to an extent, internationally for their particular characteristics which, it is said, are essentially attributable to their geographic source’.\(^ \text{383}\) Allowing other food producers and traders to use regional names such as ‘Jindi’ (abbreviated from Jindivik in Victoria), ‘Milawa’, ‘King Island’, ‘Coffin Bay’ and ‘Moreton Bay’ on food that does not have a strong or clear connection with those regions is a misuse of Australian regional names. This misuse of Australian regional names is not being adequately protected against under current laws.\(^ \text{384}\)

Consumer protection laws provide that food labels must be accurate and not mislead, or have the potential to mislead consumers. However, protection for regional names under consumer protection laws is flawed in the absence of misleading or deceptive conduct, or if the potential to mislead or deceive cannot be shown. The Trade Marks Act also provides very limited protection against the misuse of regional names in that it does not regulate whether the food products in relation to which the trademark is going to be used have a clear connection with the named region. Further, passing off laws offer very limited protection against misuse of regional names, as they are concerned with protecting the reputation of individual traders rather than the reputation that Australian regions have for producing quality authentic regional food. Consequently:

\[
\text{It would be an understatement to state that there are inadequacies in the way in which Australian law protects [regional names]. Other than wine, no other Australian [regional name] is afforded protection as a legally recognised GI in this country.}\(^ \text{385}\)
\]

There is a significant risk that the assets that Australia has in certain regional names will be lost, due to the absence of adequate legal regulation of whether food products do in fact originate from the place claimed in Regional Branding. This has the potential to affect Australia’s regionality and agricultural and agrifood industries.\(^ \text{386}\)

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\(^ \text{383}\) Stern and Makris, above n 8, 40.

\(^ \text{384}\) Ibid.

\(^ \text{385}\) Ibid 43.

\(^ \text{386}\) Ibid.
2.7.4. Australia risks losing its assets in Australian regional names, affecting regionality and agricultural and agrifood industries

The current use of Regional Branding by food producers on food products that lack any clear or strong connection with the region claimed ‘does nothing for the sense of regionality in Australia’. Being able to use Australian regional names to make an origin claim on food products that lack any clear connection with the named region affects the region’s reputation for producing quality regional food. Current laws do not provide adequate ex ante guidance for food producers and traders as to when Australian regional names can be used on food products to make origin claims. Of note, what is lacking is guidance on where some of the ingredients are sourced, or some production of food products takes place, outside the Australian region. This allows food producers and traders to take advantage of the reputation that Australian regions have for producing quality regional food and the value that accordingly exists in Australian regional names.

Undermining a region’s reputation affects the region’s identity, as a region that produces quality regional food and the value that exists in the regional name. This continual undermining of regionality and the value in Australia’s regional names has the potential to affect the sales of food products bearing Australian regional names both within and outside Australia. It is not only Australian consumers who seek local and authentic food and to whom the connection between food products and Australian regions is important. Many of Australia’s neighbouring countries such as China and Japan also seek authentic food that comes from Australian regions. They recognise that to make authentic regional food, local traditions and know-how and locally sourced ingredients are essential. These countries place importance on knowing the origin of food and the story behind the food. Subsequently, in the absence of a legal framework that adequately protects Australia’s regionality and the value in Australian regional names, the deficiencies with current laws have the:

Potential to seriously impact upon the growth of our agricultural industries and one must question whether our agricultural industries are being protected in the way they should ... Unless Australian [regional names] are protected, not only in Australia, but also overseas, those [regional names] risk being abused by third parties and their exclusivity lost. That in turn, could clearly impact upon the sales of products sold bearing those [regional names].

Therefore, to further Australia’s agricultural and agrifood industries due consideration must be given to:

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387 Mattson, above n 23.


389 Stern and Makris, above n 8, 43.
identifying the connection that exists between food and origin before food producers can use regional names on food labels to make origin claims
protecting the value that exists in Australian regional names as identifiers of authentic regional food that is qualitatively connected to Australian regions
regulating that food producers use regional names only on authentic regional food products that have a clear and strong connection with Australian regions.

2.7.4.1 Laws protecting against free-riding

The four types of harm identified result, and will continue to result, in the absence of legal protection against free-riding. As identified above current consumer protection laws, passing off laws and trademark laws do not protect against food producers free-riding on the reputation that Australian regions have for producing authentic regional food. This is primarily because of the lack of regulation under these laws that Australian regional names only be used on food products that have a clear connection with the region names in their Regional Branding.

However, there is one aspect of trademark law that potentially does protect against the tarnishment of a trademark and, in this sense, against free-riding. Under section 120(3), a person infringes a registered trademark if:

1) the trademark is well known in Australia
2) the person uses as a trademark a sign that is substantially identical with, or deceptively similar to, the trademark in relation to (i) goods (unrelated goods) that are not of the same description as that of the goods in respect of which the trademark is registered (registered goods) or are not closely related to services in respect of which the trademark is registered (registered services) or (ii) services (unrelated services) that are not of the same description as that of the registered services or are not closely related to registered goods
3) because the trademark is well known, the sign would be likely to be taken as indicating a connection between the unrelated goods or services and the registered owner of the trademark and for that reason, the interests of the registered owner are likely to be adversely affected.390

Therefore, under section 120(3), a registered trademark owner of a well-known trademark can take infringement action against a person who uses, as a trademark, a substantially identical or deceptively similar sign in relation to goods or services unrelated to those in respect of which the well-known trademark is registered.391

The registered owner is required to establish that, because the trademark is well known, use of the sign would be likely to be taken as indicating a connection between the unrelated goods and the registered trademark owner. This would affect the registered owner’s rights and interests in their trademark.392

390 Trade Marks Act 1995 s 120(3) (emphasis in original).
392 Ibid.
However, section 120(3) only applies when the substantially identical or deceptively similar sign is used in relation to *unrelated goods*. Consequently, a regional food producer who is a trademark owner of a trademark containing ‘Barossa’ that they use on food products would not be able to rely on section 120(3) to obtain protection against a rival food producer who is free-riding on the reputation that the Barossa has for producing quality food products. Section 120(3) would not apply as the goods are related—they are all food products. Therefore, section 120(3) does not protect against a rival food producer using the name ‘Barossa’ on food products (i.e., same goods) that have no clear connection with the region and free-riding on the reputation that the region has for producing quality regional food.

In circumstances in which section 120(3) does apply, there is disagreement as to how this section is to be interpreted and, in particular, if it is to be read as providing protection against dilution of a trademark. In the context of trademarks, anti-dilution protection would protect the registered trademark owner’s rights in their trademark, and investment in their brand, against ‘blurring or tarnishment’ of their mark. This is important given that, as Stern notes, dilution can typically be the only form of damage suffered by a registered trademark owner. Therefore, Stern believes that ‘it is arguable that dilution of the well-known mark is enough to show that the interests of the registered owner are likely to have been ‘adversely affected’’. However, Burrell and Handler suggest that section 120(3) is not an anti-dilution provision, but rather is ‘intended to meet Australia’s international obligation under Article 16.3 of TRIPS Agreement’. This suggestion is supported by the *TM Manual* that, in Part 19B, explains that section 120(3) ‘implements Australia’s international obligations to provide protection to the registered owners of well-known trademarks’. Article 16.3 of TRIPS Agreement requires Australia to prevent use of similar marks on dissimilar goods when such use would be likely to cause confusion. In Burrell and Handler’s opinion, it is this need to show confusion that does not make section 120(3) an anti-dilution provision, given that it calls for proof of confusion, rather than providing protection solely on the basis that there has been blurring or tarnishment of a trademark. Further, the wording of section 120(3)(c) requires ‘more than consumers forming a ‘mental association’ between two signs’, whereas, in anti-dilution laws the ‘mental association’ is

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393 Burrell and Handler, above n 124, 352.

394 Ibid.

395 Stern and Makris, above n 8, 44.

396 Burrell and Handler, above n 124, 353.


398 Burrell and Handler, above n 124, 353.

399 Ibid.
enough. Under section 120(3), the ‘mental association’ is not between the marks, but:

Between the owner of the well-known mark and the goods or services of the defendant. As such, section 120(3)(c) ought to be read as requiring that a consumer must be likely to believe either that the defendant’s unrelated goods or services originate from the registered owner, or that the registered owner has sponsored, approved of, or has some other commercial association with such goods or services, as a result of the defendant’s use of the well-known registered mark.\textsuperscript{400}

Based on this interpretation, section 120(3) does not protect against dilution (free-riding) of a trademark.

\textbf{2.7.4.2 Solution to the identified deficiencies}

A legal framework must be implemented that is dedicated to identifying and protecting the connection between food and origin, to overcome the problems (types of harm) identified resulting from deficiencies with current laws and regulations. Consumer protection laws, passing off laws and trademark laws each have their own concern and focus, none of which adequately consider the connection between food and origin or cater for the protection of that connection. Without a legal framework that identifies the connection between food and origin, and protects that connection, Australian regional names will continue to be used on food products that lack a clear and strong connection with Australian regions. Food producers will continue to free-ride on the reputation that Australian regions have for producing quality and authentic regional food.

To protect against food producers free-riding on the reputation that Australian regions have, Van Caenegem suggests that the policy goals behind legal protection against such free-riding should be:

The encouragement of higher cost, low volume local sourcing and production. This mitigates the risk of free-riding and protects consumer interest in accurate credence claims concerning food products for which such consumers are generally prepared to pay above-market prices.\textsuperscript{401}

There needs to be a legal framework that provides regional food producers with incentives to invest in producing food products with Regional Branding. There needs to be a legal framework that rewards regional food producers for investing in ‘higher cost, low volume local sourcing and production’, by only allowing them to use their relevant regional name on authentic regional food products to make an origin claim. Other food producers and traders whose food products lack a clear and strong connection with the region should not be allowed to use a regional name on their food products to make origin claims. This is regardless of whether the

\textsuperscript{400} Burrell and Handler, above n 124, 353-354.

\textsuperscript{401} van Caenegem, above n 7, 6.
Regional Branding falls short of being misleading or deceptive or involving passing off. Any use of a regional name on a food product that does not originate from that region, or does not comply with particular criteria regarding how food is connected to a particular region, should be ipso facto an infringement. By having a legal framework that strictly regulates when regional names can be used in the context of Regional Branding, the assets that Australia has in regional names will be better protected than they are under current laws and regulations.

To accommodate these policy goals and effective regulation, it is time for Australia to introduce a legal framework that has, as its paramount consideration, the connection between food and origin. I recommend that a sui generis food GI system be implemented in Australia to protect the connection between authentic regional food and Australian regions. As Chapter 4 explains, a sui generis food GI system identifies food that is qualitatively connected to a region and protects that connection. It provides protection to the connection between food and origin within a legal framework. Given this primary focus, a food GI system is the ideal mechanism to protect the value that exists in Australian regional names for the purposes of Regional Branding and to regulate how food producers use them on food products. Having such a system is better than trying to accommodate protection of, and guidance relating to, the connection between food and origin under current laws and regulations that do not have that connection as their primary concern or focus. It is more practical and effective to have one legal framework dedicated to protecting the connection between food and origin, rather than trying to provide this protection across a patchwork of laws and regulations. One legal framework would ensure effective regulation of whether there is a connection between food and origin before food producers and traders can use regional names on their food products. Thus, food producers and traders would need to comply with one legal framework rather than three different areas of laws and regulations. Further, a sui generis GI food system can be tailored to accommodate the needs of Australia’s agricultural industries and agrifood industries to protect and reinforce Australia’s regionality. A food GI system would create trading opportunities for Australia, particularly with the many neighbouring countries that favour food GI protection. Having an Australian sui generis food GI system would encourage other countries that support food GIs to trade with Australia. It would reassure them that Australia is ready and willing to protect foreign food GIs in exchange for the protection of Australian food GIs. As Stern and Makris note, adopting a sui generis GI system for food is a very important agrifood and trade consideration for Australia:

\textit{Unless Australian GIs are protected, not only in Australia, but also overseas, those GIs risk being abused by third parties and their exclusivity lost … Most countries will not recognise and protect foreign GIs unless they are first recognised and protected in their own countries.}\footnote{Stern and Makris, above n 8, 43.}
The longer Australia waits to develop its own food GI system, the more it runs the risk of having to comply with GI protection requested by its trading partners in implementing a food GI system. Therefore, it is time for Australia to revise the current legal protection that it offers to the connection between regional food and origin and the value that exists in Australian regional names as identifiers of that connection.

A food GI system would overcome the problems that exist as a result of the deficiencies with current laws and regulations that have been previously identified. A food GI system would provide:

- clear ex ante guidance to food producers and traders as to when they can use Australian regional names on food products to make an origin claim. It would include clear criteria and specifications about how food is clearly and strongly connected to a region. This would include the requirement to ensure that a certain percentage of the ingredients used to make the food product are locally sourced from the region.
- effective and strict regulation of the connection between food and origin before food GIs (regional names) can be used on food products to make an origin claim. Food producers and traders would only be allowed to use food GIs on food products that have a clear and strong connection with the GI area.

Therefore, a food GI system would mitigate the risk of food producers and traders using Australian regional names on food products to make an origin claim when their food products lack a clear connection with the GI area. There would be no requirement to prove misrepresentation. Any use of a food GI on food products that do not originate from the GI area and that do not comply with the food GI system criteria would be ipso facto an infringement. Thus, a food GI system would mitigate the risk of food producers and traders taking advantage of the reputation that an Australian region has for producing quality regional food and the value that accordingly exists in the regional name. Further, it would provide an incentive to regional food producers to invest in producing food products with Regional Branding, as they know that there is a legal framework that regulates that only food products that originate from the GI area can be labelled with the food GI. Consumers would be able to rely on food labels and trust that food labels accurately identify the origin of food products. They would be able to easily identify local and authentic regional food products without the need to carry out independent investigation into the origin of food products. Australia’s agricultural and agrifood industries would benefit from this consumer confidence, as sales of food products bearing Australian regional names would increase.

A food GI system would be similar to the Australian wine GI system with some additional features, as this chapter will now explain. It would provide much needed transparency on the origin of food products by regulating that food GIs are only used on food products that have a clear and strong connection with the named GI area. The Australian wine GI system protects the value that exists in Australian regional names.

404 van Caenegem, Drahos and Cleary, above n 15, 27.
regional names as identifiers of the origin of grapes used to make wine. It provides \textit{ex ante} guidance to wine producers about the requirements with which they must comply to use wine GIs on their wine labels to identify the origin of their wines. Its existence serves as a reminder that Australia understands the benefits that a GI system can bring to protecting the assets that Australia has in Australian regional names and to protecting Australia’s regionality. The Australian food industry “has a lot of work to do to catch up with the sort of providence branding and regional integrity requirements expected in the wine industry”.\footnote{Marshall, above n 18.} It is time for Australia to introduce a similar GI system for food.

2.8. The Australian Wine GI System

A direct contrast to the protection afforded to Australian regional names used on food products is that which is provided to Australian regional names used on wine labels under the Australian wine GI system. Australian law currently provides differential treatment to how wine producers can use Australian regional names on wine labels, in the form of GIs, compared to how food producers can use Australian regional names on food labels. The Australian wine GI system provides wine producers \textit{ex ante} guidance in relation to what is required to use wine GIs on wine labels. The Australian wine GI system offers insight into how a GI system could be used in Australia in relation to food products. This analysis explains the:

- evolution of the Australian wine GI system
- key features of the Australian wine GI system
- protection GIs provide to Australian regional names
- lessons that can be taken from the Australian wine GI system in considering a food GI system for Australia.

2.8.1. Phases of the system

Stern identifies the six main phases of the Australian wine GI system that clearly set out the development of the current system.\footnote{Stephen Stern, ‘A History of Australia’s wine Geographical Indications legislation’ in Dev S Gangjee \textit{Research Handbook on Intellectual Property and Geographical Indications} (Edward Elgar Publishing 2016), 246-247.} In summary, the first phase was pre-1987, when there was no legislative GI system operating in Australia. During this time, there were no significant attempts made from any European authority to protect European wine designations.\footnote{Ibid 246.} The second phase, between 1987 and 1993, saw major GI litigation take place, for the most part initiated by the Institut national de l’origine et de la qualité (INAO), as well as negotiations between the Australian government and the European Community (EC) on a wine treaty.\footnote{Ibid.} The third
phase, between 1993 and 2005, saw the first Australian GI system enacted into Australian law. Australian GIs for wines became registered under the system and the first Australian GI disputes took place. There were ongoing negotiations of the Joint Committee, established by the 1993 EC–Australia Wine Agreement, in which ‘inter alia agreed to the final phase-out date of European GIs’. During the next stage, between 2005 and 2010, the implementation of the Australia–US FTA (AUSFTA) had an effect on the wine trade. With the AUSFTA, came a series of amendments dealing with conflicts between GIs and trademarks. In December 2008, the EU and Australia signed a new treaty that replaced the 1993 Wine Agreement. The Treaty came into effect in 2010, after which time Australia amended its wine legislation to implement the Treaty. This occurred predominantly during the fifth phase, between 2011 and 2014. In the last phase, from 2014 onwards, The Wine Australia Corporation Act 2010 (Cth) was amended and became the AGWA Act that came into force on 1 July 2014. Some aspects of these phases will now be elaborated on to explain the development of the current Australian wine GI system.

One of the main reasons why the Australian wine GI system had a slow evolution over six phases is the slow development of the Australian wine sector. Vine cuttings were brought to Australia from England with the First Fleet in 1788 and were planted in the first white settlement in Australia that is now Sydney. However, Grape phylloxera affected Australia’s wine industry in the early 20th century. Following this, the wine industry only slowly developed over the next four or five decades. This was largely because Australia was mainly a beer-drinking nation. It was not until the 1970s that Australia’s wine sector began to grow. At the end of the 1970s, the sector was significant enough to ‘warrant government assistance and intervention’ and the government enacted the Australian Wine and Brandy Corporation Act 1980 (AWBC Act).

The AWBC Act established the Australian Wine & Brandy Corporation. This organisation was later renamed as the Wine Australia Corporation and, after merging with the Grape and Wine Research and Development Corporation, it was

409 Ibid.
410 Ibid 247.
411 Ibid.
412 Ibid.
413 Stern, above n 406, 251.
414 Ibid.
415 Ibid.
416 Australian Wine and Brandy Corporation Act 1980 (Cth) (‘AWBC Act’).
renamed as the AGWA in 2014.\textsuperscript{417} It is still known as the AGWA. The AGWA is an Australian government statutory marketing authority established to: promote and control the export of Australian wine grape products from Australia, promote and control the sale and distribution after export of Australian grape products and promote trade and commerce in grape products among the Australian states and territories.\textsuperscript{418} Thus, there is a distinguishing system of regulation in the wine industry that regulates the use of Australian regional names on wines as part of a legal framework dedicated to identifying the connection between wine and Australian regions. In comparison, we have a patchwork of laws and regulations that inadequately regulate the use of Australian regional names on food products as the connection between food and origin is not a core consideration of any of those laws and regulations.

When the AWBC Act was amended in 1989, part of its amendments included the implementation of the Label Integrity Program (LIP). Under LIP, wine producers must keep records relating to the vintage, grape varieties used and source of origin of their wine and must make those records available for audit: ‘The purpose of auditing is to ensure truth in labelling, thereby increasing consumer confidence in the reliability of label claims’.\textsuperscript{419} At the same time as the LIP was implemented, the INAO took steps in Australia to stop the misuse by Australian wine producers of a range of French controlled appellations of origin.\textsuperscript{420} This was after the INAO had commenced court action in 1987 in Australia, along with the Union interprofessionnelle des vins du Beaujolais and 19 Beaujolais growers and producers, to stop the sale of Australian wines labelled as Beaujolais (Beaujolais Litigation).

In this instance, wines were being labelled as ‘Beaujolais, Beaujolais style, Australian Beaujolais and Australian Beaujolias style’.\textsuperscript{421} As ‘Beaujolais’ is a controlled Appellation of Origin (AoO) in France, the litigation was based on the main argument that:

\begin{quote}
Beaujolais wine had acquired a reputation in Australia over many decades and the use of that name by Australian wineries for their product (which commenced in 1984) would mislead or deceive purchasers into the belief that the Australian wines of that name were ‘true’ Beaujolais wines, having the same characteristics, as the French ones.\textsuperscript{422}
\end{quote}

\textsuperscript{417} Stern, above n 406, 251.

\textsuperscript{418} Part VI A of the Wine Australia Corporation Act 1980 (Cth) (as amended).

\textsuperscript{419} Stern, above n 406, 252.

\textsuperscript{420} Ibid 256.

\textsuperscript{421} Ibid.

\textsuperscript{422} Ibid.
The French Beaujolais producers contended that ‘no matter how good the Australian wines were, or how similar to the French Beaujolais, the simple fact remains that they were not Beaujolais and using the name was misleading as to the characteristics and qualities of the wines’. The Beaujolais Litigation settled out of court and each defendant agreed to stop using the name ‘Beaujolais’ after a short phase-out period.

In 1987–1989, the INAO commenced ‘over 80 separate matters’, litigious and non-litigious, that sought to protect French wine AoCs in Australia. Midway through the Beaujolais Litigation, Australia started negotiating a treaty on wine with the EC. The discussions leading up to the Treaty lasted almost four years. The Agreement between Australia and the European Community on Trade in Wine was initialised in 1993 and signed in January 1994. The overall effect of the 1994 Treaty was the removal or reduction of many of the non-tariff barriers to entry into the EC of Australia wines. This meant that Australia was able to gain easier access to the European wine market and Australian exports of wines grew from $344 million in 1993, to approximately $2.1 billion in 2003, to almost $3 billion in 2008. Therefore, the collaboration between Australia and the EC was beneficial for Australia, as it provided Australian with increased European wine market opportunities and increased export sales.

In return for these trade concessions, ‘the Australian wine industry agreed to a treaty that resulted in legislation prohibiting the use in Australia of many thousands of EC wine GIs that did not emanate from the region in question and comply with local laws’. In this respect, the EC achieved GI protection for its wine GIs in Australia via the 1994 Treaty, something that it ‘could not achieve through litigation’. Many of the EC GIs were unknown in Australia and thus, Australia’s agreement to protect them was not a major concession. However, there were 23 wine GIs from France, Portugal, Italy and Spain that had been so extensively used in Australia by wine producers that the Australian wine industry saw those names as generic. These included Champagne, Burgundy, Chablis, Sauternes, Hermitage, Claret, Port, Sherry and Madeira. These GIs were of ‘crucial importance in the negotiations’ of the 1994 Treaty. Hence, giving up the use of these wine GIs was

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423 Ibid 257.
424 Ibid 258.
426 Stern, above n 406, 260.
427 Ibid 258.
428 Ibid.
429 Ibid 259.
430 Ibid 261.
a major concession for Australian wine producers. The agreement to stop using the wine GIs was supported by phase-out periods for their use by Australian wine producers. The negotiations over a phase-out date for EC GIs that Australian wine producers most used continued well after the 1994 Treaty was signed. For the EC GIs Burgundy, Moselle, Chablis, Port, Champagne, Sauternes, Claret, Sherry, Graves, White Burgundy and Marsala, the phase-out date was not agreed until 14 years after the 1994 Treaty, when Australia and the EU reached agreement on a new wine treaty.431

The 1994 Treaty also dealt with the protection of traditional expressions (TEs) used in the EC and Australian wine industries. TE means ‘a traditionally used name referring, in particular, to the method of production or the quality, colour or type of the wine’432 such as the Italian wine TEs ‘Classico’ and ‘Amarone’. However, TEs would not be protected until the date that the Joint Committee (consisting of Australian and EC representatives) agreed to protect them. The 2010 Treaty ‘put in place the final steps necessary to protect each party’s TEs’.433

In return for Australia agreeing to stop using the EC GIs included in the Annex of the 1994 Treaty, the EC agreed to mutually recognise and protect Australia’s wine GIs. The 1994 Treaty protected GIs as defined in Article 2(b):

‘Geographical Indication’ shall mean an indication as specified in Annex II, including an ‘Appellation of origin’ which is recognised in the laws and regulations of a Contracting Party for the purpose and description and presentation of wine originating in the territory of a Contracting Party, or in a region or locality in that territory, where a given quality, reputation or other characteristic of the wine is essentially attributable to its geographical origin.434

At the time of the 1994 Treaty, wine GIs were both limited and new as Australian laws and regulations did not specifically recognise Australia’s wine GIs until the AWBC Act was amended in 1993. Thus, the 1994 Treaty ‘played a pivotal role in causing the Australian Parliament to enact with all haste legislation providing for the recognition and protection of Australia’s wine GIs’.435 The introduction of these laws was a ‘major step for Australia and one that required a significant amount of work to formulate an entirely new system of laws dealing with legal concepts never

431 Australia-European Community Agreement on Trade in Wine 2008 (‘2010 Treaty’).

432 Stern, above n 406, 262.

433 Ibid.

434 1994 Treaty Article 2(b).

435 Stern, above n 406, 260.
before the subject of Australian judicial or statutory treatment’. These laws were significant in establishing the Australian wine GI system and:

*Enshrined in Australian legislation not only the language of the 1994 Treaty (which requires protection of the listed EC GIs) but also its spirit, by extending the protection to ‘words or expressions that so resemble a registered geographical indication as to be likely to be mistaken for it’.*

The Australian wine GI system, established by the 1993 amendments to the AWBC Act, prohibited the sale, import or export of wine with a ‘false description’ or with a ‘misleading description’. A ‘false description’ was defined as using the name of a country or a registered GI from which the wine did not originate. It was not a defence that the GI was ‘accompanied by another word or expression such as “kind”, “type”, “style”, “imitation” or “method” or similar word or expression’. A ‘misleading description’ was defined as one using a registered GI, a translation of a registered GI (such as Burgundy) or a word or expression that so resembles a registered GI as to be likely to be mistaken for it. Therefore, these amendments provided strict protection to wine GIs, as they could only be used on wines originating from the GI area.

When the AWBC Act was amended in 1993 to incorporate provisions relating to the creation of the Australian wine GI system, amendments were also made to the *Australian Wine & Brandy Corporation Regulations 1981* with the introduction of Regulations 24 and 25. The specific purpose of these two regulations was to ‘enable [the Geographical Indications Committee (GIC)] the means of creating, 

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436 Ibid 263.

437 Ibid.

438 *Wine Australia Corporation Act 1980* (Cth) as amended (‘WCA’) s 40C.

439 WCA s 40E.

440 WCA s 40D(1)(a).

441 WCA s 40D(1)(b).

442 WCA s 40D(4).

443 WCA s 40F(1)(a).

444 WCA s 40F(1)(b).

445 WCA s 40F(4)(a).

446 *Australian Wine & Brandy Corporation Regulations 1981* (Cth) (‘AWBC Regulations’).
registering and protecting Australian wine GIs’ such as Barossa Valley.\textsuperscript{447} The AWBC Regulations\textsuperscript{448} define a wine ‘region’ in Regulation 24 as:

- a single tract of land that is discrete and homogeneous in its grape growing characteristics to a degree that it is measurable
- including not less than five vineyards of no less than five hectares each
- producing not less than 500 tonnes of fruit each year.\textsuperscript{449}

The regulations also provide that, in defining a ‘wine region’ or ‘subregion’, the GIC can take into account \textit{inter alia}:

- the existence of natural features in the proposed region
- the history of grape and wine production in the area
- climatic uniformity
- grape harvesting dates
- the geology of the proposed region
- the history of the proposed region.\textsuperscript{450}

Australia’s wine GIs are divided into a hierarchy of states (federal units), zones (e.g., Barossa), regions (e.g., Barossa Valley and Eden Valley) and subregions (e.g., High Eden). There are also super zones (i.e., ‘Adelaide’ that includes Mount Lofty Ranges, Fleurieu and Barossa).\textsuperscript{451} Australian wine GIs are all registered on the ‘Register of Protected GIs and Other Terms’. This Register was established by the 1993 amendments to the AWBC Act. It contains the names of all protected Australian GIs registered in accordance with determinations made by the GIC, as well as the names of European GIs registered under the 1994 Treaty.\textsuperscript{452} Currently, there are 114 registered Australian GIs included on the Register. In the Appendix, there are three maps that illustrate the wine regions of Australia as prescribed by the GIC. Appendix A provides the GI boundaries for the wine zones of Australia and includes ‘Barossa’ and ‘Mount Lofty Ranges’. Appendix B provides the GI boundaries for the wine regions of Australia that include ‘Barossa Valley’, ‘Eden Valley’ and ‘Adelaide Hills’. Appendix C illustrates the specific wine GI regions of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{447} Stern, above n 407, 266.
\item \textsuperscript{448} Note that the AWBC Regulations are now called the Australian Grape and Wine Authority Regulations 1981 (Cth).
\item \textsuperscript{449} AWBC Regulations reg 24.
\item \textsuperscript{450} AWBC Regulations reg 25.
\item \textsuperscript{452} Ibid.
\end{itemize}
\end{footnotesize}
South Australia that include ‘Barossa Valley’ and ‘Adelaide Hills’. These will be further discussed in Chapter 6.

The 1993 amendments to the AWBC Act established the GIC to determine the names and boundaries of Australia’s wine regions. The GIC can make determinations on an application made by winemakers or a wine grape grower or by acting on its own initiative. In determining a GI, the GIC is required to consult any declared winemakers and wine grape grower organisations and any other organisations or person the GIC thinks appropriate. Under section 40T of the AWBC Act, to determine a GI the GIC must identify the boundaries of the GI, the word or expression used to describe the GI and any conditions of use that are to apply to the GI. Once the GIC has made its determination, this is treated as an interim determination that will not be finalised until the publication of notice of the interim determination.

Regulations 24 and 25, to which the GIC must refer in making a GI determination, ‘do not impose any limits on matters such as the grape varieties used in any particular GI … [nor] deal with maximum yields, minimum alcoholic levels and so forth’. The AWBC Regulations focus on whether the wine was made from grapes grown in the designated area. In relation to determinations of Australian GIs:

> It was irrelevant what variety of grapes, how or where they were planted or tended, how or where the wine was made and so on. This appeared to be nothing more than an indication of provenance of 85 per cent of the raw materials of the wine and not a true GI, at least in so far as TRIPS defines it.

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453 All the maps in the annexure have been sourced from Australian Grape & Wine Association, Register of Protected GIs and Other Terms available at https://www.wineaustralia.com/labelling/geographical-indicators/labelling-gi-australia (current as at November 2017).

454 AGWA Act 2013 s 40P.

455 AGWA Act 2013 s 40Q.

456 AGWA Act 2013 s 40S.

457 AGWA Act 2013 s 40T.

458 AGWA Act 2013 ss 40V and 40W.

459 Stern, above n 406, 271.

460 Ibid 267.
This is tied to the amendments to the AWBC Act that provided two different definitions of GIs for wine:

1) a word or expression used in the description and presentation of the wine to indicate the country, region or locality in which the wine originated
2) a word or expression used in the description and presentation of the wine to suggest that a particular quality, reputation or characteristic of the wine is attributable to the wine having originated in the country, region or locality indicated by the word or expression.\footnote{\textit{AWBC Act} s 4.}

While paragraph (2) was very similar to what would be the eventual GI definition in the TRIPS Agreement, paragraph (1) diverged significantly from any internationally recognised GI definition. Since 1994, the AWBC enforced this paragraph (a) definition of GI. However, amendments made to the AWBC Act in 2010, renamed the \textit{Wine Australian Corporation Act 2010} (\textit{WAC Act}),\footnote{\textit{Wine Australian Corporation Act 2010} (Cth) (\textit{\textquoteleft WCA Act 2010\textquoteright}).} changed the definition to make it consistent with the GI definition that was included in the 1994 Treaty as well as in the TRIPS Agreement. The GI definition in the WAC Act was as follows:

\begin{quote}
Geographical Indication, in relation to wine goods, means an indication that identifies the goods as originating in a country, or in a region or locality in that country, where a given quality, reputation or other characteristic of the goods is essentially attributable to their geographic origin.\footnote{\textit{WCA Act 2010} s 4.}
\end{quote}

This is also the current GI definition in section 4 of the \textit{Australian Grape & Wine Authority Act 2013}\footnote{\textit{Australian Grape & Wine Authority Act 2013} (Cth) (\textit{\textquoteleft AGWA Act 2013\textquoteright}) s 4.} that came into force on 1 July 2014. Thus, the current GI definition is consistent with the TRIPS Agreement definition of GI.

Before reviewing the amendments made to the AWBC Act in 2010, it is important to consider the effect of the AUSFTA between Australia and the US that was entered in 2004. The AUSFTA contained provisions that were ‘designed to protect US brand owners from having their Australian trademark rights adversely affected by foreign GIs that become protected in Australia’.\footnote{Stern, above n 406, 278.} In effect, the AUSFTA provides that a GI cannot be registered using a particular name if there are pre-existing trademark rights in the same name in Australia. Consequently, amendments were made to the AWBC Act to include a new subdivision dealing
with objections to determinations of GIs based on pre-existing trademark rights.\textsuperscript{466} These amendments have been carried forward into the current AGWA Act (2013).\textsuperscript{467}

Thus, when an application is made to the GIC to determine a GI, or the GIC is determining a GI, the GIC must advertise this and notify the public about the proposed GI.\textsuperscript{468} An objector may object to the determination of a GI on one of three main grounds. First, the objector may have an existing trademark registration.\textsuperscript{469} Second, the objector may have a pending trademark application lodged in good faith.\textsuperscript{470} Third, the objector may have common law trademark rights based on actual use of the mark in good faith and without any application for, or registration of, the mark.\textsuperscript{471} If an objection is made to the Registrar of Trade Marks on one of these grounds, then, under section 40RC (2) of the AGWA Act, the Registrar is required to determine if one of the grounds is ‘made out’. However, the AWGA Act does not provide any guidance as to what factors the Registrar should consider when making such a determination. If the Registrar decides that a ground of objection is made out, section 40RC (3) provides that the Registrar can still recommend to the GIC that the proposed GI be determined.\textsuperscript{472} Note 1 to section 40RC (3) provides that the Registrar might make this recommendation if the Registrar is satisfied that the proposed GI was in use before the trademark rights arose.\textsuperscript{473} This is interesting, given that, while the effect of the Note is:

\begin{quote}
A ‘first in time, first in right’ approach contemplated by the AUSFTA … it is put backwards … [However,] ‘its implication is that if the proposed GI was not in use before the trademark rights arose, then the Registrar should not recommend to the GIC that the proposed GI be determined’.\textsuperscript{474}
\end{quote}

Other than the inclusion of this Note 1 in section 40RC (3), there is no guidance provided as to what circumstances the Registrar may recommend that the GI still be registered notwithstanding that the Registrar has found that a ground of objection to the proposed GI has been ‘made out’. In this regard, the AWGA Act ‘grants to the Registrar … a very broad discretion to make a recommendation that a GI be

\begin{footnotes}
\footnotetext[466]{AGWA Act 2013 Division 4, Subdivision D.}
\footnotetext[467]{AGWA Act 2013 Division 4, Subdivision D, ss 40RC-40RG.}
\footnotetext[468]{AGWA Act 2013 s 40RA.}
\footnotetext[469]{AGWA Act 2013 s 40RB (1) – (2).}
\footnotetext[470]{AGWA Act 2013 s 40RB (3).}
\footnotetext[471]{AGWA Act 2013 s 40RB (4).}
\footnotetext[472]{AGWA Act 2013 s 40RC (3).}
\footnotetext[473]{AGWA Act 2013 s 40RC (3) Note 1.}
\footnotetext[474]{Stern, above n 406, 279 (emphasis in original).}
\end{footnotes}
registered irrespective of an objection having been ‘made out’. This discretion would appear to fly in the face of the AUSFTA, although it may be limited by future regulations or decisions. 475

An example of an objection made under section 40RC of the AWBC Act is that of the Rothbury Wines’ determination of GI filed in the names of Murray Tyrell, Tyrell’s Vineyards Pty Ltd and Trevor Drayton. 476 A small group of winemakers in the Lower Hunter Valley Region wanted to have two subregions determined by the GIC in the area. The smaller subregion, to the south of Broke Road, would be called ‘Pokolbin’ and this was where each of the applicants had their own respective vineyards. The other subregion was to the north of Broke Road and would be called ‘Rothbury’. 477 However, the name ‘Pokolbin’ was the name that all winemakers in the area had used for many years on their wines and not just those to the south of Broke Road. Hence, several winemakers were against the applicant’s GI application. Further, in relation to the name ‘Rothbury’, although there was a parish of that name and the name appeared on maps of the region, the name Rothbury was not known by local winemakers to be the name of their region and had not been used by anyone as the name of a GI. 478 However, ‘Rothbury’ was the name of a subsidiary and winery of Foster’s, whose predecessors had used the name since approximately 1969 and had several trademark registrations containing the name ‘Rothbury’, as well as trademark applications for that name. 479

Once the application for the two subregions was made to the GIC and the GIC had advertised it, Foster’s subsidiary, Rothbury Wines Pty Ltd, lodged an objection under section 40RC of the AWBC Act. Deputy Registrar Arblaster decided that the objection to the registration of the GI had been made out. Some points worthy of note in this context included that the evidence adduced that the word ‘Rothbury’ was ‘barely’ a geographical word and had no ‘force as a gestalt’. 480 ‘Rothbury’ had developed a secondary meaning as a trademark denoting the wines of the Objector. 481 Given this secondary meaning, the Objector had trademark rights in the word ‘Rothbury’ in relation to wine. Therefore, the use of ‘Rothbury’ as a GI would be confusing with the term ‘Rothbury’ contained in the registered mark ‘The Rothbury Estate’. The use of the word ‘Rothbury’ as a GI would, because of the

475 Ibid.

476 Objection by Rothbury Wines to determination of Geographical Indication filed in the names of Murray Tyrell, Tyrell’s Vineyards Pty Ltd and Trevor Drayton (2008) ATMO 13 June 2008 (Dy. Registrar Arblaster) (‘Rothbury’).

477 Rothbury [23].

478 Rothbury [117].

479 Rothbury [118].

480 Rothbury [118].

481 Rothbury [120], [146].
reputation of the trademarks, be confusing and ‘the likelihood of confusion [was] not ameliorated by any force that the word ‘Rothbury’ has otherwise developed’. Thus, the determination of ‘Rothbury’ as a GI was not recommended given the prior trademark rights that the Objector had in the term ‘Rothbury’. This decision highlights that prior trademark rights that a trademark owner has in a trademark that includes a term that is similar to a potential GI can influence the determination of a GI.

Similarly, registration of trademarks can be affected by GIs. For example, under section 61 the Trade Marks Act, a trademark registration may be opposed on the ground that it contains or consists of a false GI. Section 6 of the Trade Marks Act defines a GI as:

Sign that identifies the goods as originating in a country, or in a region or locality in that country, where a given quality, reputation or other characteristic of the goods is essentially attributable to their geographical origin.

Section 61 was included in the Trade Marks Act for Australia to meet its obligations under the TRIPS Agreement, to provide a ground of opposition to trademark registration in which the trademark contains a sign that might also be recognised as a GI. This section of the Trade Marks Act ‘most explicitly deals with the relationship between trademarks and GIs’. The registration of a trademark in respect of particular goods may be opposed on the ground that the trademark contains a GI for similar goods that originate in a country, region or locality in that country, other than the country in which the trademark goods originated. The ground is established if the trademark goods are similar to the GI goods or if the use of the trademark in relation to the trademark goods would be likely to deceive or cause confusion. As Handler explains:

While this ground overlaps to some extent with section 43 of the Trade Marks Act [as discussed in this chapter] in denying registration to certain geographical signs the use of which would be likely to deceive or cause confusion.

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482 Rothbury [165]-[166].

483 Rothbury [Summary].

484 Trade Marks Act 1995 s 61.


486 See TRIPS Agreement art 24.5 and 24.9.

487 Burrell and Handler, above n 124, 462.

488 Trade Marks Act 1995 s 61(1).

489 TM Manual Part 46, paragraph 4.6, Effective Date 15 August 2016.
confusion, it goes further in one sense in potentially allowing a successful opposition simply on the basis that the marks contains or consists of a ‘false’ GI, irrespective of the issues of consumer confusion.\textsuperscript{490}

Section 61(1) applies when the trademark applicant’s specified goods are ‘similar to those [that are] the subject of the GI (but that the two sets of goods originate from different countries or regions), even if the applicant’s use of its mark would not cause any confusion’.\textsuperscript{491} However, there are several defences available to the trademark owner under subsections 61(2) to 61(4) of the Trade Marks Act including, but not limited to, if the trademark goods did originate in the country, region or locality indicated or that the sign in question has ceased to be a GI in the country of origin of the GI goods.\textsuperscript{492} When a defence applies, the trademark might not be opposed and proceed to registration.

Under section 42 of the Trade Marks Act, a trademark application may be rejected when a trademark, or part of a trademark, is identical to, or resembles, a registered GI and the trademark application is in class 33 for wines and grape products.\textsuperscript{493} If a trademark matches a GI that is on the AGWA Register, ‘the presence of such a match on the AGWA Register indicates that the use of the trademark may contravene the AGWA Act\textsuperscript{494} and thus, be contrary to law. However, if the trademark usage is in accordance with the conditions specified in the relevant entry on the AGWA Register, then the trademark might be accepted and registered with the following endorsement:

\begin{quote}
It is a condition of registration that the trademark will only be used under the conditions entered on the Register of Protected Geographical Indications and Other Terms for use of the <Geographical Indication/Traditional Expression/Quality Wine Term/Additional Term> and that the use will accord with the Australian Grape and Wine Authority Act 2013.\textsuperscript{495}
\end{quote}

Further, it is possible for a trademark that contains a GI to not contravene section 42(b) if the context of the term makes it obvious that it is being used within a trademark for the sake of its ordinary English meaning and with no potential reference to the geographical location.\textsuperscript{496} This was considered by the Trade Marks

\begin{flushleft}
\textsuperscript{490} Burrell and Handler, above n 124, 462-463.
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\begin{flushleft}
\textsuperscript{491} Ibid 463.
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\textsuperscript{492} TM Manual Part 46, paragraph 4.6.3, Effective Date 15 August 2016.
\end{flushleft}

\begin{flushleft}
\textsuperscript{493} Trade Marks Act 1995 s 42.
\end{flushleft}

\begin{flushleft}
\textsuperscript{494} TM Manual Part 32B, paragraph 2.1, Effective Date 16 October 2017.
\end{flushleft}

\begin{flushleft}
\textsuperscript{495} Ibid.
\end{flushleft}

\begin{flushleft}
\textsuperscript{496} TM Manual Part 32B, paragraph 2.1.2, Effective Date 16 October 2017.
\end{flushleft}
Office in the *Application by Ross & Veronica Lawrence* [2005]. 497 Ross and Veronica Lawrence applied to register the trademark ‘First Feet’ for wines, but their application was rejected by the trademarks examiner on the basis that it included the German GI ‘First’. The Examiner requested that the applicants consent to an endorsement being attached to their mark that ‘the trademark will be used only in relation to wines originating from the FIRST subregion within the Einzellagen wine growing area within Germany’. 498 The applicants refused to consent to the endorsement and requested a hearing before a trademarks Hearing Officer. The applicants argued that their use of the word ‘First’ in their trademark was not as use of the German GI, but was used as ‘part of the ordinary and common English expression ‘feet first’ as in to ‘jump or dive in somewhere, feet first’’. 499 The Hearings Officer accepted this argument and provided some guidance as to when trademark applications should not be rejected under section 61:

*Where the context of a geographical indication makes it obvious that it is being used within a trademark for the sake of its ordinary English signification as a word contained in an English dictionary, with no potential reference to the geographical location, it is appropriate that the application should be accepted for possible registration.* 500

Following this decision, and the 2010 amendment of the *AWBC Act*, sections 40DA (2) and 40FA (2) of the AGWA Act now provide that when a word or term is a common English word or term, the description and presentation of wines that includes such a term that is also a GI will not be misleading. The defence applies when:

- the description and presentation of wine includes a word or term that is a registered GI
- the word or term is a common English word or term
- the word or term is not used in such a way to indicate that the wine originated in the country, region or locality in relation to which the GI is registered
- the description and presentation indicates the actual origin of wine
- the word or term is used in good faith.

Other amendments to the AWBC Act in 2010 were made after Australia and the EU finalised their 2008 round of negotiations on the wine accord that existed

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497 *Application by Ross & Veronica Lawrence* [2005] ATMO 69 (21 November 2005) (Delegate Ian Thompson) (‘First Feet’).

498 *First Feet* [2].

499 *First Feet* [17], [20].

500 *First Feet* [9], [32]-[34].

501 *AGWA Act 2013* s 40FA (2).
between them and ‘The changes since the 1994 Treaty were so significant that the parties signed a new Treaty which superseded its predecessor’. The Australia–European Commission Agreement on Trade in Wine, was signed by Australia and the EU on 1 December 2009, but did not enter into force as a treaty until 1 September 2010. One of the main changes emanating from the 2010 Treaty was setting a final date of the phase-out by Australia of EU wine GIs containing names such as Champagne and Port, as discussed earlier in the context of the 1994 Treaty. The phase-out date for names such as Port and Sherry came 18 years after the phase-out had been agreed to in principle. Given that these names were commonly used by Australian producers, the phase-out date set down in the 2010 Treaty had real significance.

When the 2010 Treaty was implemented, the Australian government made some sweeping changes to the AWBC Act, later renamed in 2010 as the Wine Australia Corporation Act and, more recently in 2014 as the Australian Grape & Wine Authority Act. New rules for the protection of GIs were introduced in the new legislation. In summary, the new legislation:

1) added the use of registered translations of a registered GI to the definition of ‘false description and presentation’
2) clarified that certain uses of GIs were not a ‘false description and presentation’ or a ‘misleading description and presentation’ in certain defined circumstances
3) reduced dramatically the number of German GIs that are protected (due to the EU limiting the number of such GIs, compared with the 1994 Treaty)
4) inserted a new definition of a ‘GI’ that is now consistent with the definition as set out in the 2010 Treaty and TRIPS
5) included several new defences against alleged breaches of the provisions protecting registered GIs (such as when the use is of a common English word or term like ‘First Feet’)

502 Stern, above n 406, 280.
503 2010 Treaty.
504 Explanatory Memorandum, Australian Wine and Brandy Corporation Amendment Bill 2009, 2: The Australia-EC Wine Agreement...was a significant revision of the 1994 Agreement. It provides benefits to both parties and is strongly supported by the Australian wine industry.
505 Stern, above n 433, 286.
506 Ibid.
507 See AGWA Act 2013 s 40D (2)(c).
508 See AGWA Act 2013 ss 40DA, 40DB, 40FA and 40FB.
509 See AGWA Act 2013 s 4 and discussion of ‘GI’ definition above.
6) removed the need to establish that a person had breached the legislation ‘knowingly’ to establish a breach of the provisions that protect registered GIs and TEs.

7) renamed the Register of Protected Names to cover protected TEs and quality wine terms, so that it became the ‘Register of Protected Geographical Indications and Other Terms’. It was also reorganised into four parts to include: (a) GIs for both Australian and foreign wines, as well as the translation of foreign GIs, (b) TEs for wines originating in foreign countries; (c) quality wine terms for wines originating in Australia and (d) other terms in relations to wine (e.g., Méthode Champenoise).

These changes are incorporated in the most recent compilation of the AGWA Act.

2.8.2. Practical effect of the Australian Wine GI system for wine producers and wine grape growers

Following the explanation of the six main phases of the evolution of the Australian wine GI system, it is important to explore the practical effect that the Australian wine GI system has for wine producers and wine grape growers. In exploring the practical effect, the difference is apparent in the regulation of usage of regional names on wines compared with the regulation of regional names on food products.

2.8.2.1 Rules regarding usage of registered GIs

As already explained, the current Australian wine GI system is regulated under the AGWA Act. The definition of ‘GI’ in section 6 of the AGWA Act is:

*Geographical Indication, in relation to wine goods, means an indication that identifies the goods as originating in a country, or in a region or locality in that country, where a given quality, reputation or other*

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510 See AGWA Act 2013 s 40FA(2) and discussion of ‘First Feet’ above.

511 See AGWA Act 2013 ss 40E, 40F.

512 See AGWA Act 2013 s 40ZD.

513 The most recent compilation of the Australian Grape and Wine Authority Act 2013 is Compilation No. 35 and is available at https://www.legislation.gov.au/Details/C2017C00097. This compilation is dated 22 March 2017 and includes amendments up to Act No. 13, 2017.

514 The most recent compilation of the AGWA Act 2013 is available at https://www.legislation.gov.au/Details/F2014C00910. This compilation is dated I July 2014 and includes amendments up to SLI No. 70, 2014B.
characteristic of the goods is essentially attributable to their geographic origin.\textsuperscript{515}

The section 5D definition of ‘originate’ provides that a:

\begin{quote}
Wine, or a grape extract that is used or intended to be used in manufacturing wine, is taken to have originated in a country or in a particular region only if the wine or extract is made from grapes grown within the territory of that country or from grapes grown in that region or locality.\textsuperscript{516}
\end{quote}

The rules for the use of registered GIs are provided in Regulation 21 of the \textit{AGWA Regulations 1981}.\textsuperscript{517} The rules can be summarised as follows:

\begin{itemize}
\item Three or less registered Australia GIs and foreign placenames can be used in the description and presentation of wine.\textsuperscript{518}
\item \textit{If the description and presentation of the wine uses only one registered Australia GI and does not use a foreign registered GI and does not use a foreign placename}, then at least 85 per cent of the wine must have been obtained from grapes grown in the registered Australia GI area.\textsuperscript{519}
\item \textit{If the description and presentation of the wine uses only one foreign registered GI}, then at least 85 per cent of the wine must have been obtained from grapes grown in the registered foreign GI area.\textsuperscript{520}
\item \textit{If the description and presentation of the wine uses two or three registered GIs, at least one of which is a registered Australian GI and does not use a foreign placename}, then in total at least 95 per cent of the wine must have been obtained from grapes grown in the registered GI areas and at least 0.05 per cent of the wine must have been obtained from each of the registered GI areas and the description and presentation must set out the registered GIs in descending order of the proportions of the relevant grapes in the wine.\textsuperscript{521}
\end{itemize}

\textsuperscript{515} AGWA Act 2013 s 4.

\textsuperscript{516} AGWA Act 2013 s 5D (a) and (b).

\textsuperscript{517} The most recent compilation of the \textit{Australian Grape and Wine Authority Regulations 1981} (Cth) (‘AGWA Regulations 1981’) is Compilation No. 35 and is available at https://www.legislation.gov.au/Details/C2017C00097. This compilation is dated 22 March 2017 and includes amendments up to Act No. 13, 2017.

\textsuperscript{518} AGWA Regulations 1981 reg 21(1).

\textsuperscript{519} AGWA Regulations 1981 reg 21(2).

\textsuperscript{520} AGWA Regulations 1981 reg 21(2A).

\textsuperscript{521} AGWA Regulations 1981 regs 21(3) and (4).
• If the description and presentation of the wine uses at least one registered Australian GI and at least one foreign placename, then in total at least 95 per cent of the wine must have been obtained from grapes grown in the registered Australian GI areas and the countries, regions or localities identified by the foreign placenames and at least 0.05 per cent of the wine must have been obtained from each of those registered GI areas and foreign placename countries, regions or localities and the description and presentation must set out the registered GIs and foreign placenames in descending order of the relevant grapes in the wine.522

Therefore, the basis of connection between wine and origin for the purposes of the Australian wine GI system is purely the regional origin of grapes used to make the wine. The Australian wine GI system does not include any rules regarding: typicality of wine, production methods, what wine varieties must be used to make wine or how or where vines must be planted. These are not relevant factors in determining whether a wine producer or wine grape grower can use a wine GI. The reason that the Australian wine GI system is not overly prescribed is because when Australia signed the 1994 Treaty and started to implement the Australian wine GI system, government and representative committees involved in the implementation were ‘adamant that [they] did not want an ‘appellation system’ ’.523 The Australian wine industry did not want to adopt a wine GI system similar to the French system on the basis that it did not want too many rules and restrictions to apply to Australian wine producers and wine grape growers. Flexibility would assist with maintaining innovation in winemaking practices. In this sense, the Australian wine GI system might be considered more of a system regarding ‘indication of source’524 as it really only prescribes that, to use a wine GI, wine producers and wine grape growers must ensure that at least 85 per cent of the grapes used to make a wine labelled with a wine GI comes from the GI area.525 However, at the time that the Australian wine GI system was implemented, Australia could not have had a GI system as prescribed as the French system. This is because, in comparison to France’s wine industry, Australia’s wine industry was quite young. However, as time has passed the Australian wine industry has ‘begun to develop and promote the distinctive regional qualities of its wines as a means of increasing profitability’.526 Therefore, the Australian wine GI system might soon need to be

522 AGWA Regulations 1981 reg 21 (5) and (6).

523 Stern, above n 406, 290.

524 Ibid.

525 AGWA Regulations 1981 reg 21(2).

improved to cater for typicality and regionality of wines as factors that will determine whether wine is connected to Australian wine GI areas.\textsuperscript{527}

Although the current Australian wine GI system is not as prescribed as the French Appellation system, Regulation 21 of the AGWA Regulations 1981 puts the Australian wine industry a step ahead of the Australian food industry as it clearly sets out the relevant rules regarding usage of registered GIs on wine labels. As has been emphasised throughout this chapter, under current laws and regulations in Australia there is inadequate \textit{ex ante} guidance for food producers and traders as to when they can use Australian regional names on their food products to make an origin claim. This is particularly the case when some of their ingredients are sourced or some production of their food products takes place outside the region. Protection is limited, even in instances when they can make a claim. The Australian wine GI system does provide this guidance for winemakers and wine grape growers and thus, can offer insight into how equivalent guidance could be offered to food producers in the food industry. Although the connection between wine and origin is only based on the regional origin of the grapes used to make the wine, the Australian wine GI system still provides more protection to the connection between wine and origin than is provided under current laws and regulations to the connection between food and origin. The connection provided is evident given the extensive provisions in the AGWA Act regulating the misuse of wine GIs.

\subsection*{2.8.2.2 Provisions regulating the misuse of wine GIs}

The GI protection provided under the Australian wine GI system is much stronger than the protection provided to Australian regional names used in context of Regional Branding under consumer protection laws, passing off laws and trademark laws. As explained earlier in this chapter, in the absence of misleading and deceptive conduct, or passing off, food producers can use regional names on food products to make an origin claim—even though their food products only have an attenuated connection with the named region. However, in relation to wine GIs, the AGWA Act provisions regarding false description and presentations of wine (reviewed below) provide that a wine GI cannot be used on a wine that does not originate from the GI area on the basis that the wine producer has disclosed the actual place of origin of the wine elsewhere on the label.\textsuperscript{528} The description and presentation of wine will be false even if it indicates the country, region or locality in which the wine originated. Under the Australian wine GI system, there is ‘no possibility of using [a wine] GI while making it clear that the wine does not originate in the region, nor is there a good faith defence as exists in relation to registered trademarks’.\textsuperscript{529} Therefore, the Australian wine GI system provides wine producers and wine grape growers with a substantial advantage over regional food producers. Unlike regional food producers, if a rival wine producer misuses a wine GI on a wine that does not originate from that GI area the wine producer does not

\begin{itemize}
\item \textsuperscript{527} Ibid 459.
\item \textsuperscript{528} See eg \textit{AGWA Act 2013} s 40C(2) and 40E(2).
\item \textsuperscript{529} van Caenegem, Drahos and Cleary, above n 15, 19.
\end{itemize}
need to prove that the GI usage misleads or deceives consumers. The fact that the Rival misuses a wine GI on wine that does not originate in that GI area means that there is an infringement.

This stricter protection provided under the Australian wine GI system is enforced under the AGWA Act. Failure to provide proper descriptions and presentations of wine is an offence under section 40C(1) of the AGWA Act that provides that ‘a person commits an offence if: (a) the person sells, exports or imports wine and (b) the wine is sold, exported or imported by the person (i) in trade or commerce and (ii) with a false description and presentation’.\(^{530}\) Section 40D explains the circumstances in which the description and presentation of wine will be false for the purposes of section 40C. Section 40D includes, but is not limited to, that the description and presentation of wine is false if:

- it includes the name of a country or other indication that wine originated in that particular country, and the wine did not originate in that country\(^{531}\)
- it includes a registered GI or a registered translation of a registered GI and the wine did not originate in that GI country, region or locality\(^{532}\)

Section 40C includes a further subsection that provides that the description and presentation of wine may be false ‘even if it indicates the country, region or locality (as the case may be) in which the wine originated’\(^{533}\).

Further, section 40C applies even if the GI or translation is accompanied by an expression such as ‘kind’, ‘type’, ‘style’, ‘imitation’, ‘method’ or any similar expression.\(^{534}\) Therefore, it is not possible for a wine producer to indicate that its wine ‘exhibits qualities associated with a foreign region like Chablis or Burgundy’,\(^{535}\) if that does not reflect the wine’s actual place of origin. Thus, GI protection ‘extends to references to the wine exhibiting the style of [another GI/appellation] and still applies even when accompanied by a truthful origin claim’\(^{536}\). It is stricter than the protection provided to the usage of regional names on food products under current laws and regulations. For example, when compared with consumer protection laws, those laws require that a regional food producer taking action against a rival food producer who misuses a regional name on a food

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\(^{530}\) AGWA Act 2013 s 40C.

\(^{531}\) AGWA Act 2013 s 40D(2)(a).

\(^{532}\) AGWA Act 2013 s 40D(2)(b).

\(^{533}\) AGWA Act 2013 s 40C(2).

\(^{534}\) AGWA Act 2013 s 40D(4).

\(^{535}\) Waye and Stern, above n 526, 489.

\(^{536}\) Ibid 488.
product that does not have a clear connection with the named region, prove that consumers were misled or deceived or are likely to be misled or deceived by the rival food producer's origin claim. Therefore, consumer protection laws place an evidentiary burden on food producers that does not apply to wine producers under the Australian wine GI system when a wine producer misuses a wine GI on wine that does not originate from that area. That the wine GI has been misused is enough to require protection under section 40C without the need to prove that the GI usage was misleading in the circumstances.

Similarly, under section 40E(1) of the AGWA Act 2013, it is an offence if: ‘(a) the person sells, exports or imports wine and (b) the wine is sold, exported or imported by the person (i) in trade or commerce and (ii) with a misleading description and presentation’\(^{537}\). Section 40E, like section 40C, includes a further subsection that provides that the description and presentation of wine may be misleading ‘even if it indicates the country, region or locality (as the case may be) in which the wine originated’\(^{538}\). Section 40F explains the circumstances in which the description and presentation of wine is misleading and these are very similar to those included in section 40D as set out above. Defences to sections 40C and 40E are provided in sections 40DA and 40DB, respectively and sections 40FA and 40FB. Among the defences is when the description and presentation of wine includes a common English word or term.\(^{539}\) As explained above, these sections were included following the findings in Application by Ross & Veronica Lawrence.

The Australian wine GI system provides winemakers and wine grape growers the right to institute proceedings for an offence against sections 40C and 40E.\(^{540}\) The AGWA and various organisations are also able to institute proceedings.\(^{541}\) When sections 40C and 40E are infringed, the penalty is two years imprisonment. However, each section includes a Note stating ‘that a court may impose a maximum fine of 120 penalty units instead of, or in addition to, a term of imprisonment. A body corporate that is convicted of an offence may be fined up to five times that maximum fine’\(^{542}\). This means that individuals can be made liable for pecuniary penalties up to AU$12,000 for each offence while companies can be liable to fines up to AU$60,000 for each offence.\(^{543}\)

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537 AGWA Act 2013 s 40E.

538 AGWA Act 2013 s 40E(2).

539 AGWA Act 2013 s 40DA(2) and 40FA(2).

540 AGWA Act 2013 s 40K (1)(b).

541 AGWA Act 2013 s 40K (1)(a) and (c).

542 AGWA Act 2013 s 40C and 40E Note.

543 Stern, above n 406, 269.
Therefore, it is evident from these provisions that the Australian wine GI system provides winemakers and wine grape growers with automatic rights of protection of GIs that they can rely on when another wine producer or wine grape grower misuses a GI. These provisions regulating the misuse of GIs are far more extensive than the protection offered to regional food producers when rival food producers misuse regional names to make an origin claim on food products that lack a clear connection with a region.

2.8.2.3 Label integrity program

In addition to the rules and provisions explored above, the Australian wine GI system also has a strict system of governance when it comes to ‘truth in labelling’. With the LIP comes a system of traceability for consumers from grapes to wine bottle. As required under the LIP, section 39F(1)(f) of the AGWA Act 2013 obliges a record keeper to keep written records that show the vintage, variety and prescribed GI of the wine goods received by the record keeper, while section 39F(1)(k) obliges a record keeper to keep written records that show the vintage, variety and prescribed GI of the wine goods supplied by the record keeper.\(^{544}\) Section 39H provides detailed information of what is required under section 39F(1)(f) and (k) in relation to variety of wines, blends and grape extract.\(^{545}\) In particular, section 39H(4) relating to blended wines of different vintages, varieties or prescribed GI, requires records be kept of: what proportions of the blend are represented by each blended wine and the vintage, variety or prescribed GI of each blended wine.\(^{546}\) Similarly, section 39H(5) in relation to grape extract derived from grapes of different vintages, varieties or prescribed GIs, requires records be kept of: what proportions of the wine goods are derived from each kind of grape and the vintage, variety or prescribed GI of each kind of grape.

The LIP is enforced by a group of inspectors appointed by the AGWA under section 39ZA of the AGWA Act. Auditors may cold-call, or make an appointment with, wine producers and wine grape growers to regulate that they have kept records in accordance with the requirements set out in section 39F of the AGWA Act. The wine producer or wine grape grower will be guilty of an offence, if an inspector determines that they have failed to do one or more of the following:

- keep a record in accordance with the requirements of sections 39F(1) and (2) or 39H\(^{547}\)
- keep records that support the label claims they make in relation to wine\(^{548}\)

\(^{544}\) AGWA Act 2013 ss 39F (1)(f) & (k).

\(^{545}\) AGWA Act 2013 s 39H.

\(^{546}\) AGWA Act 2013 s 39H(4).

\(^{547}\) AGWA Act 2013 s 39J(1).

\(^{548}\) AGWA Act 2013 s 39J(2).
• keep accurate records$^{549}$
• provide a copy of a record in relation to the supply of wine goods$^{550}$
• keep a copy of a record in relation to the supply of wine goods$^{551}$

The penalty for each of these offences is two years imprisonment. The power provided to inspectors under sections 39ZC to 39ZL inclusive of the AGWA Act are extensive. Further, under section 44AB (1)(a) and (b) of the AGWA Act, the Federal Court of Australia may grant an injunction when a person has contravened the LIP or has breached a provision protecting GIs.$^{552}$ Injunctions can be issued restraining the person from continuing the misconduct and requiring them to do a particular act.$^{553}$ An example of a ‘particular act’ includes placing ‘retractive advertising in newspapers or journals informing the public that a particular winemaker had no right to use a specific GI’.$^{554}$

The traceability of wine from grapes to wine bottle is what the LIP is primarily concerned with and what inspectors focus their audits on. Inspectors ‘aim to cover all Australian wine producers every three to four years’.$^{555}$ The LIP puts the wine industry a step ahead of the food industry. Most Australian winemakers and wine grape growers happily comply with the LIP, as they can see the benefits that come out of applying Australian wine GIs to their wine products. Van Caenegem, Drahos and Cleary note, ‘An important factor in the wine industry’s compliance culture is that many of its participants agree with the industry’s strategic objective of increasing Australia’s reputation for premium wines and the important role of GIs within that objective’.$^{556}$ There is recognition in the wine industry that GIs have ‘played an important contributory role in attracting investment in quality’.$^{557}$ The Australia wine GI system has created an incentive for Australian winemakers and wine grape growers to invest in making premium quality wine. As a GI ‘precisely defines an area with a reputation for production of quality wines it also defines who is a member of the resultant community of shared commercial fate and who is not’.$^{558}$ Winemakers and wine grape growers want to be ‘members’ of this

$^{549}$ AGWA Act 2013 s 39J(3).

$^{550}$ AGWA Act 2013 s 39K(1).

$^{551}$ AGWA Act 2013 s 39K(2).

$^{552}$ AGWA Act 2013 ss 44AB (1)(a) and (b).

$^{553}$ AGWA Act 2013 s 44AB (2).

$^{554}$ Stern, above n 406, 269.

$^{555}$ van Caenegem, Drahos and Cleary, above n 5, 20.

$^{556}$ Ibid 21.

$^{557}$ Ibid 26.

$^{558}$ Ibid.
community and thus, are committed to complying with the Australian wine GI system and producing quality wines to which the Australian wine GIs attach.

It is evident from both the AGWA Act 2013 and the LIP provisions that there is a clearer legal framework (regarding labelling and the regulation of the connection between wine and origin) in place in Australia for wines than there is for food. The difference is apparent between the regulation of Australian regional names used on wines to make an origin claim as opposed to those used on food products to make an origin claim. Current laws and regulations in Australia do not provide adequate *ex ante* guidance to food producers and traders about when they can use Australian regional names on food products to make an origin claim. The Australian wine GI system provides this guidance to grape growers and wine producers. They must ensure that at least 85 per cent of the grapes that they use to make wine labelled with a GI, come from that GI area. That is the connection requirement. Consumers can rely on wine labels for traceability from grapes to wine; however, consumers are unable to rely on food labels for traceability of food products from paddock to plate. Current laws and regulations do not regulate the connection between food and origin *before* regional names are used on food labels to make an origin claim. Whereas, the Australian wine GI system regulates that wine is connected to the GI area *before* a wine GI can be used on a wine label. Therefore, wine GIs have helped ‘define and communicate the connection between the [GI] region and the wine’. This has assisted with mitigating the risk of wine producers using a wine GI on a wine that does not meet the connection requirements under the AGWA Regulations 1981. The Australian wine GI system has brought protection to the value that exists in Australian wine GIs. It has promoted Australia’s regionality for the purposes of wine promotion and sales and has led to an increase in Australian wine exports on foreign markets, particularly in Europe.

Most of the South Australian interviewees believe that the food industry is ‘20 to 30 years behind’ the wine industry and welcome a revised legal framework that is similar to the Australian wine GI system.

**2.8.3. The Australian wine GI system v. a *sui generis* food GI system**

From this analysis, it is evident that the Australian wine GI system provides advantages to wine producers and wine grape growers over food producers in the protection that it provides them when a wine GI is misused by a rival wine producer or wine grape grower. The difference is apparent in legal treatment of how Australian regional names are protected as wine GIs under the Australian wine GI system, as opposed to how Australian regional names are protected under consumer protection, passing off laws and trademark laws. The Australian wine GI system

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559 AGWA Regulations 1981 reg 21(2).

560 van Caenegem, Drahos and Cleary, above n 15, 22.

561 Interview with Jan Angas, Proprietor and Producer, Hutton Vale Lamb, (Tanunda, Barossa Valley, South Australia, 17 February 2014).
offers valuable insight into the factors that must be considered in implementing a food GI system in Australia. Through its existence, ‘the Australian wine industry has shown that Australia can work with a GI system and moreover develop GIs that are valuable’.  

The Australian wine GI system bases the connection between wine and origin on the regional origin of grapes. It does not prescribe any rules relating to production method requirements, typicality or regionality of wines. As discussed, when Australia signed the 1994 Treaty and started to implement the Australian wine GI system, the Australian government and representative committees involved with the implementation were ‘adamant that [they] did not want an “appellation system”’.  

Australia did not want to adopt a wine GI system similar to the French system, on the basis that it did not want too many rules and restrictions to apply to wine producers and wine grape growers. Many Australian winemakers and wine industry experts involved in the negotiations leading up to the 1994 Treaty were of the view that the EU’s restrictions on viticultural practices were outdated, ‘including restrictions on vines per hectare, yield and pruning, limits on the volume of wine that might be produced by a winemaker, stipulated minimum and maximum alcohol content and unjustified restrictions on the use of varietals and wine blending’.  

They preferred that Australia’s wine system remain flexible enough to maintain innovation in Australian winemaking practices.

The Australian government was focused on lowering tariffs and receiving trade concessions, and adopting WTO measures that assisted in this regard:

> Deregulation was the mantra of the day with the aim of transforming Australia into an ‘open, dynamic, flexible and high productivity economy’. A liberal wine regulatory framework that enabled winemakers to make production decisions according to market conditions and to experiment corresponded well with that political philosophy.

This approach was vastly different to that of the EC’s that wanted market support and regulation for its agricultural commodities. This approach was based on the historical European trend of protecting its local products, and the value in them, from fraudulent copies being made around the world that cheaper in quality and price. Hence, EU style appellations ‘imposed strict quality controls [and] EU common market policies comprised of restricted plant rights, wine production and price control mechanisms, import tariffs and heavy subsidisation of grape growing and winemaking through government financed distillation programs’.

562 van Caenegem, Drahos and Cleary, above n 15, 27.

563 Stern, above n 406, 290.

564 Waye and Stern, above n 526, 466.

565 Ibid 467.

566 Waye and Stern, above n 526, 467.
Australia and the EC came to the negotiations leading up to the 1994 Treaty operate with very different backgrounds and views on what a GI system should represent and how it should. Consequently, ‘Australia rejected the rules that would enable its wine regions to develop typicality’. The Australian wine GI system does not prescribe any rules about typicality or regionality (i.e., that a wine has certain qualities and characteristics that can be tied back to its geographical origin) to be labelled with a wine GI. Rather, as explained earlier in this chapter, it only prescribes that 85 per cent of grapes used to make a wine be sourced from the wine GI area. In this sense, the Australian wine GI system has been criticised for not being a GI system but only a system regarding ‘indication of source’.

However, since the inception of the Australian wine GI system, the Australian wine industry has developed and typicality and regionality of wine have become important factors in distinguishing wines. Waye and Stern recommend that the Australian wine GI system be revised in the future so that the connection between wine and a wine GI can be based on ‘the analytical and organoleptic qualities of wine’ from a region or subregion. This would be a further ‘connection’ option to the connection being based purely on the regional origin of grapes. Waye and Stern propose that a second tier of GIs be introduced into the Australian wine GI system that requires ‘an essential link to be substantiated between the wine bearing the GI and its region’. Therefore, they suggest that the Australian wine GI system be revised so that it caters for GIs that conform more closely to a ‘true GI’ in accordance with the definition of ‘GI’ in section 4 of the AGWA Act, as well as in Article 22.1 of the TRIPS Agreement, rather than GIs that merely resemble indications of source. Under section 4 of the AGWA Act, a GI in relation to wine goods is currently defined as:

An indication that identifies the goods as originating in a country, or in a region or locality in that country where a given quality, reputation or other characteristic of the goods is essentially attributable to their geographical origin.

However, under the current format of the Australian wine GI system a wine GI does not indicate that a wine’s quality, reputation or other characteristic is ‘essentially attributable’ to the origin of the wine. Rather, a wine GI only identifies...

567 Ibid.
568 Ibid.
569 Ibid 486.
570 Ibid 487.
571 Ibid 486.
572 AGWA Act 2013 s 4.
the origin of the grapes used to make the wine. The second tier GI proposed by Waye and Stern would take the significance of Australian wine GIs one step further in identifying the typicality of the wine that is ‘essentially attributable’ to the wine’s geographical origin. This is an important addition that would enhance the significance of Australian wine GIs: ‘Development of a new tier of GIs will help build greater Australian wine diversity, facilitate new stories of place, and expand marketing opportunities’.573 This is because ‘true GIs’ ‘are more highly valued than other region of origin claims’.574 By including a second tier GI in the Australian wine GI system, Australian wine producers will have the incentive to invest in ‘establishing distinctive wine and regional branding … and will be able to extract higher price premiums for their wine and increase their impact in export markets’.575 Therefore, the benefit of providing a second tier GI for wine producers is that they will be ‘better placed to leverage from their efforts to develop regionality and typicality’.576 Waye and Stern suggest that this second tier be a further option by which wine producers and wine grape growers might be able to establish a connection between wine and origin. The Australian wine GI system would still require connection based on regional origin of grapes but would also provide a further connection option based on quality (i.e., typicality) of the wine being ‘essentially attributable’ to its origin. This would provide an incentive for those wine producers and wine grape growers who have invested time and money in developing typicality of wine to use a second tier GI to identify this connection and quality.

Further, the introduction of a second tier GI would assist with mitigating the risk of any potential free-rider problem that might exist in the wine industry. Van Caenegem, Drahos and Cleary suggest that, because the current Australian wine GI system only prescribes ‘rules of origin and imposes no other standards’,577 there is a potential free-rider problem in the Australian wine industry. ‘Winemakers within a region may work hard to create a reputation for quality through the adoption of best practice methods and drawing on the strong innovation base of the industry. In the absence of detailed prescribed standards there is nothing to stop someone from buying into the region, making a lower quality wine, but being able to use the GI to market the wine because they have sourced 85 per cent of the grapes from the region’.578 Wine producers have established ‘informal mechanisms and [adopted practices of quality control] … as a way of addressing a free-riding problem that arises in the absence of mandatory quality standards’579 prescribed by the Australian

573 Waye and Stern, above n 526, 487.

574 Ibid.

575 Ibid.

576 Ibid.

577 van Caenegem, Drahos and Cleary, above n 15, 19.

578 Ibid.

579 Ibid 27.
wine GI system. Some of the mechanisms introduced include ‘the use of tasting groups or clusters in which winemakers bring along samples for evaluation by their peers’. This helps to ensure that the quality of wines labelled with the same GI are of a consistent quality. However, having a GI system that does prescribe more rules about the connection between wine and origin such as typicality, would assist with alleviating this potential free-rider problem in the wine industry.

Therefore, it is important that the limitations that currently exist with the Australian wine GI system are considered when determining an appropriate food GI system for Australia. The Australian wine GI system puts the wine industry a step ahead of the food industry for the reasons explained throughout this analysis. The food industry must learn from the practical lessons that the wine industry has experienced from working with the Australian wine GI system. An Australian food GI system must go one step further than the Australian wine GI system and consider the ways in which food can be connected to a region. Australian food GIs must be ‘true GIs’ and not just indications of source. The connection must be primarily based on regional origin of core ingredients of a food product. It might also be based on regional food producers investing time and money in certain methods and processes typically used in their region to make a food product. The variety of ways in which food is connected to an origin, as discussed in Chapter 3, must be recognised and protected to assist with maintaining the quality standard of food products that are to be labelled with a food GI.

To cater for these factors and have a ‘true GI’ system for food in Australia, a *sui generis* food GI system would be the ideal legal framework to implement. It would draw on some features of the Australian wine GI system, but be more prescribed than the Australian wine GI system to provide for a ‘true GI’ system. The core purpose of a *sui generis* GI system is to protect the link between product and place. It caters for ‘true GIs’ that identify that food products are not only connected to a region because their core ingredients are sourced from the region, but also because the food product has a certain quality, reputation or other characteristic that can be linked back to the region. As Chapter 4 explains, *sui generis* GI systems can be tailored to cater for the several ways in which food is linked to a place. They can be tailored to ensure that they properly identify and protect the connection that exists between food and origin. This is in contrast to current consumer protection, passing off and trademark laws and regulations that cannot be tailored to cater for these factors as they are not concerned with the connection between food and origin. They have different focuses that do not adequately cater for the protection between food and origin.

Therefore, a *sui generis* food GI system would assist with overcoming the deficiencies that have been identified under current laws and regulations. A *sui generis* food GI system would:

- identify how food is qualitatively connected to a region beyond regional origin of core ingredients

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provide clear *ex ante* guidance to food producers and traders as to when they can use food GIs to make an origin claim on their food products

in a similar vein to the Australian wine GI system, establish a governing body that regulates the usage of food GIs. The governing body would regulate that food products have a clear and strong connection with a GI region *before* food producers could use food GIs on food labels

provide similar provisions regulating the misuse of food GIs as provided for the misuse of wine GIs under the Australian wine GI system. By including strict protection provisions, food producers would not need to establish that the use of a food GI misleads consumers. There would be no possibility to use a food GI on food products that do not originate from the GI region and there would be no good faith defences available. Accordingly, a *sui generis* system would mitigate the risk of food producers free-riding on the reputation that many Australian regions have for producing quality regional food and the value that accordingly exists in Australian regional names

stimulate a collective commitment among GI users to invest in producing food products with Regional Branding. A GI is a public right and defines an area with a reputation for producing quality products. A GI boundary encourages food producers to collaborate and ensure that they produce food products of a consistent quality level to promote further investment in the GI and GI region. The Australian wine industry has learned firsthand that ‘where a region has committed to a quality product, the GI boundary creates certainty for future investors. They know precisely where they must buy to gain the benefit of the GI.’\(^{581}\) Therefore, by working together, and having a ‘true GI’ system, the value that exists in the GI and GI region will be increased and protected under the food GI system

provide a system of traceability for food products from paddock to plate similar to that provided on wine labels and the LIP under the Australian wine GI system. Consumers will need to be educated that a food GI indicates food products that have a clear and strong connection with the GI region and that this connection has been regulated.

These key features of a *sui generis* food GI system are further addressed in Chapters 6 and 7. Chapter 7 also discusses other practical considerations learned from the Australian wine GI system such as the intersection between trademarks and GIs and the costs involved in establishing a GI system.

A *sui generis* food GI system will bring the regulation of Australian regional names on food products more in line with the regulation of Australian regional names as wine GIs as provided by the Australian wine GI system. This is not only important at a national level, to overcome the deficiencies identified with current consumer protection, passing off and trademark laws, but also at an international level. As explained in this chapter, recognition and protection of Australian food GIs in Australia would encourage other countries that support food GIs to trade with Australia. Implementing a *sui generis* food GI system would provide trading countries with reassurance that Australia is ready and willing to protect food GIs. This is relevant, because many of Australia’s neighbouring countries such as China,

\(^{581}\) van Caenegem, Drahos and Cleary, above n 15, 26.
Thailand, Japan, Malaysia and Indonesia have recently implemented their own GI systems, and want to trade with countries that provide GI protection. The ‘longer Australia waits to develop its own GI system … the more likely it is to face design constraints’.

Trading countries will demand that Australia provide the same GI protection as that provided under their own national GI system. It would be better for Australia to have its own GI system in place to be in a stronger position to negotiate GI protection on its own terms, rather than having no contemplation of food GI protection. As Chapter 4 explains, food GIs have become important trading concessions at an international level and Australia needs to reconsider its hesitation about food GIs.

To implement a *sui generis* food GI system, it is important to understand how Australian regional food can have a strong and clear connection with Australian regions. This is particularly important to ensure that an Australian *sui generis* food GI system protects ‘true GIs’ that identify that food not only originates from an Australian region but also has a certain quality, reputation or other characteristic that is ‘essentially attributable’ to its regional origin. Chapter 3 discusses how ‘food is hitched to the universe’ to provide clear *ex ante* guidance to food producers and traders on the criteria with which they would need to comply to use a food GI on their food products. By having clear guidance on how food is connected to origin, a *sui generis* food GI system will ensure that food GIs are only used on food products that have a clear and strong connection with the GI area. This will assist in overcoming the deficiencies of current consumer protection, passing off and trademark laws discussed in this chapter.

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582 Ibid 27.
Chapter 3. The Connection Between Food and Origin

3.1. Introduction

The food industry is really confused and doesn’t understand the difference between food manufacturing and food that’s regional—of our ground and of our earth. Once regional food is understood to be food that has a connection with its origin, then a legal framework that recognises, protects and guarantees food’s origin and quality can be evolved, then we can start to move on.\(^{583}\)

It is essential to understand how authentic Australian regional food products have a clear and strong connection with Australian regions, to provide adequate protection to the connection between food and origin under a sui generis food GI system. It is necessary to identify Australian regional food that is ‘of our ground and of our earth.’\(^{584}\) A sui generis food GI system protects food products that have a clear and strong connection with a region. This includes food products that have a quality, reputation or other characteristic that is essentially attributable to its geographical origin. These are key concepts of GIs as provided by the definition of GIs under Article 22.1 of the Trade Related Aspects of Intellectual Property Agreement 1994:

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\text{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.}\]^{585}

As explained in Chapter 2, the connection between Australian wines and Australian regions is based on the geographical origin of the grapes used to make the wine. The rules for the use of registered GIs are provided in Regulation 21 of the Australian Grape and Wine Authority Regulations 1981 (Cth)\(^{586}\). The Australian wine GI system does not include any rules regarding: typicality of wine, production methods, what wine varieties must be used to make wine or how or where vines must be planted. These are not relevant factors in determining whether a wine is connected to an Australian wine GI area. There is no requirement to

\(^{583}\) Interview with Jan Angas, Proprietor and Producer, Hutton Vale Lamb, (Tanunda, Barossa Valley, South Australia, 17 February 2014) (emphasis in original).

\(^{584}\) Interview with Jan Angas, Proprietor and Producer, Hutton Vale Lamb, (Tanunda, Barossa Valley, South Australia, 17 February 2014).

\(^{585}\) TRIPS Agreement art 22.1.

\(^{586}\) The most recent compilation of the Australian Grape and Wine Authority Regulations 1981 (Cth) is Compilation No. 35 and is available at https://www.legislation.gov.au/Details/C2017C00097. This compilation is dated 22 March 2017 and includes amendments up to Act No. 13, 2017.
satisfy the ‘essentially attributable’ element of the Article 22.1 definition of GI provided in the TRIPS Agreement. That is, the Australian wine GI system does not require that wine producers and wine grape growers identify a ‘given quality, reputation or other characteristic’ of wines that is ‘essentially attributable’ to its origin to be able to use a wine GI. Rather, the connection is purely based on the regional origin of the grapes used to make the wine and that the ‘origin’ is a defined wine GI area.

This raises the question whether the Australian wine GI system is a ‘true GI’ system. Without the need to establish that wine has a quality that is ‘essentially attributable’ to its origin, the Australian wine GI system has at times been considered an indication of source system rather than a ‘true GI’ system. However, given that the Australian wine industry has developed since the inception of the Australian wine GI system, typicality and regionality of wine have become factors that are important in distinguishing wines. Therefore, Waye and Stern have proposed that a second tier of GIs be introduced into the Australian wine GI system that identifies that Australian wines have a quality that is ‘essentially attributable’ to its geographical origin. This second tier would be a second option for wine producers and wine grape growers who can prove that their wine is connected to a wine GI on the basis that the wine:

- originates from the GI area, as the grapes used to make the wine have been sourced from the GI area
- the wine’s typicality is a quality that is ‘essentially attributable’ to the wine’s regional origin.

This second tier would enhance the significance of Australian wine GIs and would allow wine producers and wine grape growers who have invested time and money in developing typicality of their wines to use a GI that reflects this investment. A second tier GI would communicate to consumers that the relevant wine is of a certain quality because of its regional origin beyond just indicating that the grapes sourced to make the wine are from a certain region.

In implementing a *sui generis* food GI system, it is important that this notion of what is a ‘true GI’ be considered. A *sui generis* food GI system must provide clear *ex ante* guidance to food producers and traders as to the connection criteria with which they must comply to use food GIs on their food products. Clear guidance must be provided regarding how ‘a quality, reputation or other characteristic’ might be ‘essentially attributable’ to a food product’s regional origin. The starting point of this analysis is provided in this chapter. It explains:

- the connection that can exist between food and origin
- the concept of *regionality*
- the geographical factors of a region that can influence food’s quality and characteristics, such as soil and climate
- the human factors of a region that can influence food’s quality and characteristics with a focus on methods and processes that are traditionally used to make food in a certain region.

By exploring these issues, this chapter provides essential background information on how regional food is connected to its origin so that an Australian *sui generis*
food GI system can cater for ‘true GIs’. Implementing a *sui generis* food GI system will assist with overcoming the deficiencies of current consumer protection laws, passing off laws and trademark laws that do not adequately protect the connection between food and origin. It will also assist with mitigating the risk of food producers and traders using Australian regional names to make an origin claim on food products that only have a weak connection with the named region; therefore, protecting against free-riding and the associated problems discussed in Chapter 2. Further, it will provide transparency of a food’s origin from paddock to plate and identify how a food product’s quality, reputation or other characteristic is essentially attributable to its regional origin.

### 3.2. Food is Hitched to Everything Else in the Universe

*When we try to pick out anything by itself we find it hitched to everything else in the universe.*

Dan Barber, a food author on paddock-to-plate cooking and eating, and chef at Blue Hill, New York, suggests that food is ‘hitched to everything else in the universe.’ What Barber means is that a single ingredient cannot be picked out by itself without some connection to the place from which it originates. Food is connected to where it comes from, its roots and its origin. Barber is not just focused on where food is made or manufactured to determine its roots, but also on where food is grown and how its origin shapes and influences taste, quality and other characteristics. The focus of this thesis is on authentic regional food that is ‘hitched’ to its regional origin. Authentic regional food is food that originates from a region in which:

*People create dishes to support an ecological reality. And they become ingrained in the cuisine and culture of the place … By looking at the origin of food, we start to look at a region’s broader story and … how land, communities and taste benefit when ecology informs the way we source, cook and eat … You can’t look at a great ingredient—a jaw dropping, delicious flavoured anything—without understanding the ecology that it came out of.*

By considering the ecological and geographical factors of a region ‘we understand place specific advantages and challenges … what ingredients are available to be worked with by people of the region’. This involves an important recognition of both the geographical factors and the human factors of a region that play a part in shaping food and influencing what food tastes like, its qualities and characteristics.

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587 Fassler, above n 10, 4.

588 Ibid.

589 Ibid.

590 Ibid.
For example, an olive comes from a tree that is rooted in soil and is affected by the microclimate in which it grows. These geographical factors play a crucial role in determining the quality and characteristics of the olive. People of the region attend to the olive and use a variety of processes and methods to grow the olive. These may be processes and methods that are adapted to take advantage of what the region offers ecologically. These human factors also play an important part in determining the quality and characteristics of the olive. The olive is truly ‘hitched to the universe’. The olive is then picked from the tree and crushed to make olive oil. Even after the olive is picked from the tree, it remains ‘hitched to the universe’. It is still connected to its origin that has influenced the olive’s quality and characteristics. And even once it is crushed into oil, the olive can still be ‘hitched’ to its origin through the quality and characteristics of the olive oil.

Barber suggests that by tracing where food comes from in this way we learn how a region’s geographical factors determine what is grown in the region and how soil, climate and other ecological factors of a region can influence the food quality and characteristics. We also learn how human factors can influence the food’s quality and characteristics depending on the processes and methods used to make the food. In looking at the connection between food and origin:

*We celebrate not just the end product (the food itself) but also the food’s connection to the whole—to everything that it took to get the soil ready to plant the food, the processes and methods used to make the food, and the food culture within which the food is made. We then begin to understand how food is hitched to everything else in the universe.*

Jan Angas suggests once we have that understanding ‘we can start to move on’ to create a legal framework that effectively protects and promotes that connection.

Connection between food and origin is not just based on where food is made or manufactured. It is about recognising and understanding how a region (i.e., its climate, people, methods and processes used to make food and its uniqueness) influences the food’s taste, qualities and characteristics. This is a criterion to which the current consumer protection laws, passing off laws and trademark laws pay little attention, as explained in Chapter 2. The current Place of Origin Labelling (PoOL) framework ignores this connection. There are no suggested criteria that focus on identifying the geographical factors and human factors of a region that combine to shape food and that could assist in determining the degree of connection required between food and origin before a PoOL claim can be made on food.

A label that claims a food comes from a region that it does not can have repercussions for other producers located in the region who ensure a qualitative connection between their food and origin before they adopt Regional Branding, which comes with the reputation of the region from which the food is sourced. As identified in Chapter 2, there is little incentive for regional food producers to invest

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591 Ibid 5.

592 Interview with Jan Angas, Proprietor and Producer, Hutton Vale Lamb, (Tanunda, Barossa Valley, South Australia, 17 February 2014) (emphasis in original).
in producing food products with Regional Branding if the same regional name can be used by other food producers on food products that lack a qualitative connection with the named region. Such usage deters regional food producers from investing in producing food products with Regional Branding. It affects the value that exists in Australian regional names as identifiers of food that is qualitatively connected to an Australian region. Regional Branding, as it currently exists, fails to add value to regional food producers’ investment in producing authentic regional food. It fails to add value to the assets that Australia has in regional names. What is needed is a legal framework that requires tighter traceability of food from paddock to plate and that decreases the chances of these problems arising—a legal framework that endorses and values Regional Branding.

3.3. Regionality

To illustrate how the connection between food and origin can be traced, it is useful to examine regional food and the concept of regionality, which go hand-in-hand. Drawing on observations made from my Italian and South Australian fieldwork, this section explores the existing concept of regionality. Next, this chapter explores examples of regional food. This analysis explains how a region’s geographical and human factors affect regional food’s quality and characteristics and assists with understanding the connection that exists between authentic regional food and its origin.

3.3.1. Regionality in Italy

Many Italians never say they are from Italy, but from Venice or Sicily or Naples, and this is the whole point—their regionality is so exciting.\(^{593}\)

Traditionally, European countries such as Italy have promoted their products on a regional basis, rather than on a country of origin basis (this will be considered further in Chapter 4). There are several reasons for this that begin with the historical evolution of the Italian identity. Italy was not unified until 1861. From 476 and the fall of the Roman Empire to 1861, Italy was made up of independent city-states, republics and regions. Hence, the regions worked autonomously and focused on their own assets and resources for sustenance. While Italy is now a unified country in a political sense, it is still a regionally diverse country. There are 20 distinct regions, each with its own unique characteristics that have been developed over hundreds of years. This regionality has filtered into the food philosophy so that there is no such thing as ‘Italian cuisine’. Rather, Italy is made up of many distinct cuisines, each with its own flavour palette and preferred cooking techniques that can be roughly grouped within regional boundaries.\(^{594}\)

Each region of Italy has different geographical factors that provide distinctive ingredients and different qualities and characteristics in food. For example, Piedmont is in Italy’s northwest and borders Switzerland and France. It is

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\(^{593}\) Jamie Oliver, *Jamie's Italy* (Penguin Books, 2005), viii.

surrounded on three sides by the Alps, and has the highest peaks and glaciers in Italy. Emilia-Romagna lies between the River Po to its north and the Apennine Mountains to its south. This position makes it one of the most fertile and productive regions of Italy. Tuscany is near the sea and hills located in central Italy and stretches from the Apennines to the Tyrrhenian Sea. These geographical differences (i.e., the soil, climate and other geographical factors) influence the ingredients that are available in a region and the quality and characteristics of the food that is made using locally sourced ingredients.

Each region has its own traditional methods of making and preparing food. Italians are very proud of these points of distinction and each believes that their own region and regionality is better than all other regions. These traditional methods sometimes tie in with neighbouring countries’ influence over the regions and migration from those countries into the regions that has taken place over the years. For example, France’s proximity to Piedmont influences Piedmont’s cuisine with fondue and creamy cheeses being a major part of Piedmontese regional cuisine. ‘Even when dishes carry the same names, they are often prepared in vastly different ways. The regions may only be a few miles apart, but Italians will always insist the cooking from their home is superior to those around them. This campanilismo, or extreme pride that Italians feel for their hometown, is universal in Italy’.  

My fieldwork carried out in the Italian regions confirmed firsthand that campanilismo is extremely high in Italy and makes the protection and promotion of the connection between food and origin an innate characteristic that Italians understand. To a certain extent, Italians are justified in thinking this way, given that the geographical factors vary from region to region and allow for different regional food that has been influenced by a region’s geographic and human factors.

Over time, there has been movement of people between the Italian regions that has:

> Blurred distinctions to a certain extent in foods and recipes of the regions [overall]. The food of Italy has always really been the food of individual regions … and the regional recipes that have most come to characterise Italian cooking—pasta, polenta, pizza, bean, offal and bread dishes—are the legacy to Italy, and the world of the day-to-day cuisine of the Italian peasant known as cucina povera, or ‘poor cooking’.  

This cucina povera or ‘poor cooking’ is very similar to the frugal farmer concept and what Barber refers to as people creating “dishes to support an ecological reality.”  

This means that Italians did not waste any resources available to them and used seasonal, regional resources to their fullest potential. They relied on their region for everything they needed. This frugal farmer concept also exists in the South Australian regions, as will be explained later in this chapter.

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596 Antonio Carluccio and Gennaro Contaldo, Two Greedy Italians (Quadrille Publishing Ltd, 2011), 8.

597 Fassler, above n 10, 4.
My Italian fieldwork confirmed Italy’s regionality and that Italy has promoted its regionality for many years with its food and agricultural products. In an interview with Mauro Rosati, Chief Executive Officer of Qualivita, based in Siena, Tuscany, Rosati explained that Italy had been working hard on recognising, protecting and promoting regionality and the connection between food and origin. Significantly, the Italian government understands the value in maintaining and promoting a connection between product and origin, ingredients, traditions and processes unique to a region, along with the value of a product that has a link with both its origin and farmers and the agricultural community from each region that makes the product.

With this focus, Italy has, for the most part, always promoted Regional Branding of food rather than ‘Made in Italy’ food products. Italy did market ‘Made in Italy’ branding and marketing of food for a brief time in the 1970s and 1980s. However, in the last 30 years Italy has moved away from ‘Made in Italy’ branding of products because this was considered too generic and non-informative and did not recognise the real value in the connection between food and origin.

Understanding the strong sense of Italian regionality assists with appreciating why European countries have historically implemented laws to protect and identify the connection between food and origin. It also assists with understanding the difference between European agricultural policies and Australian agricultural policies that place very different emphasis on GIs. These issues are explained in Chapter 4.

3.3.2. Regionality in Australia

Unlike Italy, Australia has promoted food on a country of origin basis rather than on a regional basis. This approach is the result of the combination of factors that include the:

- history of Australia from settlement to Federation
- Australian government’s focus on ‘Australian Made’ rather than regional origin of products
- slow development of Australia’s regionality.

Each of these will be considered in turn to understand why Australia has traditionally promoted the broader concept of ‘country’ as opposed to ‘region of origin’.

3.3.2.1 History of Australia, from settlement to Federation

In considering the origins of the Australian identity, we must begin with the nature of the settlement of Australia. The continent was discovered by Europeans in 1770.

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598 Qualivita gathers information all the Italian GI products. It promotes the GI system and works closely with the Ministry of Agriculture. It promotes and values the agricultural sector and shows that it has quality of an international level, with products that have DOP, IGP and STG status. It’s become the central hub of this system for Italy and has created a GI network.
and was divided into six colonies from 1788 to 1900. During this time, to establish an agriculture sector capable of supporting the new settlers, the European settlers focused on growing imported goods, rather than growing indigenous ingredients that were available in the colonies. They ignored the connection that existed between indigenous people and regions and the food. This is part of the reason for the delay in Australia’s regionality and its recognition. If the settlers had taken to the connection between indigenous communities and indigenous food much earlier, Australia might have had a different view on protecting the connection between food and origin and about implementing a system of legal protection for that connection.

European settlers did not adapt easily to their new environment. They tried to apply their homelands’ mode of farming to Australia. They farmed crops and domesticated animals as they were used to doing back home. Therefore, there was no recognition of indigenous food because the European settlers were trying to incorporate their produce and agricultural methods and practices to the environment. They were trying to become familiar with the new soil, climate and other ecological factors to determine what would grow. However, they soon realised that this was not feasible given that ‘European food was in short supply until the more regular arrival of ships and the beginnings of trade’.\textsuperscript{599} The combination of geographical factors such as different soil, different climate and so forth made it hard to establish an agricultural sector. Therefore, to feed themselves they began to rely on native game and fruits.

As Australia’s colonisation expanded, new settler communities were dispersed across Australia to:

- Produce food and wool for urban centres and for export. These communities were often geographically isolated and highly resourceful … at the local level, while ultimately dependant on commodity markets and government decisions in far-off urban centres. In this way, Australia’s regions were created as a servants of the capital cities.\textsuperscript{600}

\subsection*{3.3.2.2 Australian government’s focus on ‘Australian Made’ rather than regional origin of products}

In 1901, Australia became a Federation. With Federation, came an emphasis from the Federal Parliament on the merits of buying Australian made products. ‘The merits of buying Australian Made have been advocated in Federal Parliament … and the chambers of manufacture have been championing the cause in publications


\textsuperscript{600} Robyn Eversole, \textit{Regional Development in Australia Being Regional} (Routledge, 2016), 3.
and press advertisements since the 1930s. This emphasis grew out of necessity due to Australia’s isolation from the rest of the world. It became apparent that it was important to establish a unique Australian identity.

Section 92 of the Australian Constitution, that became law on 9 July 1900, and entered into force on 1 January 1901, reflected this position by stating that trade within the Commonwealth of Australia was to be free and no longer restricted between states and established a non-discrimination norm. This provision of the Constitution is still in effect today. Given that Australia has traditionally been viewed as far away from other countries, the focus has always been on promoting ‘Australian Made’ origin of products rather than regional origin. Australia has persistently focused on ‘urbanisation and dominance of primate cities’, while the development of Australian regions has been very much ‘stop and start’.

During the 1940s, post-World War II, the Australian government focused on nation building and decentralisation. The Chifley Labor Government undertook various policy actions through the Department of Post-War Reconstruction that included the ‘first division of States into regions and the establishment of regional committees’. This was done in an attempt to manage the absence of genuinely regional governments and to manage weaknesses arising out of local councils, as well as the ‘strategic and decentralised need for more dispersed population and industry’. Thus, regional planning division organisations were established to support the concentration of dispersed population into a small number of regional centres.

Apart from this commencement of region building, it was not until the 1970s, under the Whitlam Government, that the Australian government became truly committed

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602 Commonwealth of Australia Constitution Act 1900 (Cth), s 92 provides: Trade within the Commonwealth to be free: On the imposition of uniform duties of customs, trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigations, shall be absolutely free. But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation.

603 Anthony Hogan and Michael Young (eds), Rural and Regional Futures (Routledge, 2015), 22.

604 Ibid.

605 Ibid 23.

606 Ibid.
to regional development and decentralisation. Until then, there had always been a divide between Australia’s regions and capital cities. Gough Whitlam led a ‘substantial effort (sometimes in collaboration with the States) to decentralise population and economic activity away from the capitals, especially Melbourne and Sydney’. Whitlam developed the Department of Urban and Regional Development in an attempt to address Australia’s ‘historical ‘regional problem’ of unbalanced development and the city–country divide’.609

In 1975–1983, the Fraser Government rolled back regional policy and decentralisation. During the 1980s, under the Hawke Government, the focus was on rebuilding Australia and recovering from the recession. During 1991 to 1996, when the Keating Government took power, there was a significant shift in Australia’s regional development. Under the Keating Government, the focus shifted to ‘regional competitive advantage’ driven by local leadership. This required the creation of 50 Regional Development Organisations.610 This regional development coincided with the government’s increased focus on competition. For example, as reviewed in Chapter 2, it was during this time that Australia entered into negotiations with the EC in relation to the 1994 Treaty. Although Australia began to consider its various regions to determine Australia’s potential wine GIs, the review of Australia’s regions for this purpose was not so much about developing Australia’s regionality as it was about ensuring Australia received greater access to the European wine market.

In 1996–2007, under the Howard Government, the ‘Sustainable Regions’ program was implemented to assist regions that were in difficulty. The focus was on local input into strategic directions and local solutions to local problems.611 In 2007–2013, under the Rudd and Gillard Government, Regional Development Association Committees were established. These governments’ regional policies continued the shift in Australia’s regional development started by the Keating Government. Consequently, ‘there is a shared commitment by governments to assisting rural policies to diversify their economies … Policies are now more region specific in the sense that regional strategies are generally developed locally or regionally rather than by central governments’. 612

607 Eversole, above n 600, 4.

608 Hogan and Young (eds), above n 603, 24.

609 Ibid.


611 Ibid 27.

612 Ibid 29.
3.3.2.3 Slow development of Australia’s regionality

Overall, while some effort has been made by later Australian governments to link the connection between capital cities and regions, regional development policies in Australia have been very slow in making this connection and recognising the distinctiveness that exists in Australia’s regions. Regional development in Australia ‘continues to cast the regions as essentially separate from the nation’s centres’ and thus, there is a constant tension between what regional places ‘know and do on the ground [and] what others believe and decide about them from afar’.

To progress, regional opportunities need to be recognised more by Australian governments and part of this requires recognition of Australia’s distinctive regions. ‘The globally distinctive attributes of Australia’s regions have the potential to be springboards for competitive advantage’. Chapter 2 discussed the value in Australian regional names that serve as identifiers of authentic regional food that is qualitatively connected to Australian regions. The Australian government needs to tap into this value by recognising that:

Local knowledge and institutions are vital regional development resources. What local people know and how local people work have been repeatedly ignored—even actively suppressed by highly centralised policy processes and institutions. Yet, on the ground, local knowledge and local institutions have the potential to ‘connect the dots’ across entrenched policy silos to create more effective regional governance.

Local knowledge and local institutions have the potential to ‘connect the dots’ in the context of protecting Australia’s regionality and the connection that exists between authentic regional food and Australian regions. Australia has many unique regions that distinctively influence food’s flavour, quality and other characteristics. Many of the South Australian interviewees disclosed to me their commitment to the emergence of a unique region. They have local knowledge about their respective regions and the specific characteristics of their regional food products that are attributable to their regions that give rise to a valuable claim of regionality. As Kris Lloyd of Woodside Cheese Wrights notes:

Regionality is about identifying the fauna, flora, the geographical, the rainfall, the climatic conditions that will play a part in the characteristic of any particular food product. What are [the] cows grazing on in the Adelaide Hills that they are not grazing on in the Barossa Valley and what

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613 Eversole, above n 600, 133.

614 Ibid 131.

615 Ibid 7.

616 Ibid 136.
does that mean for the characteristics of the cheese products coming out of the two distinct regions?\footnote{17}

Angela Heuzenroeder explained that the Barossa Valley has a very strong sense of regionality because of the focus that the Barossa community has historically had on emerging a unique sense of region.\footnote{18} The food producers in the Barossa Valley have traditionally been committed to building the Barossa’s regionality. Specific to food there are several projects, including ‘Brand Barossa’, ‘Food Barossa’ and ‘Barossa Trust Mark’ to entice people to use the words ‘Barossa Valley’ on their food labels. These projects are explained in Chapter 6. Heuzenroeder explained to me that regionality in a country like Australia can develop from geographical factors and historical cultural factors. When migrants brought their recipes to a region in a different part of the world, they found that they had different ingredients. They used those ingredients in old recipes and made completely new recipes.\footnote{19} European migrants from Prussia, Germany and Silesia\footnote{20} brought their old homeland food culture to the Barossa Valley including traditions of preserving, pickling, smoking meats and baking. Migrants learned to adapt their old homeland food culture to suit their new homeland’s geographical factors such as climate and terrain. Migrants also started to source new local ingredients, in place of their original homeland’s ingredients that were not available in the Barossa.\footnote{21}

Heuzenroeder also explained that regionality can develop by adapting methods and processes over time through geographical factors, advances in technology and improvements in skills and knowledge.\footnote{22}

\footnote{17} Interview with Kris Lloyd (CEO Woodside Cheese Wrights, Woodside, Adelaide Hills, South Australia, 24 February 2014).
\footnote{18} Interview with Angela Heuzenroeder (Tanunda, Barossa Valley, South Australia, 7 May 2014).
\footnote{19} Ibid.
\footnote{20} Angela Heuzenroeder, Barossa Food (Wakefield Press, 1999), 4-7.
\footnote{21} Interview with Angela Heuzenroeder (Tanunda, Barossa Valley, South Australia, 7 May 2014). For example, for smoking meats, migrants used local woods that were available, such as mallee and red gum, and this produced a different smoked taste to the meat, than the woods used in Germany and Silesia. In terms of baking, ingredients traditionally used to make Rote Grütze-Red Berry Dessert, from Mecklenberg, Brandenburg and north Germany were substituted with Barossa Valley sourced ingredients. German migrants brought this recipe, which originates from the 19th century, to the Barossa Valley. It is made of red berries or gooseberries thickened with grain, mainly sago. On arriving to the Barossa ‘those fruits of the forest were not in the forest here…but there were red grapes around at vintage time, and so they made red grape juice and thickened that and the sago was added to give it texture. So they made an entirely different dish.’
\footnote{22} Interview with Angela Heuzenroeder (Tanunda, Barossa Valley, South Australia, 7 May 2014) and Heuzenroeder, above n 620, 93. As an example of this, Angela Heuzenroeder explained how the process to make the German cake Streuselkuchen, originating from Silesia, has been adapted over time in the Barossa. This is yeast cake-the Kuchen, with a crumbly topping of flour-the Streusel, sugar, butter and spices, and fresh fruit under the topping. The Silesians brought with them the practice of putting fruits under the topping, which were spread between the dough and the topping before baking. Traditionally the
Over the years, as people in the Barossa used old ingredients in a new way, food traditions mingled and the Barossa earned a reputation for outstanding and inventive cuisine. Indeed, people in the Barossa have developed some original local dishes not made in quite the same way in any other part of the world. While similar patterns emerged in the Adelaide Hills, the original German culture remained strongest in the Barossa Valley, and historians have described the district as a unique centre of continental traditions and culture in an otherwise English-speaking community.

The Barossa food culture is still very strong today with locals wanting the German and Silesian heritage to be maintained though food and wine that is produced in the region by descendants and the community. Maggie Beer notes that:

Nowhere else in Australia … has such an identifiable regional food culture: the ties to the land hearkening back to European settlers of the Valley, the traditions of the seasons upheld, a ‘peasant’ culture in its closest possible sense. I give this last as the greatest of accolades, because it meant that the mixed farmers or vignerons were proud of their food and their culture and they worked hard yet, I suspect effortlessly, to marry their food traditions to our climate … The Barossa has a special food heritage, and I think it has shown the way for other Australian regions to look around them to maximise their food potential. But tradition cannot be imposed—we have it in the Barossa Valley.

Thus, the Barossa Valley is an example of an Australian region that has its own sense of regionality that has developed over time mainly due to a combination of geographical factors and historical cultural factors. Although many European settlers did not adapt easily to their new environment and there was limited development of a unique identity for many Australian regions, the European settlers
in the Barossa Valley persevered and adapted their homeland knowledge, recipes, processes and methods to their new environment. This transplanting of culture was crucial in developing the Barossa’s unique identity. It is because of the commitment to emerging a unique region that the names ‘Barossa Valley’ and ‘Barossa’ have so much value today in the context of Regional Branding. The effect of transplanting culture on the Barossa Valley and the Adelaide Hills is discussed further in Chapter 6.

It is evident from this analysis that Australia’s regionality has developed more slowly than Italy’s regionality and why the Australian government has historically promoted country of origin (i.e., Made in Australia) of products rather than regional origin. Chapter 4 explains that the Australian government’s focus on country of origin of products rather than regional origin of products has affected Australia’s view of GIs and the protection of these at an international level. However, for regions such as the Barossa Valley and Adelaide Hills that have been committed to emerging their region’s uniqueness (largely due to European settlers transplanting their culture into the regions) it is evident that regionality is a blend of the geographical factors of a region (i.e., soil, climate and other geological factors) and the human factors of a region (i.e., the processes and methods traditionally used by people of the region to make certain food products that are unique to that region). Italy’s sense of regionality confirms that it is the unique geographical factors combined with human factors that contribute to a region’s regionality. The next part of this chapter will explore how regionality affects regional food and how regional food is connected to its origin.

3.4. What is Regional Food?

In Australia, not all food products with Regional Branding are authentic regional food products that have a clear and strong connection with the named region. Therefore, the question that must be asked is: What is regional food? This section will explain that regional food is food that is influenced by its region’s regionality. Regional food originates in a certain region and has qualities and characteristics that can be connected back to its origin—to both the geographical and human factors of a region. The starting point of this discussion is the geographical and human factors of a region that influence regional food’s quality and characteristics.

3.4.1. Geographical factors of a region

In researching geographical factors that can influence food’s quality and characteristics, it became evident that geographical factors have traditionally been reviewed for the influence that they have on wine’s quality and characteristics. Europeans (particularly the French) have had a long association with considering the role that the geographical environment of a region can have on the quality and characteristics of wine. The French have long used the term terroir in this regard. Terroir is French for ‘land’ and was originally used by the French to describe the

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626 The Oxford Dictionary of English defines terroir as ‘the complete natural environment in which a particular wine is produced, including factors such as the soil, topography and climate.’
effect that the geographical and physical factors of a region had on its wine’s flavour. Research of the history of the word shows that:

The French believe that a specific terroir will affect a wine in a specific way, irrespective of viticultural practices and winemaking techniques. Cistercian monks from the Cote d’Or discovered early in the first millennium that certain vineyards delivered the best grapes year after year. They concluded that it was due to the soil and they started to grade the quality of the land into a ‘cru’ classification. The monks began to establish the boundaries of different terroirs, many of which still exist today as the Grand Cru vineyards of Burgundy. 627

In Australia, Girgensohn has written extensively on Barossa terroir and notes that:

Skilled wine tasters can pick the wine region wines originate from pretty much without fail. There are characteristics in wine that are specific to regions … The impact of terroir is incontrovertible through taste … [but] proving it scientifically is very hard. 628

Terroir factors that can influence wine’s characteristics include climate (i.e., temperature and temperature range, rainfall and humidity), topography (i.e., altitude, aspect and slope) and the soil. 629

In terms of the soil component of terroir, there is a vast amount of scientific writing on whether the quality of soil can explain the unique quality of a wine. 630 This debate exists because not all factors of terroir are equally relevant in all regions. Some regions may be defined more by soil, some by topography and others by climate. However, recent studies suggest that microbes can affect a wine’s quality. 631 As evidence of microbes is gathered from the soil, there are now the beginnings of a suggestion that scientifically proving the influence of terroir on wine quality is possible. In his article, Masterson considers studies into the effect of microbes on the quality of wine and makes some interesting observations.

The first study was carried out by David Mills in California. The findings of this study identify:

The existence of non-random ‘microbial terroir’ as a determining factor in regional variation among wine grapes. The study starts to walk down a path to something we could actually measure … Someone has to prove that something about terroir makes it to the bottle, and no one has done that yet

628 Ibid 19.
629 Ibid.
630 Andrew Masterson, “Is Winemaking an art or science?”, Cosmos Magazine, 5 January 2015 1, 2-3.
... We’ve proven that what enters the winery are different microbial sets from different regions. At least some of these microbes are known to influence wine flavour. So, it has led us to a hypothesis that the regional sets might produce regional flavours. ⁶³²

Masterson then reviews the study carried out by the University of Auckland’s biologist Matthew Goddard, who tested the idea that it is the regionally different populations of wild yeasts and other fungi that provide some of the answers to terroir:

*Alongside Mills’ paper, the evidence is stacking up. Different regions have different microbes … And as far as the findings with wild yeast: It’s the first objective evidence we have for natural regional variation in a species that is key to winemaking. This opens the door to the microbiome as a potential component of terroir.* ⁶³³

Masterson also examines the results of a study conducted by the Australian Wine Research Institute (AWRI) that explains that:

*The studies on the microbiome are exciting as it potentially can affect wine in at least two ways—through its effects on grape composition and what microbes end up in the ferment. There is no doubt that more complex yeast populations can deliver more complex wines.* ⁶³⁴

AWRI is interested in understanding what makes wines unique and gives different wines points of distinction to other wines. To that end, Masterson notes that the ‘findings on the identity of the microbes will be an additional tool’, to understanding this and ‘far from detracting from terroir they reveal the amazing beauty of it’. ⁶³⁵

Therefore, in terms of soil, there is now some scientific evidence that supports the notion that terroir can:

- influence wine quality and characteristics
- explain wine’s regional origin and the influence that regionality has on wine’s quality.

This scientific evidence is also important from a legal perspective as it provides evidence that geographical factors of a region can influence wine. This is one of the central notions of GI protection.

From research conducted on Barossa Valley terroir, Girgensohn suggests there are three factors that are significant in defining Barossa Valley’s terroir:

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⁶³² Masterson, above n 630, 6.
⁶³³ Ibid 7.
⁶³⁴ Ibid 8.
⁶³⁵ Ibid.
1) temperature and temperature range  
2) available moisture (rainfall and water-holding capacity)  
3) soil.

Girgensohn further explains that temperature and temperature range are ‘critical for the grape-ripening process. Factors which affect temperature are elevation, wind, latitude and soil’.  

He found that there were vast temperature differences across the Barossa, with elevations for vineyards varying from 180 m to 400 m, with gully winds a strong factor in some areas. In relation to available moisture, rainfall for the Barossa varies from 450 mm to 650 mm per year, and the water-holding capacity of the soil varies depending on its composition (i.e., sand or clay). As for soil, Barossa’s soil ‘has been shaped over millions of years. The result is a lot of variety and complexity’. In summary, Girgensohn suggests that the:

*Terroir concept is just as relevant for Australia as it is for France or any other country and it is just as relevant for Shiraz as for any other grape. Different terroirs can be, at a minimum, different starting points for wines, on another view, they can be the key to a wine’s uniqueness.*

In relation to the Australian wine GI system, Regulations 24 and 25 of the AGWA Regulations 1981 provide the criteria that the GIC should consider in determining a GI boundary. These include the geology of the proposed region such as climate, topography and soil. However, while this inclusion may appear to suggest that it is a legal requirement that a wine’s quality and characteristics be influenced by a region’s geographical factors before a GI can attach to the wine, this is not the case. Rather, the focus is on the regional origin of grapes. Therefore, the Australian wine GI system in its current format does not consider the influence that the wine GI area’s geographical factors have on the wine’s quality, characteristic or reputation. However, in practice, many Australian wine producers and grape growers understand the influence that a region’s geographical factors have on wine’s typicality. For this reason, Waye and Stern suggest the second tier of GIs in the Australian wine GI system should reflect this local knowledge of wine producers and wine grape growers throughout some wine GI areas. The analysis above emphasises that there is justification for including a second tier in the Australian wine GI system as geographical factors can influence a wine’s quality.

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636 Girgensohn, above n 627, 20.  
637 Ibid.  
639 Ibid.  
640 Ibid 19.  
641 Stern, above n 406, 267.
3.4.2. Human factors of a region

Human factors of a region can also influence the quality of a product. In terms of wine, Girgensohn and Robinson believe that human choice, processes and methods regarding viticulture, winemaking and the geographical factors of terroir all play an important part in creating and shaping a wine. They also believe that viticulture and winemaking affect the geographical factors of terroir. For example, decisions made about grape varieties, irrigation, pruning, use of oak, yeast and length of maceration all affect terroir.

Jay and Taylor agree with this view. Having researched the makings of Champagne in the French region Champagne (a protected Appellation of Origin [AoO] under the Controlled Appellation of Origin system), it is their opinion that the taste and characteristics of Champagne are influenced by both the terroir of the region (i.e., the geographical factors of the region) and the method used to make the Champagne known as the méthode champenoise (i.e., a human factor of the region).

In context of the fieldwork that I conducted in the Barossa Valley, it was also evident that both geographical and human factors influence wine quality. The German migrants who came to the Barossa brought with them a mindset that is still evident today in the region:

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643 Robinson, above n 642, 693-695.


645 The Appellation d’Origine Controlee (AOC) designation links champagne with its geographical origin, Champagne FRA, and makes it subject to rules of production and manufacturing. It signifies a close link between a product and its terroir and human input. This will be reviewed further in this chapter.

646 Jay and Taylor, above n 644, 15. Looking at the terroir of Champagne, Jay and Taylor disclose that it is derived from: the vineyards of Champagne [that] straddle the 49th parallel; they mark the northern most limit of viticulture on the European continent. The subsoil of the region is mainly chalk, which is highly porous and acts as a reservoir of water during summer months. Outcrops of limestone mixed with chalk and marl are naturally fissured, providing excellent drainage.’

647 Ibid [18]. In looking at the méthode champenoise used to produce champagne within the region, Jay and Taylor acknowledge that the method includes: Primary fermentation on vats or barrels, blending of several different wines from the production of several different years’ harvests to achieve the distinctive style de maison, and lastly secondary fermentation, which is the key to champagne production. They therefore conclude that it is the combination of the geographical factors and human factors that ‘contribute to the sense of identity and connection between the land, the produce and the people of Champagne. This fuels the passion and the desire of the Champenois to protect the product and the appellation from foreign imitators, from faux champagnes.’
They were frugal, had a strong work ethic and a long association with wine, given that wine had been made in Silesia since the 12th century. Winemaking was part of the migrants’ self-sufficiency. Interestingly, the Germans saw themselves as caretakers of the land and their aim was to leave it in better shape for their children. This explains the many significant vine-growing families who are now in their fifth or sixth generation of growers. It could be said that valuing terroir was implicit in their philosophy. \(^{648}\)

In conducting the fieldwork carried out in the Barossa Valley, it became evident that migrants brought with them traditions, methods and practices of winemaking some of which are still employed today. Thus, it was evident that human factors can influence a wine’s quality and characteristics. For example, in the late nineteenth-century, AP John Coopers, at Chateau Tanunda, introduced the concept of using American oak as part of the fermentation process of wine, so that the wine’s flavours became more pronounced. The ‘tasty American oak [has continued to] contribute significantly to the flavour profile of most Barossa Shirazes.’ \(^{649}\)

In the early 1950s, Max Schubert of Penfolds in the Barossa Valley adopted winemaking techniques that he had learned from his visit to Europe in 1949 that:

> Would improve a wine for a couple of decades and live for a couple more. As Cabernet Sauvignon was in short supply [in the Barossa Valley] and the other Bordeaux varieties were hardly available at all, Schubert decided to base this wine on Shiraz. Initially, the grapes came from the Magill vineyard and another vineyard south of Adelaide. But the Barossa took the lead in later years. His objective was to create a big, full-bodied wine with a maximum extraction of all the components in the grape material used. \(^{650}\)

In this way, Schubert introduced to the Barossa a winemaking technique that became the model for premium winemaking in the Barossa for the next 50 years.

Human factors of a region also influence food’s quality and characteristics. In the *Guide to Geographical Indications, Linking Products and their Origins*, \(^{651}\) Giovanucci et al. discuss terroir in the context of food products. They offer the view that terroir is not just about the geographical factors of a region, but also about the interaction between those factors and human factors such as the methods and processes used to make a product within a region. They define terroir as a:

> (1) delimited geographic space, (2) where a human community, (3) has constructed over the course of history a collective intellectual or tacit

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\(^{648}\) Girgensohn, above n 627, 25.

\(^{649}\) Ibid 28.

\(^{650}\) Ibid 27.

production know-how, (4) based on a system of interactions between a physical and biological milieu, and a set of human factors, (5) in which the socio-technical trajectories put into play, (6) reveal an originality, (7) confer a typicality, (8) and can engender a reputation, (9) for a product that originates in that terroir. 652

It is useful to explain each of these factors in turn:

1) ‘delimited geographic space’ refers to a defined, delimited geographical location/area from which a product originates
2) ‘human community has constructed over the course of history collective intellectual or tacit production know-how, based on a system of interactions between a physical and biological milieu and a set of human factors’ refers to the people of a region having a certain ‘know-how’ (a form of intellectual property) that is made up of skills, methods and processes that they adopt and adapt for the geographical environment in which they live to make various food products
3) ‘in which the socio-technical trajectories put into play, reveal originality, confer typicality, and can engender a reputation, for a product that originates in that terroir’ suggests that a product made from the interaction between geographical factors and human factors can have a unique flavour and characteristic and also reveal an originality and typicality of a region. This implies that a qualitative connection between the food quality and the geographical and human factors from which it originates can set the food product apart from a similar food product that originates from a different region. This point of distinction, and qualitative connection, can then provide the product with a reputation, in terms of recognition and desirability by consumers, for the product’s unique quality, taste and characteristics.

If GIs for regional food products are to be recognised in Australia, the interaction between the geographic factors and the local human factors used to make the food must play an important part in giving the food product its quality and characteristics, so much so that if the food product was made in another region, it would have a different quality and characteristics. For human factors to be a connecting criterion in a food GI system, they must be factors that are traditional and unique to a region. Human factors that can be duplicated in another region to make a similar product would undermine their uniqueness and that they are ‘essentially attributable’ to a particular region. Therefore, this criterion requires the identification of human factors that are unique to a region. The uniqueness of human factors (that cannot be duplicated elsewhere) will make those human factors valuable for a region and worthy of protection under a food GI system:

The unique organoleptic properties that emerge from the terroir and its traditional methods of production and processing may be difficult to duplicate in other regions or countries and can thus be a valuable and

652 Ibid.
lasting competitive advantage for the food product and the region from which it originates.\textsuperscript{653}

It is evident from the above analysis that the geographical and human factors of a region can influence regional food’s quality and characteristics. Regional food products that have a quality, characteristic or reputation that is essentially attributable to their regional origin are worthy of being protected under a \textit{sui generis} food GI system, as they are food products that have a quality, characteristic or reputation that is ‘essentially attributable’ to their regional origin and that are ‘hitched to the universe’. The next part of this chapter provides examples of regional food that have a clear and strong connection with the South Australian regions and Italian regions. These examples emphasise that the geographical and human factors of a region can influence a regional food’s quality and characteristics. They are examples of the types of food products that would be protected under a \textit{sui generis} GI system.

3.4.3. Examples of regional food

3.4.3.1 South Australian regions

\textit{Hutton Vale Farm, Angaston, Barossa Valley}

Using local, fresh seasonal ingredients, Jan Angas, of Hutton Vale Farm, makes a range of chutneys by hand in small batches at the Hutton Vale Farm in Angaston, Barossa Valley. She has been making the chutneys since 1990, when ‘as a result of a wonderful crop of pears in quantities beyond our consumption, rather than waste them we started bottling, drying, pickling and chutney making’.\textsuperscript{654} This is an example of food that has resulted from the \textit{frugal farmer} concept explained earlier in this chapter. The product emerged from a desire to avoid food wastage. Excess pears are used in various ways: bottling, drying, pickling and chutney making. From these humble beginnings, marketable products emerged that are uniquely ‘hitched’ to the Barossa Valley.

The connection between the chutneys and the Barossa Valley is based on: core ingredients used to make the chutneys are locally sourced from the Barossa Valley and the chutneys are made in Angaston in the Barossa Valley.

\textit{Krondorf Trading Co, Tanunda, Barossa Valley}

Krondorf Trading Co’s jams, chutneys, pickles, mustards, sauces and relish are made by artisans, Bev and Annie, who have been ‘cooking and packing preserves, chutneys, jams, pickles, mustards and sauces without preservatives in [Bev’s] home kitchen since 1991. Everything in the jar is made from the best ingredients from either local growers or from our own garden’.\textsuperscript{655} These products are made in the

\textsuperscript{653} Giovanucci et al, above n 651, 25.

\textsuperscript{654} Interview with Jan Angas, Proprietor and Producer, Hutton Vale Lamb, (Tanunda, Barossa Valley, South Australia, 17 February 2014) and from Hutton Vale Farm website <\texttt{www.huttonvale.com}>.

Barossa Valley, by hand, in small batches, using locally sourced fresh ingredients. Some of the products are only available seasonally, owing to the availability of the fresh local ingredients used and; therefore, emphasise their regional character. They are also an example of the frugal farmer concept as seasonal ingredients are preserved for the seasons in which they are not available. Again, these products are ‘hitched’ to the Barossa Valley.

The connection between the jams, chutneys, pickles, mustards, sauces and relish and the Barossa Valley is based on: the core ingredients used to make the food products are locally sourced from the Barossa Valley and the food products are made in Tanunda in the Barossa Valley.

Maggie Beer Products—Pheasant Farm Pate

Maggie Beer’s ‘Pheasant Farm Pate’ is one of the original products that she made in her Farm Kitchen from January 1979 to November 1996, using Barossa-sourced chicken and pheasant livers. It has never been called ‘Pheasant Pate’, but rather ‘Pheasant Farm Pate’ to recognise that it was named after the farm—Pheasant Farm—where the pheasants were raised and the paté was made using the pheasants’ livers.

This paté became Maggie Beer’s first commercial product. In 1996, production was moved to the Tanunda Export Kitchen. At that point, Maggie Beer was no longer able to use the pheasant livers, as only chicken livers could be used in an export-accredited paté. Therefore, she adjusted the recipe to include only free-range chicken livers, sourced from Barossa chickens, but kept the name ‘Pheasant Farm Pate’ to symbolise its connection back to when it began at Pheasant Farm. The chicken livers are the core ingredient (i.e., 38.7 per cent of the overall ingredients) of the paté.

Maggie Beer and her team oversee the production process to ensure that the paté is still made to the same standard as Maggie originally made herself in her Farm Kitchen. The ‘quality of the Pheasant Farm Pate has always been about the freshness of the ingredients; the attention to detail in the making—where the perfect temperature has a window of variance of nothing more than one, or, at the most two degrees’.656

It is made in 10 kg batches at the Export Kitchen. This is not much more than the original batch size made at the Farm Kitchen: ‘Each batch is 10 kg at a time, a continuous process where the paté is made and filled in the containers that it is then baked in and then chilled quickly for safety’.657

656 Information sourced from “Maggie Beer Products”

657 Ibid.
The paté is also made without adding any chemical preservatives, as Maggie Beer ensures that the highest standards of processes are followed to allow the continuing ‘chill chain’ from finished product to retailer. This is very rare, as chemical preservatives are ‘found in most paté production, both here and overseas. This has a huge flavour and texture impact’ that Maggie Beer is very proud of and ‘the quality and detail and years of history of testing to prove this, give us a real edge in the marketplace’. Overall, this product is ‘hitched’ to the Barossa Valley. The connection between the paté and the Barossa Valley is based on: the core ingredient (i.e., chicken livers) of the paté is locally sourced from the Barossa Valley and the paté is made in Tanunda in the Barossa Valley.

3.4.3.2 Italian Regions

Aceto Balsamico Tradizionale di Modena protected designation of origin (PDO)(Traditional Balsamic Vinegar of Modena)

Aceto Balsamico Tradizionale di Modena PDO (ABTM PDO) (regulated under Italian Ministerial Decree no.124, 30 May 2000 and EC Regulation 813/2000, 17 April 2000) is balsamic vinegar obtained from the must of the typical grapes from the Province of Modena. It is aged for at least 12 years and at least 25 years for the Extra Aged typology. The production method for ABTM PDO is that it must be obtained:

\textit{Exclusively from must originating from grapes belonging to the Lambrusco, Ancellotta, Trebbiano, Sauvignon, Sgavetta, Berzemino and Occhio di Gatta grape varieties, as well as other PDO varieties registered for the Province of Modena. After having been pressed and before cooking, the fresh musts can be decanted and refrigerated to prevent the watery parts freezing. Cooking must take place outdoors, over a direct flame for at least 12–14 hours. The product is then left to age for 12 years: the product is put in a series of small barrels, each made from a different kind of wood which are placed in order of volume creating what is known as the ‘batch’. Each year, using a particular decanting method, the contents of the smaller barrels are transferred into larger ones. The production area for ABTM PDO is within the entire territory of the Province of Modena, in the Emilia-Romagna region.}\textsuperscript{659}

The ABTM PDO is not to be confused with Aceto Balsamico di Modena PGI (ABM PGI)—balsamic vinegar that is obtained from grape must and wine vinegar refined for various periods of time in receptacles made from precious wood. Its production area includes the Provinces of Modena and Reggio Emilia in the Emilia-Romagna region.\textsuperscript{660}

\textsuperscript{658} Ibid.

\textsuperscript{659} Mauro Rosati, \textit{Qualivita Atlas Food & Wine, Italian PDO PGI TSG agri-food and wine products-organic farming} (Joanna Ledgard trans, Edizioni Qualivita, 2013), 259.

\textsuperscript{660} Ibid 258.
The connection between the ABTM PDO and Modena is based on geographical factors (i.e., only must from the grapes that can be sourced from specific grape varieties grown in Modena and its surroundings can be used to make the ABTM PDO) and human factors (i.e., the prescribed methods and processes traditionally used to make the ABTM PDO).

These combined factors have influenced the taste, quality and characteristics of the ABTM PDO. Further, the ABTM PDO has gained a reputation as a world-recognised product that is synonymous with the region of Emilia-Romagna and is part of Modena’s food culture.\textsuperscript{661} It is clearly ‘hitched’ to its origin.

\textit{Grana Padano PDO cheese}

Grana Padano PDO is a hard and finely grated cheese produced from raw cow’s milk that originates from cows that are milked twice a day and fed with green or preserved fodder from the immediate production area. These cows graze in the production areas of Grana Padano PDO, throughout the regions of Piedmont, Lombardy, Trentino-Alto Adige, Veneto and Emilia-Romagna. The production method that is required for the cheese to be branded with the PDO registration is:

\begin{quote}
The milk is partially skimmed throughout the natural separation of the cream at a temperature of between 8°C and 20°C. The milk is put into copper or copper-lined cauldrons with a characteristic bell-shape. Coagulation is achieved with calf’s rennet. The curd cheese is broken into fine grains and cooked at a maximum temperature of 56°C until the lumps become elastic. It is then left fully immersed in the whey for a maximum of 70 minutes. The curd cheese is placed in moulds for at least 48 hours which imprint the cheese with the mark of origin. It is then salted in brine for 14 to 30 days. Natural maturation occurs at a temperature of 15°C to 22°C, for a period that varies from a minimum of nine months to more than 20. At the end of the eighth month, the cheese is submitted to a series of product tests to assure that it meets the required standards established by the product specification. At this stage, it is either fire-branded or, if the cheese does not possess the obligatory characteristics, the mark of origin imprinted by the mould is removed by shaving. For all types of packaging and sizes, the product must be packaged immediately within the same production area.\textsuperscript{662}
\end{quote}

Therefore, the connection between Grana Padano PDO and the regions of Piedmont, Lombardy, Trentino-Alto Adige, Veneto and Emilia-Romagna is based on:

\begin{itemize}
\item geographical factors—Grana Padano PDO is produced from raw cow’s milk originating from cows that are bred in the regions of Piedmont, Lombardy, Trentino-Alto Adige, Veneto and Emilia-Romagna
\end{itemize}

\textsuperscript{661} Interview with Andrea Galleotto (Consorzio Aceto Balsamico Tradizionale di Modena, Modena, Emilia-Romagna, Italy, 17 September 2014).

\textsuperscript{662} Rosati, above n 659, 71.
• human factors—the prescribed production method traditionally used to make Grana Padano PDO.

**Prosciutto di Cuneo PDO**

The production area for Prosciutto di Cuneo PDO is limited to the provinces of Cuneo and Asti in the region of Piedmont, as well as limited provinces of Turin. All stages of production, from the birth of the pigs used to make the Prosciutto to the curing of the meat, must be carried out in the areas of Cuneo and Asti, and the limited provinces of Turin. The production method for the Prosciutto di Cuneo PDO is that it must be made:

*From thighs of pigs born and bred in the area and fed with local cereals. It is seasoned with salt and sometimes with a salt flavoured with pepper and other spices. It is left to dry in the cold and put to season in ventilated places. The air that is used to dry the pigs is very important. It is Piedmontese air. The air in the Piedmontese area is a significant component of the PDO registration as the air is not too dry or humid and therefore dries out the meat really well. The Alps in the area make it possible for winds to keep the humidity level down to help with the aging of the Prosciutto.*

Therefore, the connection between Prosciutto di Cuneo PDO and the provinces of Cuneo and Asti in the region of Piedmont, as well as limited provinces of Turin, is based on:

• geographical factors—all stages of production, from the birth of the pigs used to make the Prosciutto to the curing of the meat, must be carried out in the areas of Cuneo and Asti and the limited provinces of Turin

• human factors—the prescribed production method traditionally used to make Prosciutto di Cuneo PDO.

The above examples of South Australian and Italian regional food products illustrate that regional food is connected to a region when it is made:

• using locally sourced ingredients

• within a region

• using prescribed production processes and methods involving human factors.

In these examples, the food products are ‘hitched’ to their respective regions and labels that include regional placenames are justified given this connection.

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663 Interview with Luigi Allasia, Director of Prosciutto di Cuneo, and majority holder in the Consorzio di Tutela di Prosciutto di Cuneo for the Cuneo province, (Lagnasco, Piedmont, Italy, 10 September 2014).
3.5. Criteria for a *Sui Generis* Food GI System

This chapter has explained that the connection between regional food and origin can be based on the following elements:

- the core ingredients used to make regional food are locally sourced from the relevant region
- the regional food product is made within a region
- a region’s geographical and human factors (such as processes and methods used within a region to make a regional food product) influence the quality of the food product.

In considering these elements, as well as the limitations of the Australian wine GI system in how the connection between wine and origin is currently regulated under Regulation 21 of the AGWA Regulations (i.e., based only on the regional origin of the grapes used to produce the wine), this section explains the connection criteria that needs be included in a *sui generis* food GI system.

It is also important to consider the Article 22.1 definition of GIs in the TRIPS Agreement and the ‘essentially attributable’ element explained at the beginning of this chapter. This definition provides guidance on the criterion that should be included in a GI system in relation to establishing the connection between food and origin. While Article 22.1 and the ‘essentially attributable’ test are discussed further in Chapter 4, for present purposes Article 22.1 provides that the quality, reputation or other characteristics of a good can each be a sufficient basis for determining if that good is connected to a region. In some cases, all connecting factors may be relevant and in other cases, only one will be relevant. The TRIPS Agreement provides for these alternative scenarios. The TRIPS GI definition does not specify what factors from a geographical origin may influence a good’s quality, characteristics and reputation. Nor does the TRIPS GI definition require that the good must be produced, processed or prepared in the locality. Rather, the TRIPS GI definition provides flexibility for WTO members to determine these factors on a case-by-case basis, as WTO members are in the best position to evaluate the connection between food and origin.

The quality criterion relates to subjective factors such as quality of the ingredients or the manufacturing process used to make a food product. If a food product has been produced by a traditional method or has been produced, prepared and processed in a particular geographical area this can contribute to its quality. Food producers must be able to explain ‘why the location gives rise to a different quality and to explain the influence of the location of the product on these specific characteristics’. This reinforces the need to prove connection between good and origin.

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Reputation is linked to the history and historical origin of the product. A food producer needs to explain the reputation of a regional food product, the historical existence of the food product in the regional area and its reputation.\textsuperscript{667} Reputation can also be based on the distinctive character of the product. The stronger a product’s identity, the more it will distinguish itself from other products, to prove that it is recognised as distinct and that it has specific features. ‘This is because its features have enabled it, from a particular point in time and up to present, to bear a geographical name in its sales designation and to acquire an identity which has been transformed into an established reputation’.\textsuperscript{668}

Other characteristics can include natural factors of a geographical environment such as soil and climate and human factors such as particular traditions of the producers established in a geographical area.\textsuperscript{669}

The Article 22.1 guidance points, in addition to the earlier discussion regarding regionality and the connection between regional food and origin, confirm that the criteria required in a \textit{sui generis} food GI system must ensure that food GIs are only used on regional food products that have a clear and strong connection with the GI region. The criteria must provide Australian food producers and traders clear \textit{ex ante} guidance as to how regional food products are connected to Australian regions and when food GIs can be used on food products to identify and protect that connection.

The analysis of regionality and regional food in this chapter emphasises that a food GI system needs to cater for connection between regional food and origin that is based on:

- regional origin of core ingredients used to make the food product
- regional production of food products taking place within a GI region
- investment that regional food producers have made in using ‘traditional methods, often small-scale and intensive’\textsuperscript{670} in producing authentic regional food products.

To do this, an Australian food GI system would provide the following two main levels or tiers of GI protection:

1) a basic-level GI protection for food products that are made within a region and made using locally sourced ingredients
2) a higher-level GI protection for food products that are made within a region using locally sourced ingredients but \textit{also} have a quality, reputation or other characteristic that is ‘essentially attributable’ to their regional origin.

\textsuperscript{667} \textit{Geographical Indications}, WIPO Doc No. SCT/10/4, 25 March 2003, 7.
\textsuperscript{668} \textit{Geographical Indications}, WIPO Doc No. SCT/10/4, 25 March 2003, 6.
\textsuperscript{669} \textit{Geographical Indications}, WIPO Doc No. SCT/10/4, 25 March 2003, 5.
\textsuperscript{670} van Caenegem, above n 7, 5.
In this regard, the *sui generis* food GI system would:

- provide protection for ‘true GIs’ in comparison to the protection currently offered for Australian wine GIs under the Australian wine GI system that is just based on regional origin of grapes
- be similar to the Italian–EU food GI System because it would offer two different levels of GI protection based on the strength of connection between food and origin. This feature of the Italian/EU food GI system is further explained in Chapter 5.

For both levels of GI protection, the following two criteria would need to be satisfied:

1) core ingredients must be locally sourced from the GI region

From conducting the South Australian and Italian fieldwork, it is evident that authentic regional food products are generally made from:

- core ingredients that are locally sourced from a region
- other value-adding ingredients (such as salt and preservatives) or other ingredients that cannot be locally sourced from a region because they are not available in the region.

Therefore, an Australian food GI system would prescribe that the core ingredients used to make a food product must be locally sourced from the GI region. For example, the milk (i.e., core ingredient) used to make cheese labelled with the food GI ‘Barossa Valley’ would need to be sourced from cows that are bred in the registered ‘Barossa Valley’ GI food region. The food GI system would also prescribe a percentage of core ingredients that need to be locally sourced from the GI region for the purposes of providing clear *ex ante* guidance on this criterion to food producers and traders. This would be similar to the regional origin of grapes requirement under Regulation 21(2) of the AGWA Regulations that prescribes that if the description and presentation of wine uses only one registered Australian GI, then at least 85 per cent of the wine must be sourced from grapes grown in the registered GI area.\(^671\)

Core ingredients used to make regional food products are often only available on a seasonal basis. If a core ingredient is seasonal and can only be grown in, or sourced from, a particular region, this will further emphasise that the food product has a clear connection with the GI region. Regional food producers who produce authentic regional food products using ‘non-staple low volume local ingredients’\(^672\) can use a food GI to identify that the food is made using locally sourced ingredients from the GI region. This will mitigate the risk of other food producers free-riding on the reputation that a region has for producing authentic regional food products. This is on the basis that their food products will not have a clear connection with the GI region, because they have not made them using core ingredients sourced from the GI region. This will also protect consumers in that they can trust that food

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\(^{671}\) AGWA Regulations 1981 reg 21(2).

\(^{672}\) van Caenegem, above n 7, 5.
labels with food GIs indicate food products that are truly local-made using locally sourced and fresh seasonal ingredients.

2) regional food product must be made within the GI region

A food product must be made within a GI region to be able to be labelled with a food GI. Although this is not required under the Article 22.1 TRIPS GI definition, local production reinforces the connection between regional food and origin. As Van Caenegem explains, ‘the encouragement of … local production’,\(^{673}\) in addition to locally sourcing core ingredients eliminates the problem of food GIs (i.e., regional names) being used on food products that do not have a clear connection with the GI region. This will mitigate the risk of food producers and traders free-riding on the reputation that the GI region has for producing authentic regional food and the value that accordingly exists in the GI. It will also mean that consumers will be able to trust that food labels that include food GIs provide regulated transparency of origin of food from paddock to plate.

In conducting the South Australian fieldwork, it is evident that most of the regional food products made by the South Australian interviewees (who are regional food producers) are made within the South Australian regions. However, there are some food products that require that stage of their production to take place outside the region. Therefore, a GI system must take this into consideration and provide that a certain percentage of the production stages of the food product take place within the GI region. I recommend that the percentage required be high—at least 85 per cent—to ensure that there is a link between food product and the GI region. A high percentage will mitigate the risk of food producers using a food GI on their food products when most, or none, of the production stages of their food product takes place within a GI region. There must be production stages that occur within the GI region and a high percentage requirement is essential to ensure that regional food products are connected to their regional origin.

The South Australian fieldwork also revealed that most of the wines labelled with the registered wine GIs ‘Barossa Valley’ or ‘Adelaide Hills’ are produced within those GI regions. This is notwithstanding that the Australian wine GI system does not prescribe that wines labelled with a registered wine GI must be produced within the GI region.

As explained in Chapters 6 and 7, in implementing a food GI system the GI boundaries for food products will need to be demarked on their own merit rather than adopting the Australian wine GI boundaries. During the South Australian fieldwork, it became apparent that the Australian wine GI boundaries would not be inclusive of regional food producers who invest time and money in producing regional food products using locally sourced core ingredients because they are located outside the wine GI boundaries. In many instances, a partial broadening of the wine GI boundaries would accommodate these regional food producers.

\(^{673}\) Ibid 6.
To obtain the second level of GI protection, the following criterion would need to be satisfied in addition to the above two criteria:

3) regional food has a quality, reputation or other characteristic that is essentially attributable to its regional origin.

If a regional food product has a quality, reputation or other characteristic that is essentially attributable to its regional origin, then it can be labelled with a second-level GI. To distinguish between first and second-level GIs, different GI logos or labels will be used on food products similar to those used under the Italian/EU food GI system, as explained in Chapter 5.

Drawing on the guidance obtained from the Article 22.1 TRIPS GI definition, and on the analysis of how human and geographical factors can influence a food product’s quality, a regional food product’s quality or other characteristic might be essentially attributable to its regional origin because of the quality of ingredients used to make the food product or because it has been produced by a traditional method or process. For example, cheese labelled with the food GI ‘Barossa Valley’ would need to be sourced from cows that are bred in the registered ‘Barossa Valley’ GI food region and that have been grazing on Barossa Valley pastures. By having this connection with the Barossa Valley, it is also likely that the cheese will have a certain quality or characteristic that is essentially attributable to its regional origin. For example, the geographical factors of the Barossa Valley might provide a unique flavour that distinguish the cheese from one made using milk that is sourced from cows bred in the Adelaide Hills. Kris Lloyd from Woodside Cheese Wrights explains that the fauna, flora and the climatic conditions of a region play a part in the characteristic of any particular food product. What the cows graze on in the Adelaide Hills that they do not graze on in the Barossa Valley will affect the cheese products coming out of the respective regions.\(^674\) If a regional food producer can establish that the cheese does have a certain quality or other characteristic that is essentially attributable to its regional origin, then the cheese product can be labelled with a second-level GI. This is further explained in Chapters 5 to 7, inclusive.

A regional food product’s quality might also be influenced by the human factors of a region. For example, a regional food producer might ‘implement more expensive production methods (such as high-quality feed regimes) that result in a more flavoursome and/or attractive product’.\(^675\) This is particularly relevant to regional food producers who produce meat products or smallgoods. If regional food producers implement a ‘high-quality feed regime’, the combination of geographical factors (i.e., animals being bred within a region are affected by climate, soil and altitude of a region) and human factors (i.e., production methods such as high-quality feed regimes) will influence the end product’s quality. This is discussed further in Chapter 5 in relation to the food product ‘Prosciutto di Cuneo PDO’ and Chapter 6 in relation to smallgoods made in the Barossa Valley. If a regional food producer can establish that the meat or smallgoods has a certain quality that is

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\(^{674}\) Interview with Kris Lloyd (CEO Woodside Cheese Wrights, Woodside, Adelaide Hills, South Australia, 24 February 2014).

\(^{675}\) van Caenegem, above n 7, 5.
essentially attributable to its regional origin, then the food products can be labelled with a second-level GI. This is further explained in Chapters 5 and 6.

Further, as explained above, human factors such as traditional processes and methods used to make a food product might also influence a food’s quality, reputation or other characteristic. It is important that the traditional processes and methods that food producers use are ones that are traditionally used within the GI region and that are unique to the relevant GI region and not ones that can be duplicated in another region to produce a similar food product. The ability to duplicate human factors from one region to the next and produce a similar end food product will undermine the processes and methods are unique to the GI region. This is in recognition that ‘mimetic technology can now persuasively and legally simulate the material characteristics of most geographically and historically authentic goods, with the result that these material characteristics no longer reliably signal authenticity’ 676. Therefore, regional food producers must establish that the particular process and method used to make the food product is unique to the GI region. Gangjee explains that this requirement might be established when a food producer can show that traditional methods are part of the region’s culture and regionality having been used historically within the region to make the food product in question. 677 This is explained further in Chapters 5 and 6.

Not all regional food products are made using processes and methods that are unique to a region. For example, the process of making Hutton Vale Farm chutneys and Krondorf Trading Co chutneys is not unique to the Barossa Valley. However, because the core ingredients used to make the chutneys are locally sourced from the Barossa Valley and all the chutneys are made within the Barossa Valley, there is still a clear connection between the chutneys and the Barossa Valley. Conversely, the process and method used by ABTM PDO to make vinegar is unique to the region of Modena in Italy, as it has been historically and traditionally used in the region to make high-quality vinegar. It is a prescribed method and process under the PDO GI registration of the vinegar. This traditional process and method in addition to the sourcing of must from grapes local to Modena to make vinegar that is produced in Modena, all indicate that the vinegar has a clear and strong connection with Modena.

Further, as explained in relation to the Article 22.1 TRIPS GI Definition, a regional food producer might be able to establish that the food product has acquired a reputation, given its history within a region. A food product with a strong identity with a region might also enable a regional food producer to use a second tier GI on the food product. For example, Maggie Beer’s Pheasant Pate has a reputation that is connected to its regional origin of the Barossa Valley. Its core ingredient (i.e., chicken livers) is also locally sourced from the Barossa Valley and it is made within the region.

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676 Gangjee, above n 164, 234.

677 Ibid.
Therefore, to satisfy this criterion, regional food producers will need to establish the connection between their food product and origin on the basis that their food product has a quality, reputation or other characteristic that is ‘essentially attributable’ to its regional origin. By providing _ex ante_ guidance on how this criterion can be satisfied such as the examples provided above, food producers can determine the elements that they must satisfy to show this connection.

Chapter 7 will discuss each criterion and further explore the elements that should be included an Australian _sui generis_ food GI system.

### 3.6. Conclusion

By implementing a food GI system that provides clear _ex ante_ guidance and criteria for food producers, the connection between food and origin will be effectively regulated and protected. Implementing a _sui generis_ food GI system in Australia will assist with overcoming the deficiencies of existing current consumer protection laws, passing off laws and trademark laws in regulating the usage of Australian regional names on food products. A _sui generis_ food GI system will:

- regulate that food GIs are only used on food products that have a clear and strong connection with a GI region in accordance with the criteria provided under the food GI system
- mitigate the risk of food producers free-riding on the reputation that certain regions have for producing quality regional food and taking advantage of the value that accordingly exists in Australian regional names
- restore consumers’ trust in food labels on the basis that food GIs would be understood by consumers as being indicators of food products that originate from the named GI region, have been made within the GI region and have a certain quality, reputation or other characteristic that is essentially attributable to its regional origin. This would require an education roll-out of what the GI system means for consumers (explained further in Chapter 7). All connecting factors would be regulated before a food GI is attached to the food providing regulated transparency of origin of food products from paddock to plate
- encourage regional food producers to invest (i.e., through time and money) in producing authentic regional food products as they can use a food GI on their food products to identify the connection between their food products and relevant region. Further, the benefits that come with GI registration would provide significant incentives for regional food producers. This is because any use of a food GI on a food product that does not meet the connection criteria required by a _sui generis_ food GI system will be _ipso facto_ an infringement
- protect the assets that Australia has in Australian regional names.

Food GIs have become a very significant trading concession and the subject of several BTAs and FTAs. Therefore, implementing a _sui generis_ food GI system is an important consideration for the Australian government—not just at a domestic level but also at an international level. Chapter 4 explains that implementing a _sui generis_ food GI system is an important step for the Australian food, agrifood and agricultural industries at both a national and an international level.
Chapter 4. The Case for a *Sui Generis* Food GI System in Australia

4.1. Introduction

Chapter 2 identified the deficiencies of current consumer protection law, passing off law and trademarks law in regulating Australian regional names on food labels. It emphasised that current laws and regulations:

1) allow food producers and traders to use Regional Branding on food labels that fall short of being misleading or deceptive, or involving passing off, even though the food only has an attenuated connection with the named region
2) do not give regional food producers enough *ex ante* guidance as to when they can make an origin claim on food labels and products, especially when some of their ingredients are sourced, or some of their food production takes place, outside the named region
3) do not adequately govern whether there is a connection between food and origin *before* a regional name can be used on a food label to make an origin claim.

Further, they allow food producers and traders to free-ride on the reputation that certain regions have for producing quality regional food and take advantage of the value that accordingly exists in Australian regional names. While this might not always be misleading in the circumstances, or involve passing off, Chapter 2 explained that this free-riding is problematic as current laws and regulations do not protect against it or the problems that arise from it.

In reviewing the Australian wine GI system, the deficiencies of current laws and regulations were further emphasised. The analysis of the Australian wine GI system in Chapter 2 clearly demonstrates the different treatment that exists under current Australian laws regarding the regulation of Australian regional names used on food products and wines. Australian wine producers and wine grape growers benefit from a legal framework that protects the connection between wine and origin, albeit based only on regional origin of grapes. The AGWA Act has extensive provisions that protect against the misuse of GIs compared with the minimal protection provided under current laws when Australian regional names are misused on food products.

Chapter 3 explained how regional food is connected to its origin, analysing the concept of *regionality*. It explored how geographical and human factors of a region can influence food’s quality and characteristics. Chapter 3 emphasised that food GIs should be used on food labels under a regulated food GI system to:

- overcome the deficiencies of current laws and regulations regarding the usage of Australian regional names on food products
- mitigate the risk of food producers free-riding on the reputation that certain regions have for producing quality regional food and taking advantage of the value that accordingly exists in Australian regional names
• bring the regulation and protection of Australian regional names used on food products to the same level as provided to wine GIs used on wine labels under the Australian wine GI system.

There are several ways in which food GIs can be protected in accordance with international laws. These include, but are not limited to:

• a *sui generis* GI system
• trademark legislation that allow GIs to be registered as CTMs or collective trademarks
• other laws and regulations such as consumer protection laws.678

As explained in Chapter 2, in line with its TRIPS Agreement obligations, Australia provides protection for GIs for all goods other than wines and grape goods with registration of GIs as CTMs. This chapter explores why a *sui generis* GI system is the ideal legal framework to protect food GIs and the connection between food and origin given the:

• limitations of CTMs
• GI protection provided to Australian wine GIs under the Australian wine GI system.

Drawing on how food is ‘hitched to the universe’ (as explained in Chapter 3), a *sui generis* food GI system would accommodate the elements necessary to establish how Australian regional food is connected to Australian regions. A *sui generis* GI food system will have some similar features to the Australian wine GI system, but it will also have additional features that make it a ‘true GI’ system. These include basing the connection between food and origin not only on regional origin of core ingredients of food products, but also on other factors such as regional food producers investing time and money in making food products using processes and methods traditionally used in the GI region that are unique to the region to make the particular food products. At a national level, implementing a *sui generis* food GI system will overcome the deficiencies of current laws and regulations and the problems that arise from these.

This chapter explains a supplementary justification for Australia adopting a *sui generis* food GI system. A *sui generis* food GI system will also put the Australian government, food, agrifood and agricultural industries in a much stronger position when it comes to international trade. Food GIs have become a very significant trading concession and the subject of several BTAs and FTAs. Therefore, to move forward in international trade, it is extremely important to implement a *sui generis* food GI system that is tailored to meet the needs of the Australian food industry, agrifood industry and agricultural industry. While Australia has traditionally adopted a minimalist approach to recognising and protecting food GIs for various reasons that will be analysed throughout this chapter, this chapter recommends that Australia reconsider its approach to food GIs because of the resulting benefits that

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would accrue for Australian regional food producers, food, agrifood and agricultural industries in the context of international trade.

4.2. Available Methods of Protection for GIs in International Law

Chapter 2 explained that Australia currently provides protection of GIs in two main ways:

1) under the Australian wine GI system in relation to wines and grape products
2) as registration of certification trade in relation to GIs for all other products including food products.

In providing these two main mechanisms of GI protection, the Australian government complies with its requirement to provide the legal means for protection of GIs under the TRIPS Agreement. In relation to GIs for all products other than wines and spirits, Article 22.2 of the TRIPS Agreement provides WTO members with the discretion to provide the legal means that they deem appropriate to protect GIs within their country. Article 22.2 provides:

In respect of geographical indications, members shall provide the legal means for interested parties to prevent: a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good [and] b) any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967).679

One of the main reasons for the flexibility included in Article 22.2 is that, at the time of its drafting, WTO members were in disagreement as to the most effective legal means to protect GIs to satisfy their international obligation of providing GI protection under Article 22.2 of the TRIPS Agreement.680 Each WTO member had its own views on this depending on what legal means they used at a national level to protect GIs or geographical location names used on products to denote geographical origin of those products. For example, prior to the TRIPS Agreement, European countries implemented sui generis systems to protect their national GIs. Once the TRIPS Agreement was implemented, European countries adapted those sui generis GI systems to meet their international obligations of providing GI protection under Article 22.2. Hence, the GI definition within European sui generis systems follows, but does not mirror, the GI definition in Article 22.1 of the TRIPS Agreement. Today, the EU has a registered GI system for foods and agricultural products under Regulation EU No. 1151/2012. It has a registered GI system for wines under Council Regulation EC No. 479/2008 of 29 April 2008 on the common

679 TRIPS Agreement art 22.2.

680 Geuze, above n 678, 130.
organisation of the market in wine\textsuperscript{681} and for spirits under Regulation EC No. 110/2008 No 110/2008 of the European Parliament and Council of 15 January 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks.\textsuperscript{682} In July 2014, the EU submitted a Memo on the Green Paper on the protection of geographical indications for non-agricultural products with the hope of also introducing an EU GI system for non-agricultural products such as glass, leather goods and ceramics.\textsuperscript{683} Therefore, the EU has chosen to protect GIs at both a national and an international level as part of a \textit{sui generis} system. This is reviewed in detail in Chapter 5.

Conversely, prior to the TRIPS Agreement, countries such as Australia and the US traditionally looked more to laws on trademarks, unfair competition and passing off to provide recognition and protection of names that included geographical locations or that denoted provenance of the goods to which GIs are attached. For this reason, Australia chose to protect GIs for all products other than wine and grape products by providing protection for them through a patchwork of laws, including trade mark law and registration as CTMs. Australia chose to take a minimalist approach in protecting GIs for all products other than wine and grape products and in complying with Article 22.2 of the TRIPS Agreement. Some of the reasons for this include:

1) GIs and trademarks serve similar purposes. Both GIs and trademarks ‘signal the (commercial or geographical) origin of goods in the marketplace and sustain valuable reputations’\textsuperscript{684}

2) A trademark system is already familiar to businesses, both national and international. Further, using a legal framework that is already established and familiar provides administrative and budgetary benefits. By protecting GIs by registration of a certification trademark, the same resources ‘already committed to trademark system for applications, registrations, oppositions, cancellations, adjudication and enforcement’ can be used\textsuperscript{685}

3) The Australian government has not placed much emphasis on GI protection for goods other than wine, because Australia’s agricultural policies have traditionally been driven by open market considerations

\textsuperscript{681} Council Regulation EC No. 479/2008 of 29 April 2008 on the common organisation of the market in wine.


\textsuperscript{683} The European Commission, 'Memo on the Green Paper on the protection of geographical indications for non-agricultural products' (The European Commission, 2014) and 'Green Paper: Making the most out of Europe's traditional know-how: a possible extension of geographical indication protection of the European Union to non-agricultural products' (European Commission, 2014).

\textsuperscript{684} Gangjee, above n 166, 2.

and ensuring that agricultural products meet health and safety standards. This is very different to the EU’s agricultural policy that places significant importance on food GIs in the EU’s food and agricultural sector.

This last reason is one of the main justifications for Australia’s minimalist approach to GI protection for all products other than wine and grape products. Australia’s minimalist approach is very much a conscious result of the agricultural policies that Australia chose to adopt over the course of the 20th century. As explained in part 3.3.2 of Chapter 3, Australia has traditionally promoted the broader concept of ‘country’ as opposed to ‘region of origin’ in promoting food products. Australia has therefore not placed much emphasis on protecting regional names as indicators of food products that have a real and strong connection with an Australian region. This is contrasted with the EU’s agricultural policies that have traditionally promoted food products on a regional basis as explained in part 3.3.1 of Chapter 3. Part 4.2.2 of this chapter provides further detail on the EU’s approach to GI protection by explaining that the EU’s agricultural policies have traditionally chosen to privilege smaller scale rural production and provide high-level sui generis protection.

However, each of these reasons can be challenged, as the analysis below explores. Trademarks serve a different purpose to GIs and the existence of the Australian wine GI system illustrates that when GIs are protected under a GI system this protects GI users against the misuse of the relevant GI and the reputation of GI areas and the value that exists in GIs. This protection surpasses the protection that is otherwise available for GIs under a trademark system. Further, Australia’s traditional view on GIs for products other than wines and spirits needs to change given the interest in Regional Branding by food producers and traders and consumer demand for local foods at both a national and an international level.

4.2.1. Trademarks v. GIs

Australia has merged GI protection for all products, other than wines and grape products, into existing trademark laws. This is on two main bases:

1) that both trademarks and GIs serve a similar purpose in that they are badges of origin (i.e., commercial and geographical)
2) that the trademark system is already in existence and is familiar.

In relation to the first ground, as explained in Chapter 2, while trademarks and GIs are both badges of origin, a trademark that includes a regional name that is used on food products does not identify that the food product has a clear and strong connection with the named region. Whereas, a regional name that is a registered GI and is used on food products does identify food products that have a clear and strong connection with the named region. This is because a GI is a sign that identifies a link between product and place, rather than a sign that is a badge of origin of who produced the product.686

686 Gangjee, above n 166, 14.
A GI is used to ‘demonstrate a link between origin of the product to which it is applied and a given quality, reputation or other characteristic that the product derives from that origin’.\textsuperscript{687} It is the connection or link between product and place that sets GIs apart from trademarks.\textsuperscript{688} GIs are descriptive of goods’ geographical origin based on delineated GI boundaries and prescribed rules. GI systems strictly regulate that GIs are used only on goods that originate from the GI area and are in accordance with GI criteria. These are key GI factors that trademark systems do not adequately address.

Although the Australian wine GI system was implemented primarily to put into effect agreements reached between Australia and the EC or EU in negotiating the 1994 Treaty and 2010 Treaty, its existence also illustrates recognition by the Australian wine industry and government that GIs serve a different purpose to trademarks. Other than the link between product and place, GIs also often require a consideration of other factors such as agricultural policy, rural development, trade issues and cultural heritage.\textsuperscript{689} In the context of the Australian wine GI system, the ‘other factors’ that were pivotal in implementing the wine GI system included significant trade concessions and entry for Australian wine producers into the European wine market. In exchange for these, the Australian wine industry agreed to protect European wine GIs. In relation to a food GI system, ‘other factors’ might include agricultural and agrifood policies, food trade issues such as export priorities, capabilities and finances and an emphasis on local products, knowledge, producers and localities.\textsuperscript{690}

Further, it is evident from the Australian wine GI system that GIs are public collective rights shared among a GI community. This is very different to trademarks that provide legal proprietary rights to registered trademark owners. Given that they are public rights, GIs involve more government and state regulation, for example, the AGWA regulates the Australian wine GI system. Regulation of GIs cannot be merged into trademark laws but requires a dedicated body that regulates the: delineation of GI areas, connection between product and GI area and usage of the GI in accordance with specific GI criteria.

GIs serve a different purpose to trademarks and require consideration of very different factors than trademarks. Thus, the second ground for protecting GIs as part of Australia’s trademark system is also undermined. Using CTMs to protect GIs, rather than implementing a \textit{sui generis} GI system, because the trademark system is already established and familiar and thus, provides administrative and

\begin{footnotes}
\item \textsuperscript{687} Standing Committee on the Law of Trade marks, Industrial Designs and Geographical Indications, \textit{The definition of Geographical Indication}, WIPO Doc No. SCT/9/4, 1 October 2002, 2.
\item \textsuperscript{688} Gangjee, above n 166, 2.
\item \textsuperscript{690} Echols, above n 685, 149.
\end{footnotes}
budgetary benefits is not a justifiable basis for merging GI protection into Australia’s trademark system.

Further to the main difference between GIs and trademarks being the connection or link between product and place, using the trademark system to protect GIs is also not suitable due to the limitations of CTMs. As explained in Chapter 2, the registration of a CTM does not adequately protect GIs. CTMs only certify the geographical origin of, and provide protection to, the food products that are the subject matter of the CTM. Further, CTMs only provide protection and certify origin of food in accordance with the rules that apply in relation to the trademark. CTMs only apply to the volunteers or approved users of the CTM. They do not stop other food producers from using the geographical location name in a CTM on their food products or obtaining trademark registration of a mark that includes the same regional name.

This is in direct contrast to GIs that are protected under a sui generis GI system. Only products that originate from the GI area that have a quality, characteristic or reputation due to their geographical origin are protected under a GI system: ‘Protection is based on a legislative or administrative act… in which important parameters, such as the production standards and the demarcation of geographical areas are defined’.

Consequently, a GI registered as part of a dedicated GI system provides a level of protection that is not offered by trademark protection. GIs have a stricter compliance and protection regime than trademarks. Any use of a GI on a product that does not originate from the designated area, or does not comply with the specific GI criteria, is ipso facto an infringement. There is no requirement to prove misrepresentation and no trademark defences such as good faith apply when a GI is misused. These GI rights are included in the Australian wine GI system under sections 40C and 40E of the AGWA Act, as discussed in Chapter 2. The Australian wine GI system illustrates that when GIs are protected under a GI system, the strict regulation that GI systems provide protects:

- GI users against misuse of the relevant GI
- the reputation of GI areas
- the value that exists in GIs.

Thus, the protection afforded to GIs under a GI system surpasses the protection that is otherwise available for GIs under a trademark system, or under other laws such as consumer protection laws.

4.2.2. Agricultural policy

The other main reason why Australia has chosen to protect GIs for all products, other than wine and grape products, under trademark laws is because the Australian government has traditionally not placed much emphasis on GI protection for goods other than wine. In exporting agricultural goods such as food products, the Australian government has ‘tend[ed] to be dictated more by market considerations such as the costs of labour and obtaining raw materials than by fixed geographical

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location’.692 This is instead of managing agricultural production ‘by prioritising small-scale, artisanal and localised production through their rural policies’.693 Australian agricultural policies and government regulation have focused more on ‘ensuring that minimum, usually health-driven, standards are met’ 694 rather than regulating regional origin of agricultural products. For example, Australian agricultural exports must meet importing countries’ expectations of being ‘free’ of pests and residues. Therefore, agricultural policies have focused on Australia’s ‘clean’ reputation to promote agricultural exports. There has been a focus on helping farmers meet international safety standards and maintain a reputation for quality agricultural products that are ‘clean and green’.695 Thus, Australia has ‘an excellent international reputation for clean and green production’.696

Despite this focus, Australian government has not considered the distinctive attributes that Australian regions have and the economic and competitive advantages that they can provide to the agrifood and agricultural industries on both the domestic and international markets.697 As discussed in Chapter 3, the Australian government has been ‘quick to group [Australian] regions together’ rather than identifying that each Australian region has ‘distinctive attributes, and [that] many are distinctive on the world stage’.698 Historically, the Australian government has promoted country of origin of products rather than regional of origin of products. This is despite the observation that ‘globally distinctive attributes of Australia’s regions have the potential to be springboards for competitive advantage’.699 Hence, the quality of agricultural products including food products has been considered from a health and safety standard rather than a regional origin standard. However, as will be discussed, new quality parameters are beginning to emerge in Australian agricultural and agrifood industries. One of these parameters is the authenticity and provenance of food products.700

692 Handler, above n 370, 153.

693 Ibid.

694 Ibid 154.


696 Ibid.

697 Eversole, above n 600, 7.

698 Ibid.

699 Ibid.

In addition to the focus on health and safety, agricultural policies have also focused on neoliberalism principles. Since the 1980s, Australian governments have been committed to open competition on the world market ‘expressed through the elimination of tariffs, import restrictions and production subsidies’.

Australian farmers ‘have been encouraged to adapt to liberalised trade through development of more productive farming systems, that is through intensive farming practices, farm consolidations, displacement of smaller, less “efficient” farmers and developing better business management capacities’. Australian farmers have not received many subsidies from Australian government, receiving the second lowest levels of support after New Zealand in the Organisation for Economic Cooperation and Development. Therefore, this neoliberalism approach has contributed to the lack of focus from the Australian government on ‘small-scale, artisanal and localised production’ in rural policies.

The Australian government has traditionally viewed GIs for all products other than wines as ‘contesting neoliberalism because … GIs draw on “ideas of localism, consumer choice and value capture” … and represent enclosure’. Other than in relation to Australian wines, the Australian government has generally viewed GIs as strong trade barriers to entry on the market. This view has influenced the position that Australia has taken in relation to GIs and GI protection at an international level. As a WTO member, Australia does not support the extension of protection for GIs for agricultural products under the TRIPS Agreement. Extension of the protection for GIs for all products other than wines and spirits (Extension Debate) has been an ongoing issue of negotiation between WTO members since the Doha Development Round of WTO negotiations in November 2001 (Doha Round).

Article 23.1 of the TRIPS Agreement provides additional protection for GIs for wines and spirits than currently provided for all other products in accordance with Article 22.2 of the TRIPS Agreement. Article 23.1 of the TRIPS Agreement provides that:

Each member shall provide the legal means for interested parties to prevent use of a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question or identifying spirits for spirits not originating in the place indicated by the geographical indication in question, even where the true origin of the goods is indicated or the geographical indication is used in translation or


702 Ibid.

703 Ibid.

704 Ibid.
accompanied by expressions such as ‘kind’, ‘type’, ‘style’, ‘imitation’ or the like.\textsuperscript{705}

This second, and higher level, of GI protection prohibits the use of an untrue GI, even if it is used in translation or accompanied by an expression such as ‘kind’, ‘type’, ‘style’ or ‘imitation’ or even where the true origin of the wines and spirits is indicated. Further, under Article 23.2 of the TRIPS Agreement, the registration of a trademark containing or consisting of a GI for wines or spirits not having this origin is prohibited, even if the public is not misled as to the true origin of the product. Therefore, there is no need to show that the public might be misled or deceived or that the use constitutes an act of unfair competition. Article 24.1 of the TRIPS Agreement reinforces the higher level of GI protection for wines and spirits by specifying that WTO members agree to enter into negotiations aimed at increasing the protection of individual GIs for wines and spirits.\textsuperscript{706} Article 23.4 of the TRIPS Agreement reinforces the higher level of GI protection provided to wines and spirits by providing that:

\textit{To facilitate the protection of GIs for wines, negotiations shall be undertaken in the Council for TRIPS concerning the establishment of a multilateral system of notification and registration of GIs for wines eligible for protection in those Members participating in the system.}\textsuperscript{707}

By implementing the Australian wine GI system, Australia provides additional protection for GIs for wines and grape products in accordance with Article 23.1 of the TRIPS Agreement, as explained in Chapter 2.

However, Article 23.1 of the TRIPS Agreement has not been well received by many WTO members. This is especially true of WTO members that are developing countries and derive their main income from agricultural goods rather than wines and spirits. These members are of the opinion that the higher protection provided to wine GIs is discriminatory, both culturally and as a commercial impediment to the ability to collect more money associated with GIs on other types of protected goods.\textsuperscript{708} Many of Australia’s neighbouring countries such as India, Pakistan, Thailand and Sri Lanka are in favour of the additional GI protection that is provided to wines and spirits being extended to other products.\textsuperscript{709} These countries’

\textsuperscript{705} \textit{TRIPS Agreement} art 23.1 (emphasis added).

\textsuperscript{706} \textit{TRIPS Agreement} art 24.1.

\textsuperscript{707} \textit{TRIPS Agreement} art 23.4.


governments view GIs as a means to protect their rural and traditional goods on an international level that would enable them to develop.\footnote{710}{Gervais, above n 708, 72.}

EU countries such as Italy and France also favour the extension of the higher level of GI protection to other products, as they have historically prospered economically from using GIs on food products. In contrast to Australia, EU countries ‘have a long history of subsidising regional producers of agricultural goods ... [and have] deemed the strong protection of its Members’ GIs to be a vital part of its agricultural policy of sustaining the European economy’.\footnote{711}{Burrell and Handler, above n 124, 465.} Therefore, the EU has a strong interest in the Extension Debate and it is also pushing for WTO members to include protected GIs on a multilateral system of notification and registration (Multilateral Register). The EU is keen to extend protection of GIs for all products to the same level as that currently offered to wines and spirits under Article 23.2 of the TRIPS Agreement because EU countries have long benefited from ‘making a product whose origin infuses it with a higher market value’.\footnote{712}{Gervais, above n 708, 73.} In contrast to the Australian government’s view that there has not been a ‘need to establish registration schemes for regional names specifically to benefit rural, traditional producers’,\footnote{713}{Handler, above n 370, 154.} most European countries ‘have long sought in their rural policies to control and privilege a particular type of localised production of foods’.\footnote{714}{Ibid.} Since the early twentieth century, European countries have regarded the regulation of regional names on agricultural products as an important aspect of their rural and agricultural policies. Controlling localised production of goods and using GIs on goods to indicate the origin and unique qualities and characteristics of the goods became key features of Europe’s Common Agricultural Policy (CAP) that was implemented in 1962. As further explained in part 5.6 of Chapter 5, the CAP is a partnership between agriculture and society, Europe and its farmers. It implements a system of agricultural subsidies and other programs with a view to ‘improving the income of farmers and safeguarding the rural economy’.\footnote{715}{Handler, above n 370, 152-153.} Therefore, the CAP promotes small-scale, artisanal and localised production and supports farmers by recognising that the quality and diversity of EU’s agricultural production is a major contributor to the EU’s economy.\footnote{716}{Michael Blakeney, The Protection of GIs: Law and Practice (Edward Elgar, 2014), 70.} The CAP recognises that GIs are ‘an indispensable part of [EU] agricultural policy, serving both to preserve the incomes of small-to-medium-sized producers and to guarantee the sustainability of the rural economy’.\footnote{717}{Dibden et al, above n 709, 304-305.}
Following the CAP’s implementation, ‘EU-wide notification and registration schemes for Member States’ GIs for wines, spirits and agricultural foodstuffs were set up in the late 1980s and early 1990s, with the stated aim of fostering the production of quality regional produce that was bound up with the uniqueness of “place”. The EU currently provides the following GI protection schemes:

- Council Regulation EC No. 479/2008 of 29 April 2008 on the common organisation of the market in wine.

Michael Handler notes, ‘The most noteworthy feature of these schemes is the high level of protection afforded to GI owners: the “misuse, imitation or evocation” of protected GIs by third parties is prohibited, even where this does not result in consumer deception, and is stipulated that protected GIs cannot become generic’. For example, under Regulation EU No. 1151/2012 of the European Parliament and Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs, the EU provides a sui generis GI system of protection for agricultural and food products and also protects against confusion, deception, dilution, 725
usurpation\textsuperscript{726} and becoming generic.\textsuperscript{727} These strict protection rights reflect the importance that the EU places on GIs as part of the CAP and the historical importance that GIs have had throughout Europe since the early twentieth century. As further explained in part 5.6 of Chapter 5, these schemes operate to reward farmers and agricultural producers ‘for their efforts to produce a diverse range of quality products’\textsuperscript{728} that benefit the EU rural economy. These quality schemes are considered crucial to ‘complement rural development policy as well as market and income support policies of the CAP’,\textsuperscript{729} Hence, the EU’s rural and agricultural policies are vastly different to Australia’s agricultural policies. The EU policies focus on localised production and subsidising and rewarding farmers who produce quality, artisanal food products. Their contribution to a diverse rural economy is significant in the EU market. Using GIs as indicators of products that are connected to origin and of a certain quality, or that have certain characteristics or a reputation because of their origin, is part of the EU culture. Given the EU’s historical usage of GIs, and the importance that EU countries have placed on GIs as part of their agricultural policies and a successful economy, it is understandable why the EU is pressing for an extension of GI protection for agricultural goods in the Extension Debate. The EU wants to ‘ensure that its GIs are protected at much the same levels in foreign export markets’\textsuperscript{730} as they are across the EU.

However, Australia and the US do not favour an extension. This is not only due to Australia’s different policy views and position on GIs when compared to those of European countries, but also because of a ‘New World’ versus ‘Old World’ dichotomy that exists between Australia and the EU. Countries such as Australia (New World) have been using Old World (EU) food terms to describe food products primarily because European immigrants brought many Old World terms to Australia. When EU immigrants began to produce Old World food products in Australia, albeit with locally sourced ingredients, they used Old World terms because these were recognisable by other immigrants (i.e., consumers). Hence, ‘Locally made products using European names were either produced by [immigrants] or produced to appeal [to immigrants]’\textsuperscript{731} Instead of renaming the local-made product, immigrants used Old World terms to describe them that other

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{726} EU Regulation 1151/2012 art 13(1)(b): any misuse, imitation or evocation, even if the true origin of the product is indicated or if the protected name is translated or accompanies by an expression such as ‘style’, ‘type’, ‘method’, ‘as produced in’, ‘imitation’ or ‘similar’.
\item\textsuperscript{727} EU Regulation 1151/2012 art 13(2): protected designations of origin and protected geographical indications shall not become generic.
\item\textsuperscript{728} Blakeney, above n 716, 71.
\item\textsuperscript{729} Ibid.
\item\textsuperscript{730} Handler, above n 370, 153.
\item\textsuperscript{731} Ibid 155.
\end{enumerate}
\end{footnotesize}
immigrants would recognise. As part of the Extension Debate, the EU would like to ‘claw back’ (i.e., take back) as many Old World terms as possible from the New World to obtain GI rights in those names at an international level.

However, some Old World terms have become generic product descriptors in the New World. For example, ‘feta’ is a type of cheese and an Old World term brought to Australia by Greek immigrants in the mid-twentieth century. It is a soft cheese made from sheep’s milk that is produced in brine. Instead of renaming the cheese, Greek immigrants to Australia marketed the cheese to other immigrants using the name ‘feta’.732 Australian cheese producers have continued to use the term ‘feta’ to describe the type of cheese, as consumers recognise cheese described as ‘feta’ has certain characteristics. Under Article 24.6 of the TRIPS Agreement, Australia is not obliged to protect a EU GI if that term has become generic in Australia.733 Therefore, Australian cheese producers can produce a soft cheese in brine that tastes like feta and call it ‘feta’. Australian cheese producers can label the cheese ‘feta’ and export it to other countries, other than to: the EU, where ‘feta’ is a protected food GI pursuant to Regulation EU No. 1151/2012 of the European Parliament and Council of 21 November 2012 on quality schemes or agricultural products and foodstuffs and to other countries that might have agreed to protect the term ‘feta’ as a GI with the EU under an FTA (e.g., under the EU–Korea FTA734 as discussed later in this chapter). However, extended protection of GIs for all products at the same level of protection provided to wines and spirits under Article 23.1 of the TRIPS Agreement would result in Australian cheese producers no longer being able to use the term ‘feta’ on cheeses. However, as discussed in Chapter 6, most of the South Australian cheese producers interviewed as part of the fieldwork would prefer to use South Australian regional names on their locally made cheeses rather than use EU cheese names to describe their cheese product. By using Australian regional names on cheeses, they can communicate with consumers the regional origin of the cheese and that it has been made using locally sourced milk in most instances.735

732 Ibid.

733 *TRIPS Agreement* art 24.6: *nothing in this section shall require a Member to apply its provisions in respect of a geographical indication of any other Member with respect to goods or services for which the relevant indication is identical with the term customary in common language as the common name for such goods or services in the territory of that Member. Nothing in this Section shall require a Member to apply its provisions in respect of a geographical indication of any other Member with respect to products of the vine for which the relevant indication is identical with the customary name of a grape variety existing in the territory of that Member as of the date of entry into force of the WTO Agreement.*

734 *EU-Korea Free Trade Agreement* (Signed 15 October 2009; in force 1 July 2011) (‘EU-Korea FTA’).

735 Interview with Kris Lloyd, Manager and Head cheese-maker, Woodside Cheese Wrights, (Woodside, Adelaide Hills, South Australia, 24 February 2014).
The above analysis explains the historical differences of countries such as the EU and Australia regarding the significance they have placed on GIs as part of their agricultural and rural policies. EU has traditionally placed emphasis on localised production, quality diverse rural products and rewarding and subsidising farmers for producing such products given the contribution that they make to the EU rural economy. Conversely, Australia has traditionally not placed much emphasis on GIs. Neoliberalism policies and regulation of health and safety standards in exporting agricultural products have meant that Australia has been driven more by open markets in its agricultural policies. Therefore, the Australian government has not traditionally subsidised farmers or promoted localised production, but instead has liberalised trade through developing more productive farming systems. The Australian government has not seen a need to implement a GI system to promote agricultural exports, as the regional origin of goods has not been a focus for a quality standard in the agricultural industry and its policies.

However, new quality parameters are beginning to emerge in Australian agricultural and agrifood industries. One of these parameters is authenticity and the provenance of food products. As explained in Chapter 2, there is significant interest among food producers and traders and the agrifood industry in using Regional Branding on food products. This is on the basis that food products with Regional Branding communicate to consumers a ‘story’ about the food product. This concept of ‘storytelling’ involves food producers and traders on food labels communicating with consumers the origin of food products and the processes and methods used to make the food products. Thus, the story creates a certain image and perception in consumers’ minds about the quality and characteristics of the food product. This is important, given current consumer demands for local and authentic food products. However, as explained in Chapter 2, not all food products with Regional Branding have a clear and strong connection to the named region and; therefore, consumers cannot decipher which food products are authentic or local with a clear and strong connection with the named Australian region.

For consumers to rely on and trust the story that is being told on food labels by food producers and traders, there needs to be a system that regulates that the food products to which Regional Branding attaches originate from the place claimed and have a strong and clear connection to the region. Further, there needs to be a shift in Australian agricultural policies that places importance on the regional origin of food products, to reward Australian regional food producers who invest time and money in producing authentic regional food products that have a clear and strong connection with Australian regions. This requires agricultural policies that promote localised production and ‘quality’ food products based on the regional origin of food, in addition to health and safety standards. As Eversole suggests, the Australian government should identify the distinctive attributes that Australian regions have and the economic and competitive advantages that they can provide to the agrifood and agricultural industries in both the domestic and international

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The Australian government should develop policies that recognise Australia’s regionality and protect the assets that Australia has in Australian regions and regional names for the purpose of identifying food products that are local and that do have a story that can be communicated to consumers. They should support regional origin labelled food products, rather than focusing solely on ‘Made in Australia’ labelled food products. Australian regional policies should focus more on localism to ‘extend neo-liberalist policy by placing the self-sufficiency of rural and regional communities at the heart of policy strategy’. Providing support to local rural communities will mean these communities are likely to work closely together to build the reputation that their regions have for producing quality food and the value that exists in their regional name. They are likely to work together to ensure that they are all producing food products of a similar quality level.

Having policies that support localised production will respond to current consumer demands for local and authentic food and for quality foods based on provenance. These demands exist at both a domestic and an international level. For example, China wants to know more about Australian regional food product stories. Not only are Chinese importers interested in knowing that Australia’s food and agricultural products are ‘clean and green’ and safe, they also want to know about the provenance of Australian food products. They want food products that ‘connect with emotions’ and tell a story about the link between product and place and food products that have been made using small-scale production. This is because China places importance on regional origin of food products. It recognises and respects that different cultures have different traditions when it comes to food production and it places significance on food products that are made using locally sourced ingredients by food producers who are invested in producing quality artisanal food products that are connected to regions. China’s regional cultural diversity has

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737 Eversole, above n 600, 7.

738 Anthony Hogan, Jen Cleary, Stewart Lockie, Michelle Young and Catherine Daniel, ‘Localism and the Policy Goal of Securing the Socio-Economic Viability of Rural and Regional Australia’ in Anthony Hogan and Michelle Young (eds) Rural and Regional Futures (Routledge, 2015) 260, 278.


meant it has recently become more interested in obtaining international protection for its GIs.\textsuperscript{742} It wants to trade with countries that also recognise and protect GIs for food products as discussed. Therefore, it is important for the Australian government to acknowledge the opportunities that exist in recognising Australia’s regionality and localised production. By supporting localised production and localism, and identifying the connections that exists between regional food products and Australian regions, there are opportunities for regional food producers to move away from ‘commodity markets into more lucrative markets through differentiation’.\textsuperscript{743} However, this will require the Australian government to identify that there is a need to establish a regulation system for regional names and the regional origin of goods.

4.2.3. Case for a \textit{sui generis} food GI system

Chapter 2 notes that a \textit{sui generis} food GI system is the ideal legal framework to overcome the deficiencies of current laws and regulations in relation to the regulation of regional names on food products. The above analysis regarding whether GIs are adequately protected as part of Australia’s trademark system also supports a case for Australia to implement a \textit{sui generis} food GI system. GI protection should not be merged into trademark laws, as trademarks and GIs serve different purposes. The connection between product and place is a paramount distinction. The connection between food products and Australian regions cannot be adequately protected under trademark laws, because trademark laws do not consider the connection between food and origin in determining if a trademark that includes a regional name can be used on a food product. Conversely, GIs protected under a \textit{sui generis} GI system identify the geographical origin of food products and that the food product has a quality, characteristic or reputation owing to its geographical origin: ‘Since the link to place is what sets GIs apart [from trademarks], the verification of this link and causally related product qualities calls for greater scrutiny and public oversight during the regulation process, as well as subsequently commercial use’.\textsuperscript{744} Therefore, protection of food GIs cannot be merged into trademark laws on the basis that the trademark system is already in existence and is familiar. Trademark laws do not cater for this stricter regulation required for the proper protection of GIs.

The Australian wine GI system emphasises the inadequacies of current trademark laws to protect GIs, as well as the advantages of GI protection. GIs have a stricter compliance and protection regime than trademarks. Any use of a GI on a product that does not originate from the designated area, or does not comply with the specific GI criteria, is \textit{ipso facto} an infringement. When a GI is misused, there is no

\begin{itemize}
  \item \textsuperscript{742} van Caenegem, Drahos and Cleary, above n 15, 61.
  \item \textsuperscript{743} C Bramley and J F Kirsten, ‘Exploring the Economic Rationale for Protecting Geographical Indicators in Agriculture’ (March 2007) Vol 46, No 1 \textit{Agrekon} 69.
  \item \textsuperscript{744} Gangjee, above n 691, 2.
\end{itemize}
requirement to prove misrepresentation and no trademark defences such as good faith apply. Therefore, when GIs are protected under a GI system, this protects:

- GI users against misuse of the relevant GI
- the reputation of GI areas
- the value that exists in GIs.

Thus, the protection afforded to GIs under a GI system surpasses the protection that is otherwise available for GIs under a trademark system or under other laws such as consumer protection laws. Therefore, implementing a sui generis GI system would overcome the deficiencies of current trademark law, consumer protection law and passing off law and the problems caused by these deficiencies, as food GIs would only be used when food products had a clear and strong connection with the GI region. This would mitigate the risk of food producers taking advantage of the reputation that Australian regions have for producing quality regional food and the value that accordingly exists in Australian regional names. Consumers would be able to rely on food labels that included food GIs to identify authentic and local food.

Consumer demand at both a domestic and an international level for local food products and food products that have a story to tell demonstrates the need for the Australian government to introduce agricultural policies that promote localised production and regulate regional origin of food products. A sui generis food GI system would provide regulation of regional origin of food products. GIs guarantee the origin and the quality of food products. A sui generis GI food system can be tailored to include criteria that reflect how Australian regional food is connected to Australian regions. As explained in Chapter 3, this includes identifying:

- where core ingredients have been sourced
- whether food products have been produced within the GI area
- whether food products have been made using methods and processes typically used within the GI area that are unique to that area.

These are considerations that cannot be made under trademark laws, or other laws and regulations, as those laws do not protect the connection between food and origin. Conversely, sui generis GI systems identify the link between product and place. The link must provide an explanation of why the product is linked to the GI area. This is discussed further in Chapters 5, 6 and 7. Notably, Chapter 7 identifies the criteria that food producers and traders should meet for their food products to have a clear and strong connection to Australian regions to use a food GI. Thus, a sui generis food GI system will provide food producers and traders ex ante guidance as to when they can use food GIs and will regulate that there is a link between product and place before GIs can be used on food products.

Food GIs have become an important aspect of international trade, as more countries become interested in knowing about the regional origin or provenance of their

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745 Gangjee, above n 166, 209.

746 Ibid 233.
trading partners’ food products. To accommodate this, Australia needs to introduce agricultural policies that support localised production and differentiated commodities. GIs can assist with promoting food products and regional areas and, therefore, bring benefits to Australia’s rural economy. GIs are public rights and they can be shared among a rural community or GI region. To build value in the food GI, local producers are likely to collaborate to ensure that they all work to the same quality standard in producing food products. This is evident from the Australian wine GI system, as discussed in Chapter 2. Food GIs identify the regional origin of food products and ‘origin stands out as a market for quality and variety of other desirable associations’. Many of Australia’s neighbouring countries want to trade with countries that have implemented GI systems to protect GIs, rather than merging GI protection into existing laws for trademarks, consumer protection or passing off. Therefore, the Australian government needs to reassess its traditional views of GIs as trade barriers and instead consider GIs as opportunities to diversify its agricultural economy and to open up new markets. This further supports the case for a sui generis food GI system.

4.3. GIs and International Trade

Other than for wines and grape products, Australia has traditionally viewed GIs as barriers to trade and as opposition to the main principles of Australia’s agricultural policies of open competition, neoliberalism and free trade. Australia, as a WTO member, currently opposes the extension of protection of GIs for all products to the higher level of protection provide for GIs for wines and spirits under Article 23.1 of the TRIPS Agreement. This is because the Australian government does not want the EU to claw back Old World terms that have been used in Australia by food producers as generic descriptor terms and thus, impose barriers to trade of food products using those terms as generic product descriptors.

Australia implemented the Australian wine GI system to give effect to what the Australian wine industry and government agreed to with the EC and EU in its negotiations regarding the 1994 Treaty and 2010 Treaty. In exchange for protecting EU wine GIs and terms of traditional expression, the Australian wine industry obtained access to the European wine market. It is unlikely that the Australian wine industry would have received those trade concessions if the government had not agreed to protect EU GIs and TEs.

Similarly, if the Australian government does not reconsider its position on protection of GIs for other products such as food products, then the Australian agricultural and agrifood industries run the risk of missing out on trade opportunities with countries that support food GIs. These countries include some of Australia’s neighbouring countries such as China, the Republic of Korea and India. As a WTO member, China protects GIs under its trademarks laws (i.e., as

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747 Ibid 276-277.

748 Ibid 282.
certification and collective trademarks) and a *sui generis* GI system.\textsuperscript{749} GIs are protected under the *Provisions on the Protection of Geographical Indication Products*\textsuperscript{750} and the *Measures for the Administration of Geographical Indications of Agricultural Product*.\textsuperscript{751} While both protect ‘agricultural products’\textsuperscript{752} the *Provisions on the Protection of Geographical Indication Products* also protects handicrafts or spirits. This legislation was enacted to assist agricultural producers to ‘enhance the quality of their production and give due importance to the origin of particular goods’.\textsuperscript{753} Given China’s ‘historical identity, its regional cultural diversity and its long record of innovation in products such as silk and porcelain’,\textsuperscript{754} China has become interested in seeking international protection of its GIs in bilateral agreements that protect its GIs at the same level as protected under the above Chinese laws. For example, China and the EU have agreed to protect 10 of each other’s GIs under the ‘10 plus 10 project’.\textsuperscript{755} China has agreed to protect 10 EU GIs including ‘Grana Padano’ and ‘Prosciutto di Parma’ and added these to the Chinese GI Register in exchange for the EU agreeing to protect 10 Chinese GIs in the EU including ‘Longjing cha’ for tea and adding these to the EU GI Register.\textsuperscript{756}

Since 2008, the EU has entered into several bilateral trade agreements (BTAs) and preferential trade agreements (PTAs) with both WTO member countries and non-WTO member countries. The main objective of these agreements has been for the


\textsuperscript{750} *Provisions on the Protection of Geographical Indication Products* (issued by General Administration of Quality Supervision, Inspection and Quarantine 16 May 2005, effective 15 July 2005) (‘PPGIP’).

\textsuperscript{751} *Measures for the Administration of Geographical Indications of Agricultural Product* (issued by Ministry of Agriculture 25 December 2007, effective 1 February 2008) (‘MOA’).

\textsuperscript{752} PPGIP art 2.2 defines ‘Agricultural Product’ as: (i) those planted or cultivated in the said region; and those (ii) those made, wholly or partially, of the raw materials from the region and produced or processed with the particular techniques in the region. MOA art 2 defines ‘Agricultural Product’ as: primary agricultural products, including plants, animals, micro-organisms and the processed products thereof obtained in agricultural activities.


\textsuperscript{754} van Caenegem, Drahos and Cleary, above n 15, 61.


EU to ‘secure a TRIPS Plus level of protection for GIs for all products in foreign markets’. That is, the EU has secured protection of EU GIs for agricultural and food stuff products at the higher level provided to wines and spirits under Article 23 of the TRIPS Agreement. The Extension Debate has been in negotiations among WTO members since the Doha Round in 2001. Therefore, the EU has entered into bilateral and preferential trade as a way to obtain higher-level protection for EU food GIs at an international level rather than waiting for the outcome of the Extension Debate. A recent example of such agreement with another neighbouring country of Australia is the EU–Korea FTA. In the FTA, the Republic of Korea has agreed to provide the higher-level Article 23 protection to many EU food GIs. Hence, the Republic of Korea has agreed to protect some EU terms that in other countries have become generic product descriptors. Returning to the ‘feta’ example discussed earlier, the Republic of Korea has agreed to protect that term under the FTA. Consequently, Australian cheese producers of ‘feta’ cheese will not be able to export cheese to the Republic of Korea labelled ‘feta’ as the Republic of Korea has committed to protecting the term with the EU. Instead, Australian cheese producers will need to relabel their cheese and ‘This raises questions as to whether [Australia] … might be entitled to compensation’ due to losing market access in Korea in relation to ‘feta’ cheese. Were it not for the existence of the EU–Korea FTA, Australian cheese producers could continue to export cheese labelled ‘feta’ to the Republic of Korea, as the cheese producers use the term as a generic product descriptor. As explained earlier, under Article 24.6 of the TRIPS Agreement, Australia is not obliged to protect a EU GI if that term has become generic in Australia. However, with the existence of the EU–Korea FTA, Australia can no longer export cheese labelled ‘feta’ to the Republic of Korea despite the term ‘feta’ being generic in Australia. A further example of a PTA that EU has recently finalised is the Comprehensive Economic Trade Agreement (CETA) with Canada.

Another neighbouring country of Australia, India, has also implemented a sui generis GI system under the Geographical Indications of Goods (Registration and

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758 EU-Korea Free Trade Agreement (Signed 15 October 2009; in force 1 July 2011) (‘EU-Korea FTA’).

759 EU-Korea FTA arts 10.18.4, 10.21.1 and Annex 10-A.

760 TRIPS Agreement art 24.6: nothing in this section shall require a Member to apply its provisions in respect of a geographical indication of any other Member with respect to goods or services for which the relevant indication is identical with the term customary in common language as the common name for such goods or services in the territory of that Member. Nothing in this Section shall require a Member to apply its provisions in respect of a geographical indication of any other Member with respect to products of the vine for which the relevant indication is identical with the customary name of a grape variety existing in the territory of that Member as of the date of entry into force of the WTO Agreement.
Protection Act) 1999. The Act establishes a public right in GIs that is officially included on a public register. The sui generis system was designed in part to protect Darjeeling tea. This is because Darjeeling tea is world-renowned as ‘one of the best teas for flavour and quality. For probably more than 150 years it has been grown and produced in privately owned tea gardens about 2000 metres above sea level in the Darjeeling district of West Bengal’. The word ‘Darjeeling’ and the Darjeeling logo were initially protected as registered CTMs in India. However, once the Geographical Indications of Goods (Registration and Protection Act) was enacted, the Indian Tea Board filed for the registration of both as GIs. This was based on the tea’s distinctive and naturally occurring quality and flavour that is linked with the ‘unique and complex combination of agroclimatic conditions in the [West Bengal] region and the production regulations imposed’ on the production of Darjeeling tea. By registering ‘Darjeeling’ tea as a GI under a sui generis GI system, rather than protecting it merely as a CTM, the Indian Tea Board has been able to enforce the ‘Darjeeling’ GI India and obtain higher GI protection for the tea than it would have otherwise obtained under CTM registration. Further, India has entered into BTAs with Japan, Sri Lanka, Singapore, the Association of Southeast Asian Nations (ASEAN) and several ASEAN countries separately to obtain GI protection for its agricultural GIs including ‘Darjeeling’ tea. India, as a WTO member, also supports the Extension Debate and Multilateral Register.

The effect of Australia’s neighbouring countries implementing sui generis GI systems to protect their own food GIs for the Australian food industry is threefold:

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762 Echols, above n 685, 105-106.

763 Ibid.

764 Ibid.

765 Ibid.

766 Japan-India Comprehensive Economic Partnership (Signed 16 February 2011; in force 1 March 2011).


768 India-Singapore Comprehensive Economic Cooperation (Signed 29 June 2005; in force 1 August 2005).

769 ASEAN-India Framework Agreement on Comprehensive Economic Cooperation Between the Republic of India and the Association of Southeast Asian Nations (Signed 8 October 2003; in force 1 July 2004).

770 Echols, above n 685, 106.
1) in protecting food terms as GIs in their own respective countries under a *sui generis* GI system, these countries are more likely to demand protection of those terms as GIs from Australia. For example, in relation to ‘Darjeeling’, Australian tea producers are unable to export tea labelled ‘Darjeeling’ to India or to any other country that India has entered into a FTA or PTA with under which the other country protects ‘Darjeeling’ as a GI. This puts Australian food producers and exporters ‘at a competitive disadvantage requiring rebranding and re-education of consumers’ regarding the tea that is exported.

2) as explained in relation to the EU-Korea FTA, it affects Australian food exporters’ ability to export food products produced in Australia that are labelled with a EU food GI. Even though the EU food GI might be a generic product descriptor in Australia, Australian food producers and exporters are unable to export cheese products branded with such terms to countries that have entered into FTAs and PTAs with the EU under which they have agreed to protect EU food GIs. Therefore, the FTAs and PTAs that Australia’s neighbouring countries enter into undermine Australia’s ability to rely on Article 24.6 of the TRIPS Agreement to continue using EU GIs on food products produced in Australia on the basis that those terms have become generic product descriptors.

3) ‘the absence of a *sui generis* food GI system in Australia sets potentially strong limits on the present or future protection of Australian food exports to Asia’. This is because, by failing to implement a *sui generis* food GI system that is tailored to cater for the Australian food industry’s needs, Australia risks losing: i) the assets that Australia has in Australian regional names as identifiers of food products that have a strong and clear connection with Australian regions, ii) the ability to negotiate GI protection with neighbouring countries at a level that accommodates the Australian food industry’s needs and iii) trading opportunities with neighbouring countries (and others) that place importance on GI protection.

In the absence of a food GI system that effectively regulates the usage of regional names on food products, food producers based both in Australia and overseas can continue to take advantage of the reputation that Australian regions have for producing quality regional food. Food producers at an international level can use Australian regional names such as Moreton Bay on bugs that do not originate from Moreton Bay and take advantage of the reputation that the region has for producing quality bugs and the value that accordingly exists in the name. This is on the basis that the overseas food producer has included the actual place of origin of the food product elsewhere on the food label or mitigated the risk of consumer confusion as to the origin of the food product. While Australian food producers could seek to rely on consumer protection law, passing off law and trademark law to obtain protection against this type of free-riding, implementing a *sui generis* food GI system would provide the Australian food industry with a higher level of protection against free-riding in such instances. This was emphasised in the review of the Australian wine GI system in Chapter 2 that illustrated the stricter compliance and

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771 van Caenegem, Drahos and Cleary, above n 15, 63.
regulation that GI systems provide to the misuse of Australian regional names on products that do not originate from the named region. Therefore, by implementing a *sui generis* food GI system:

**Australia could obtain a higher level of protection against free-riding on such GIs in some of its significant agricultural export markets than is at present available through consumer deception laws. An attendant benefit of … GI registration [for food products] may be increased future protection of local registered geographical terms in export markets that have adopted a food GI registration system.**

The sooner the Australian government considers implementing a food GI system, the stronger its position will be in negotiating GI protection with its neighbouring countries. By having its own *sui generis* food GI system, Australia demonstrates to neighbouring countries that Australian food exporters are ready and willing to protect their GIs in exchange for their GI protection of Australian GIs and access to their markets. Therefore, a *sui generis* food GI system would provide the Australian food industry and Australian food exporters with a competitive advantage and the ability to niche market powers. The Australian government would be in a strong position to trade and negotiate GI usage by having contemplated and implemented a *sui generis* GI system that caters for Australia’s food industry and trading needs. In the absence of designing and implementing a food GI system that caters for Australian food industry and export needs, Australia weakens its trading and negotiating position by risking agreeing GI protection with its trading partners on terms that meet the partners’ needs and adopting those countries’ rules and regulations. Hence, it is very important for Australia to have its own *sui generis* food GI system:

*As a means on influencing the direction of global business regulation … Australia by developing its own GI model, one that suits a New World country that is an agricultural innovator and exporter, might be in a better position to influence the evolution of GI systems within its region, as well as those amongst its traditional coalition partners.*

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772 Ibid.


775 van Caenegem, Drahos and Cleary, above n 15, 63.
It is an ideal time for the Australian government to reassess its position on GIs, given the competitive advantages and trade protection that a *sui generis* food GI system could provide to the Australian food industry and food exporters. GIs can open trade opportunities for Australia, particularly with its neighbouring countries. The Australian wine industry gained trade advantages through the implementation of the Australian wine GI system and there could be trade advantages for the Australian food industry through the implementation of a *sui generis* food GI system.

Further, by ‘thinking locally in terms of the distinctive indigenous qualities of [Australia’s] produce’ and implementing a *sui generis* food GI system to protect Australia’s regionality and the connection between regional food and Australian regions, the Australian government could ‘act globally in seeking GI protection worldwide for [Australian food GIs]’ under FTAs with countries that have a GI system. By implementing a *sui generis* food GI system, Australia would be in a stronger position to negotiate terms of FTAs with trading partners in relation to GI protection. Australia is one of the most active agricultural exporters to seek FTAs, particularly in the form of BTAs. A BTA is entered into between two countries that may or may not be in the same region. The overall objective of BTAs is to expand trade between the countries concerned and to cater for the ‘direct commercial exchange of goods, including agricultural goods’.

Australia has a BTA with the following countries (including but not limited to): the US, Japan, China, Chile and Malaysia and is actively seeking an FTA with the EU.

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777 Ibid.


779 Ibid.

780 *Australia-United States Free Trade Agreement* (Signed 18 May 2004; in force 1 January 2005) (‘AUSFTA’).


782 *China-Australia Free Trade Agreement* (Signed 17 June 2005; in force 20 December 2015) (‘China-AUS FTA’).

783 *Australia-Chile Free Trade Agreement* (Signed 30 July 2008; in force 6 March 2009) (‘AUS-Chile FTA’).
These BTAs involve the ‘direct commercial exchange of goods, including agricultural products’. For example, under the AUSFTA, the US controls trade and tariff reductions in a range of food and agricultural goods ‘considered politically sensitive in one or both parties’. Thus, Australia has agreed to the exclusion of sugar and has agreed to long transition periods for beef and dairy products. In relation to GI-specific provisions, Article 17.2 of the AUSFTA provides that ‘each party shall … provide that GIs are eligible for protection as trademarks’. Article 17.2 12(b)(v) of the AUSFTA provides that it is a ground for refusing an application to protect a GI as a trademark when that GI is likely to:

(a) cause confusion with a mark that is the subject of a good faith pending application or registration
(b) cause confusion with a pre-existing mark, the rights to which have been acquired through use in good faith in the territory of the Party.

The effect of these AUSFTA provisions is that a GI cannot be registered using a particular name if there are pre-existing trademark rights in the same name in Australia. Amendments were made to the AWBC Act to include a new subdivision dealing with objections to determinations of GIs based on pre-existing trademark rights. These amendments have been carried forward into the current AGWA Act. The effect of sections 40RC to 40RG of the AGWA Act is that prior trademark rights that a trademark owner has in a trademark that includes a term that is similar to a potential GI can affect the determination of a GI. This was explained

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784 Australia-Malaysia Free Trade Agreement (Signed 22 May 2012; in force 1 January 2013) (‘AUS-Malaysia FTA’).
786 Josling, above n 811, 193.
787 Ibid 200.
788 Ibid 201.
789 Ibid195.
790 AUSFTA art 17.2.
791 AUSFTA art 17.2 12(b)(v).
792 AGWA Act 2013 Division 4, Subdivision D.
793 AGWA Act 2013 Division 4, Subdivision D, ss 40RA-40RG.
In November 2015 the EU and Australia started the process towards negotiating an FTA and, in April 2017, ‘ended preparatory work’ for potential trade negotiations.\(^{795}\) Once negotiations for the Australia–EU (AUSEU) FTA commence, it is anticipated that the EU will request that Australia protect EU food GIs under the high level of protection, given the EU’s:

- interest in food GIs
- ongoing negotiations with several countries to secure a ‘TRIPS Plus’ level of protection for GIs for all products in foreign markets\(^{796}\) in FTAs (as discussed above in relation to the EU–Korea FTA).

The effect of the TRIPS Plus provisions that the EU has sought from its trading partners include a:

> ‘Ratchet up’[of] international IP [Intellectual Property] standards as the more PTAs are negotiated, the more far-reaching the implications of the PTA provisions become. In such circumstances, it appears that if enough PTAs are negotiated containing ‘TRIPS Plus’ provisions, some of these may well become the new standards from which any future WTO trade round will proceed.\(^{797}\)

If the EU can continually obtain the TRIPS Plus level of protection for its food GIs from several trading partners under FTAs, then the EU will manage to successfully obtain the GI protection that it has been seeking under the Extension Debate in WTO negotiations since 2001. The more FTAs include the TRIPS Plus level of protection for GIs for all products, not just wines and spirits, the likelier it is that more WTO members will favour that the WTO standard of protection provided under Article 22.2 of the TRIPS Agreement be extended to match the additional protection provided to wines and spirits under Article 23 of the TRIPS Agreement.

While not all EU FTAs contain the TRIPS Plus level of protection (such as the EU’s PTA with Peru and Colombia), ‘it is likely that the EU will seek expanded GI protection in future PTAs’.\(^{798}\) The EU recently obtained this expanded GI

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\(^{794}\) Objection by Rothbury Wines to determination of Geographical Indication filed in the names of Murray Tyrell, Tyrell’s Vineyards Pty Ltd and Trevor Drayton (2008) ATMO 13 June 2008 (Dy. Registrar Arblaster) (‘Rothbury’).


\(^{796}\) Handler and Mercurio, above n 790, 339.

\(^{797}\) Ibid 325.

\(^{798}\) Ibid 339-340. See European Union-Colombia and Peru Trade Agreement (signed 26 June 2012; in force 1 August 2013).
protection from Canada under CETA. CETA was signed on 26 September 2014 and entered into force provisionally on 21 September 2017.\textsuperscript{(799)} CETA provides that the EU has accepted increased market access for some Canadian agricultural products in return for Canada accepting to protect a limited number of specific EU GIs. Canada has increased its ‘domestic levels of GI protection and protect[s] certain listed EU GIs’\textsuperscript{(800)} while also obtaining some exceptions to GI protection. As Handler and Mercurio succinctly summarise, Canada and EU have agreed that:

- some EU GIs will be protected in Canada, but such protection will not affect the ability of Canadian producers to use specified, commonly employed terms, such as ‘Valencia orange’, ‘Black Forest Ham’, ‘Tiroler bacon’, ‘Parmesan’, ‘Bavarian beer’ and ‘Munich beer’ (Article 22.7.11)
- the cheese names ‘asiago’, ‘feta’, ‘fontina’, ‘gorgonzola’, and ‘munster’, will be protected as GIs, but existing Canadian producers can continue to use such terms as generic product descriptors and future traders will be able to use such terms if accompanied by qualifiers such as ‘type’ or ‘style’ (Articles 22.7.6.1–22.7.6.2)
- certain EU GIs such as ‘noix de Grenoble’ and ‘Budejovicke’ will not be protected in Canada at all.\textsuperscript{(801)}

Therefore, the Australian food industry and government can look to CETA for some guidance on the possible type of GI protection that might need to be negotiated with the EU in relation to food GIs under the AUSEU FTA. In CETA, the existence of Articles 22.7.6.1 to 22.7.6.2 regarding generic product descriptors confirm that the EU is partially open to negotiating protection of some of its food GIs on the basis that they are generic product descriptors in the trading partner’s country. Similarly, the existence of Article 22.7.11 demonstrates that the EU is open to obtaining protection of EU GIs from trading partners without it affecting the ability of food producers to use common terms such as ‘Parmesan’ in relation to cheese. Inclusion of those provisions in CETA signifies that it is possible for Australia to enter into a similar agreement with the EU under the AUSEU FTA, in respect of EU food GIs that Australian food producers use as generic product descriptors or common terms. The EU also suggested these concessions to the US in context of the Transatlantic Trade Investment Partnership (TTIP) as a compromise to their preferred negotiation position regarding protection of food GIs as part of the TTIP FTA negotiations.

The CETA concessions are similar to the submissions that the Australian Food and Grocery Council (AFGC) has submitted in relation to the AUSEU FTA.\textsuperscript{(802)} The Department of Foreign Affairs and Trade is currently in the process of receiving

\textsuperscript{799} Information obtained from European Commission website 

\textsuperscript{800} Handler and Mercurio, above n 790, 340.

\textsuperscript{801} Ibid.

\textsuperscript{802} Australian Food & Grocery Council, \textit{Australian Food & Grocery Council Submission Australia European Union Trade Negotiations}, March 2016 (‘AFGC Submissions’).
submissions from interested stakeholders in relation to the proposed AUSEU FTA. This information will assist the Australian government in determining Australia’s key priorities as it progresses with negotiations with the EU. The AFGC has recommended that the AUSEU FTA negotiations ensure that Australian food producers and exporters can continue to use common food names while providing for GI under existing WTO agreements: ‘The objective of Australian industry is to strike a balance between the demands of food producers in particular regions and the interests of the broader global community of food producers’. Thus, the AFGC has recommended that the following principles be considered as a starting point for any agreement on GIs between Australian and the EU:

- use of compound terms—GIs should be compound terms that include the name of the region or subregion where the product is produced along with the name of the product. The product name would be considered as being generic. For example, ‘Camembert de Normandie’ would be the GI but ‘Camembert’ would be considered a generic product name.
- protection in entirety—protection should be provided to a registered name in its entirety, that is, the full compound term. For example, the full compound term ‘Parmigiano-Reggiano’ should be protected rather than individual components or derivative terms such as ‘Parmesan’.
- reference points for generic names—reference points should be established for identifying common names such as existence of a Codex standard or international standards, use of terms in dictionaries or taking into consideration levels and diffusion of global production.
- transparent objection procedures—GI systems should provide the opportunity for stakeholders to comment on applications for GI registrations to ensure that officials have fully considered the request and its effect on other farmers and food producers. Objection procedures should be included.

These submissions reflect the Australian food industry’s willingness to protect EU food GIs, but in a ‘balanced’ approach. Exceptions to GI protection based on common food terms or generic product descriptors must be provided. However, the AFGC Submissions do not discuss the need for the Australian food industry to consider Australian food GIs and protection of those in its negotiations with the EU. It is important that the Australian government consider GI protection for Australian GIs under a sui generis GI system prior to agreeing any GI protection with the EU as part of the AUSEU FTA negotiations. This would place Australia in a stronger negotiation position with the EU in terms of designing and tailoring GI protection to cater for its agrifood and trade needs. It would also provide adequate protection to Australian regional names that are valuable assets in the Australian food industry. The Council for International Trade and Commerce South Australia makes this recommendation in its submissions in relation to the AUSEU FTA:

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803 AFGC Submissions, 7.

804 AFGC Submissions, 7-8.
‘Australia [must] consider protection of Australian geographical naming rights in connection with products’. 805

In this regard, it is useful to review two FTAs that have the potential to affect Australia’s export of food products that are labelled with EU GIs including the TTIP and the Trans Pacific Partnership Agreement (TPP). The US President Donald Trump has withdrawn the US from negotiations regarding these two significant FTAs. The Office of the United States Trade Representative has explained that the withdrawal from the TPP came from ‘the commitment of the US to free and fair trade and encourages future discussions on measures designed to promote more efficient markets and higher levels of economic growth.’ 806 The TPP was to be a FTA between Australia, the US, Japan, Peru, Malaysia, Vietnam, New Zealand, Chile, Singapore, Canada, Mexico and Brunei Darussalam. On 4 October 2015, these countries concluded negotiations on the TPP. 807 However, following receipt of a letter dated 30 January 2017 from the US advising of its withdrawal from the TPP and its intention not to become a party to the TPP, 808 the Australian Senate Foreign Affairs Defence and Trade References Committee recommended that the ‘Australian government should defer undertaking binding treaty action until the future of the TPP is clarified’. 809


807 Australian Government Department of Foreign Affairs and Trade, Trans-Pacific Partnership Agreement, http://dfat.gov.au/trade/agreements/tpp/Documents/tpp-overview.pdf (November 2017). The Trans Pacific Partnership Agreement has been in negotiation since 2010, and includes 12 negotiating parties: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, USA and Vietnam. The TPP is a trade agreement out of which Australia is aiming to expand trade and investment between the TPP countries. Negotiations on the TPP concluded in October 2015, and once the TPP has entered into force it will co-exist with existing FTAs. The TPP Agreement negotiations have been somewhat controversial because of the secret negotiations that have shaped it over the last five years.


Currently, the remaining 11 countries involved in the TPP negotiations are considering ‘options to bring the TPP Agreement into force expeditiously … given the broad desire among the 11 countries to reach a good agreement’.  

The TPP contains an Intellectual Property (IP) Chapter with a section on GIs. It contains provisions to ‘promote and protect Australian brands as GIs in the TPP region’. Protection of GIs can be provided by TPP parties through trademark or dedicated sui generis systems: ‘TPP parties will provide robust and transparent application systems with opposition and cancellation procedures and grounds, including where a term would be likely to cause confusion with an already protected term, and where a term is generic’. There are also provisions regarding terms in translation and multi-component terms.

The main GI points emerging from the TPP are as follows:

- in relation to GIs already protected by TPP parties by international treaties concluded by a TPP party with another party (TPP or non-TPP) (including the GIs to be protected through agreements agreed in principle), the rules provided by such international treaties will not be affected by the TPP. Hence, those GIs will keep the protection based on such rules.
- in relation to GIs that are to be protected by any international treaty that is yet to be concluded by a TPP party with another party (TPP or non-TPP), an opposition phase as well as the option to ask for cancellation of such GIs at any time will be provided by the jurisdictions of the TPP parties. Similar provisions are to apply to GIs that are to be protected within TPP parties.

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through national recognition procedures.\footnote{Chapter 18, *Trans Pacific Partnership Agreement*, Section E: Geographical Indications, text released 5 November 2015, https://medium.com/the-trans-pacific-partnership/intellectual-property-3479efdc7adf, arts 18.36.1 and 18.36.5.} However, TPP parties are not obliged to apply such provisions to GIs for wines and spirits\footnote{Chapter 18, *Trans Pacific Partnership Agreement*, Section E: Geographical Indications, text released 5 November 2015, https://medium.com/the-trans-pacific-partnership/intellectual-property-3479efdc7adf, art 18.36.4.}

\begin{itemize}
  \item the principle of coexistence between earlier trademarks and GIs is, in principle, admitted as a limited exception to the rights conferred to trademarks\footnote{Chapter 18, *Trans Pacific Partnership Agreement*, Section E: Geographical Indications, text released 5 November 2015, https://medium.com/the-trans-pacific-partnership/intellectual-property-3479efdc7adf, arts 18.21, 18.32.1(a),(b) and 18.31.2.}
  \item while there are no provisions in the GI chapter relating to the extraterritorial nature of generic terms, determining whether a term is generic remains to be assessed within individual TPP parties’ jurisdictions\footnote{Chapter 18, *Trans Pacific Partnership Agreement*, Section E: Geographical Indications, text released 5 November 2015, https://medium.com/the-trans-pacific-partnership/intellectual-property-3479efdc7adf, arts 18.32.1(c), 18.33 and 18.34, and oriGIn, *Alert on TPP: Negotiations concluded – GI provisions available*, 28 October 2015, <http://www.origin-gi.com/member-area/origin-alerts/item/8516-origin-alerts-28-october-2015-origin-tpp-gis-tm.html>. “There are rumors as to the fact that a list of generic terms within TPP jurisdictions might have been agreed upon in the market access chapter of the Agreement.”}
  \item TPP parties that only protect GIs under a *sui generis* GI system also need to provide protection of GIs under trademark laws preferably by registration of collective or CTMs.\footnote{Chapter 18, *Trans Pacific Partnership Agreement*, Section E: Geographical Indications, text released 5 November 2015, https://medium.com/the-trans-pacific-partnership/intellectual-property-3479efdc7adf, arts 18.19 and 18.30.}
\end{itemize}

Most of the TPP GI determinations accord with the respective TPP parties’ positions in relation to the Extension Debate and the Multilateral Register. This is evident from the TPP GI provisions in that:

\begin{itemize}
  \item if GIs have not yet been protected by TPP parties at the date of the TPP coming into force, the TPP parties provide an opposition period and option for cancellation of the GI. This would prevent further barriers to trade from existing, by stopping further GI protection
  \item there are different levels of treatment between food GIs and wine and spirit GIs
  \item coexistence between earlier trademarks and GIs has been recognised
\end{itemize}
• the determination of generic terms remains to be resolved on a case-by-case basis in the relevant jurisdiction of the TPP party
• the existence of Articles 18.19 and 18.30 in the TPP undermine *sui generis* GI protection to a certain extent by requiring that TPP parties also provide GI protection under trademark laws rather than just under *a sui generis* GI system. This reflects some TPP parties’ hesitation towards *sui generis* GI protection, such as Australia’s current position.

The TPP reinforces the TPP parties’ respective GI positions and has provided them with the opportunity to lift barriers to trade affecting the TPP parties rather than waiting for an outcome in relation to the Extension Debate and Multilateral Register. Notably, the TPP is the first multilateral agreement that provides guidelines for determining whether a term is generic. Article 18.33 includes a list of non-exhaustive factors to be considered in this regard. They include ‘whether the term is used to refer to the type of good in question, as indicated by competent sources such as dictionaries, newspapers and relevant websites’.

The TPP also provides a solution for GIs that are, or have become, generic—another first for a multilateral agreement. Article 18.34 provides that an individual component of a term might be generic and; therefore, not be protected as a GI. However, it also provides a solution when a generic term is part of a multi-component term so that the whole term is protectable as a GI. For example, ‘gouda’ is considered a generic term by itself but the multi-component term ‘Gouda Holland’ is not. These provisions are very similar to what the AFGC has submitted in relation to a balanced approach of GI protection in the proposed AUSEU FTA as explained above. Therefore, the Australian government is interested in pursuing the TPP, as ‘these provisions will enable Australian agricultural exporters to better protect access for their products in TPP markets’.

Article 18.36(3) of the TPP provides that if TPP parties protect GIs under international agreements such as other FTAs, they ‘shall not preclude the possibility that the protection or recognition of a GI ceases, unless the GIs refer to wines and spirits’.

An important consequence is that, despite TPP parties’

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824 Dr Danny Friedmann, ‘TPP’s *coup de grâce* for the shield against becoming generic: Trademark system victorious as Geographical Indication system,’ (Paper presented at the EU Centre for Global Affairs, The University of Adelaide, Luncheon Discussion, ‘What’s in a Name? Geographical Indications. How are they handled in the Trans-Pacific Partnership (TPP) and implications for the EU/Australia FTA?’ Adelaide, South Australia 28 October 2016), 13.
respective FTAs (bilateral or multilateral) under which they have agreed to protect GIs, TPP parties can oppose or cancel generic names for all products other than wines and spirits. Therefore, this ‘breaks open any shield TPP [parties] might have against genericity.’825 This is very relevant to TPP parties Canada (CETA) and Vietnam826 that have both concluded FTAs with the EU. Under the respective FTAs, the EU has secured TRIPS Plus protection of its EU food GIs, albeit the CETA does provide some exceptions as explained above. The parties under the TPP might consider some of these EU GIs generic. Consequently, if Canada and Vietnam have agreed to protect some EU food GI terms that the TPP parties consider generic product descriptors or common food terms, then under Article 18.36(3) of the TPP the TPP parties can oppose or cancel protection of those generic terms. This ‘breaks the shield’ that Canada or Vietnam might have provided the EU against genericity under their respective FTAs with the EU. Thus, Article 18.36(3) places Canada and Vietnam in a compromising situation in that they have provided one level of GI protection to the EU that is likely to be inconsistent with the GI protection that they have agreed to under the TPP. Therefore, if the TPP is entered into force in the future, it will have some far-reaching consequences in terms of lifting trade barriers for some of the TPP parties.

Until it is entered into force, the Australian food industry will need to be aware of GI commitments Canada and Vietnam have with the EU as these have the potential to affect food products that Australian food producers export to those countries using EU GIs as generic product descriptors or common food terms. As discussed in relation to the EU–Korea FTA, agreeing to protect EU GIs that the Australian food industry might consider generic or common will restrict Australian food producers’ exporting abilities into Canada and Vietnam. Therefore, the Australian food industry could lose market access and be at a commercial disadvantage.

The TTIP was a proposed trade and investment agreement between the US and the EU that was in negotiations from 2013 until 2016. The Fifteenth Round of negotiations on the TTIP took place in October 2016.827 However, since the US withdrew from the TPP, negotiations with the EU in relation to the TTIP have been put on hold.828 The effect of this for the EU is that it has not progressed with the US in obtaining the TRIPS Plus level of protection for several EU food GIs that American food producers use on food products produced in the US as generic.

825 Ibid.

826 European Union-Vietnam Free Trade Agreement 2 December 2015 (agreed text January 2016, currently subject to legal revision).


product descriptors or common terms. For the US, the hold on the TTIP means that its food producers can continue using EU food GIs as generic product descriptors on food products that are produced in the US and exported to countries other than: the EU where the EU food GIs are protected terms and other countries that have entered FTAs with the EU under which they have agreed to protect EU food GIs. For the Australian food industry, the hold on the TTIP also means that it can continue to use EU food GIs on food products produced in Australia that it exports to countries other than: the EU where the EU food GIs are protected terms and other countries that have entered FTAs with the EU under which they have agreed to protect EU food GIs. If the TTIP negotiations recommence, then what the US agrees to with the EU in relation to the protection of EU food GIs has the potential to affect the Australian food industry’s usage of those terms as well. This is because, the Australian food industry currently shares very similar views to the US food industry in relation to the protection of EU food GIs. Both want to be able to continue using EU food GIs that are generic product descriptors or common food terms.

The US has raised these issues throughout the TTIP negotiations. The US has submitted that:

- EU GIs are clogging up food trade and are a main barrier to trade between the US and EU
- the EU is trying to obtain GI protection for EU food terms that are generic product descriptors or common terms in US
- EU GIs can be adequately protected as a subset of US trademark law.

Conversely, the EU has submitted the following issues during the TTIP negotiations:

- the US needs to recognise more EU GIs in the future
- some names that the US maintains are generic are not generic and should be protected as GIs
- EU GIs cannot be protected as a subset of US trademark law, as GIs are a distinct form of IP to trademarks and require a separate protection system.

A key negotiation issue discussed throughout the TTIP negotiations was that the US dairy industry does not want to abandon the right of US cheese producers to use EU cheese GIs on cheeses produced in the US, on the basis that some EU GIs are common terms or generic product descriptors in the US. The US National Milk Producers Federation (NMPF), which lobbies on behalf of US dairy producers and cooperatives, was involved in the TTIP negotiations and raised its concerns regarding the US agreeing to protect EU cheese GIs such as 'feta', ‘gorgonzola’, ‘edam’ and ‘asiago.’ The NMPF thought that the EU’s request that the US recognise these GIs was ‘cluttering up negotiations’. To progress, the NMPF

requested that a framework be created to determine which EU GIs that the EU contended needed to be recognised and protected by the US were indeed ‘legitimate GIs’. For example, the US was willing to recognise ‘Parmigiano-Reggiano’ as a legitimate EU GI because it includes a geographical indicator: parma for the province of Parma and reggio for the province of Reggio Emilia. Both provinces are found in the region of Emilia-Romagna, Italy, the production area of the cheese. However, the US was not willing to recognise the word ‘Parmesan’, used as a translation of ‘Parmigiano’ as a legitimate GI. This was on the basis that ‘Parmesan’ has become a common name for cheese produced throughout the US as a descriptor of that type of cheese. This raises very similar issues to those submitted by the AFGC in relation to the AUSEU FTA, as discussed earlier.

Further, the US Consortium for Common Food Names (CCFN) submitted during the TTIP negotiations that the US did not want to relinquish its right to use other longstanding generic food names such as ‘asiago’, ‘fontina’ and ‘gorgonzola’, 830

830 Ibid.

831 Ibid.

832 Qualivita, ‘Italian Sounding: deceived two thirds of US consumers. New battle of the consortium of Parmigiano Reggiano’, 14 December 2015, <http://www.qualivita.it/news/italian-sounding-ingannati-due-terzi-dei-consomatori-US-nuova-battaglia-del-consorzio/>: In December 2015, the Consorzio del Formaggio Parmigiano-Reggiano presented research, that it had carried out on whether US consumers believe that ‘Italian Sounding’ terms used on food, such as Italian words and Italian symbols (such as a flag, Italian colours, pictures of Italian monuments/works of art) close to translated terms, such as ‘parmesan’, denote that the products are authentic Italian made products, to the Commission of Agriculture and Rural Development of the EU Parliament. This research was presented in context of the ongoing TTIP negotiations regarding generic terms vis-à-vis EU GIs. The Consorzio carried out research in the US by showing selected US consumers two packs of ‘Parmesan’ Made in the USA. One of the packs had no references to Italy (Pack 1), while the other was characterised by clear references to the ‘Tricolore’ (the three colors of the Italian flag) (Pack 2). 38% of respondents thought that Pack 1 indicated the product was of Italian origin, while 67% of respondents believed that Pack 2 was an authentic Italian product because of the ‘Italian Sounding’ elements on the packaging. President of the Consorzio, Giuseppe Alai, in his presentation to the Commission of Agriculture and Rural Development of the EU Parliament, concluded that such US usage of terms such as ‘parmesan’ with ‘Italian Sounding’ elements is a ‘fraud which in the US affects tens of millions of consumers, and that is a serious threat to the increase in our exports and, consequently, an obvious damage even for our producers’. In his opinion, this research undermines the US position that: using terms such as ‘parmesan’ to indicate a style of cheese; with ‘Made in the US’ close by; are satisfactory practices to inform US consumers that the ‘parmesan’ cheese is not the authentic Italian Parmigiano-Reggiano PDO product. The research suggests that even when using terms such as ‘parmesan’ and ‘Made in the US’, in combination with ‘Italian Sounding’ elements, the label implies that the cheese product made in the US is an authentic Italian made Parmigiano Reggiano PDO product. The Consorzio is concerned about the impact that this will have not just on exports to the US, but also on the reputation of Parmigiano-Reggiano PDO producers, and product, where the US parmesan with Italian Sounding elements is an inferior quality product to the PDO product.
given that approximately US$21 billion of US cheese production uses EU-origin names. The CCFN submitted that this usage had resulted in part because of migration from some EU countries, in particular from Italy, to the US that caused EU immigrants to bring with them EU food names to promote their own products in their new country, such as ‘Parmesan’ to refer to a Parmigiano-Reggiano type cheese.833 Hence, some EU GIs are so widely used in the US that consumers view them as representing a category of goods rather than as having a connection with a particular origin. Once again, this raises similar issues to those discussed earlier in this chapter in relation to Old World terms being used by New World countries and the EU wanting to claw back as many Old World terms from the New World as possible. The CCFN submitted that while GIs are a legitimate form of IP and deserve protection, all producers should have the right to use, without interference, common names that are part of the public domain.834 Again, this corresponds with the Australian food industry’s current views on Old World terms. In many instances, Old World terms have become more familiar to consumers because of the New World’s usage of those terms as generic product descriptors and common food terms. Therefore, they have become part of the public domain that all food producers should have a right to use.

Another main issue in the negotiation between the US and EU during the TTIP negotiations was whether EU GIs needed to be protected by the US under a dedicated (sui generis) GI system or whether they can be protected as a subset of trademark laws. The US has contended that many EU GIs could be appropriately protected as a subset of trademarks while the EU has strongly affirmed its protection of GIs as part of a regulated GI system. The US prefers to protect legitimate GIs as a subset of trademarks, similar to Australia. The US proposes that the following benefits result from using existing trademark systems that are familiar:

• costs are kept down, as GIs can be protected under a trademark system that already exists, thus avoiding the need to employ additional resources
• the US complies with its international obligations to protect GIs under Article 22.2 of the TRIPS Agreement. Article 22.2 leaves it to WTO members to determine the legal means under which they will protect GIs for all products other than wines and spirits
• the trademark system is a ‘self-policing’ system that does not require governments to commit additional enforcement resources given that it exists and is familiar.835


835 Ibid 5-6.
Therefore, the US is maintaining its status quo in relation to providing the minimal level of GI protection in accordance with Article 22.2 of the TRIPS Agreement rather than agreeing to provide extended protection for EU’s food GIs in accordance with Article 23 of the TRIPS Agreement.

However, unsurprisingly, the EU has not agreed with these submissions, due to its historical usage of GIs, investment in its food GI system under Regulation EU No. 1151/2012 of the European Parliament and Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs and the CAP reform. This is primarily on the basis that GIs are a more distinct form of IP than trademarks and serve a different purpose. Trademark laws do not protect GIs as comprehensively as a sui generis GI system, because they do not consider the link between product and place as is required for GIs. The EU’s position is that the US trademark system, in failing to acknowledge the differences between GIs and trademarks, and in not considering the connection between food and origin, is not appropriate to be used to protect EU GIs.

This will be an ongoing negotiation issue should the TTIP negotiations resume, given the very different positions held by the US and EU on the most appropriate form of ‘legal means’ to protect GIs. Their respective positions reflect the positions each holds in context of the WTO Extension Debate and Multilateral Register that have been in negotiations since the Doha Round of WTO negotiations in 2001: “The fact that these approaches are unlikely to change in the foreseeable future, undoubtedly make common understanding on GIs at the multilateral level less likely, short of serious political compromise.”

In relation to coming to some compromise on which EU GIs are ‘legitimate GIs’, in the more recent rounds of the TTIP negotiations the EU had offered to the US a CETA-type arrangement, given that similar issues arose between the EU and Canada in the CETA negotiations in relation to generic names. CETA does not provide EU food producers with the strong exclusive rights over some EU food GIs as the EU had initially wanted. Instead, CETA provides limited protection over some EU food GIs so that Canadian food producers have a certain amount of freedom to continue to use EU food GIs on food produced in Canada as generic product descriptors or common food terms. For example, CETA allows Canadian food producers to use the English and French translated versions of some EU food GIs such as ‘Black Forest ham’, ‘Tiroler bacon’ and ‘Bavarian beer’. Canadian cheese manufacturers can also lawfully use some EU cheese GIs such as ‘fontina’, ‘asiago’, ‘feta’ and ‘gorgonzola’, accompanied by terms such as ‘style’, ‘type’ and ‘kind’. However, CETA protects several EU food GIs as compound names so that ‘Edam Holland’ and ‘Mortadella Bologna’ are protected. However, words such as ‘mortadella’ or ‘edam’ on their own are not, as these terms are used in Canada to

836 O’Connor and Company, Insight Consulting, Geographical Indications and TRIPS: 10 years later... A roadmap for EU GI holders to get protection in other WTO Members (2013), 7.

837 Handler and Mercurio, above n 790, 344.
describe a style of product. Thus, these provisions provide some flexibility to the Canadian food industry and cover similar issues that the Australian food industry has submitted in relation to the proposed AUSEU FTA.

The EU regards this limited protection for EU GIs under CETA better than no GI protection at all and was hopeful that the US would agree to a CETA-type compromise in the TTIP negotiations. The US might see this compromise as a tool that will enable the:

US dairy industry to secure carve-outs that will reduce [the US’s] self-interested opposition to the entire GI agenda. That is, if the main commercial opponents of GI protection are bought off with complex exceptions, the rest of the agenda can squeak through. This is a common tactic in trade negotiations.

However, the US was not overly willing to accept the EU’s compromise in the later rounds of the TTIP negotiations. This was on the following main grounds:

1) the TTIP negotiations are quite different from the CETA negotiations as the US is a much larger economy than Canada
2) the US has different political and trade obligations than Canada
3) the US is a ‘key driver in establishing international norms, any movement on GIs in the US is likely to translate into global progress for the EU GI agenda’.

If the TTIP negotiations resume between the US and the EU, what the US ultimately agrees with the EU in relation to the protection of EU food GIs will have consequences for other countries (both WTO and non-WTO) such as Australia. The US is a ‘key driver in establishing international norms’ and; therefore, must consider carefully the international effect it can have in agreeing to any GI concessions with the EU. If the TTIP negotiations resume, it is likely that it will include a list of protected EU GIs that will not be as restrictive as CETA with more exceptions to EU food GI protection: ‘A final deal may be so watered down as to be economically meaningless for the traditional European producers whose interests motivate EU’s GI agenda’.

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840 O’Connor and Company, above n 869, 14.

841 Ibid.
While the TTIP negotiations are on hold, the EU has continued to seek TRIPS Plus protection for EU food GIs by enacting FTAs with other countries. The more FTAs that the EU enters, the more likely that trade restrictions will exist for Australia. If EU’s trading partners agree to protect EU food GIs that Australian food producers and exporters use as generic product descriptors or common food terms, Australian food producers and exporters will be faced with more restrictions on the number of countries to which they can export food products produced in Australia labelled with EU food GIs. In the absence of the TPP negotiations commencing, the Australian food industry risks significant commercial disadvantage due to losing market access. Therefore, to obtain market access with countries that support food GIs and protection of GIs under a dedicated GI system rather than trademark laws, it is important that the Australian food industry consider:

- GI protection of Australian food GIs
- implementing a *sui generis* food GI system.

The ability to compromise protection in relation to food GIs that are generic product descriptors or common food terms provides an incentive for the Australian food industry and government to reconsider the current hesitation about protecting GIs for food products.

An interesting side effect of the TTIP negotiations has been that the US has started to acknowledge its own interests in, and potential benefits that it could receive from, recognising US GIs that the US has not previously advocated. There is some irony in the TTIP negotiations in that the US is now showing signs of looking more closely at what GIs there are within the US that the US can promote and protect to its advantage.

Observing the TTIP negotiations, it is evident that the US recognises the competitive advantage that GIs offer to the EU, both from arguments presented by the EU (including information on trade revenue generated from sales of GI products) as well as from understanding firsthand the competitive advantage that GIs can bring to goods by using them as a means ‘to build a market where consumers are able to recognise quality products and are willing to pay a higher price to obtain them’. The US is beginning to appreciate the competitive advantage it could obtain by promoting and protecting its own food GIs, rather than further developing the reputation of EU food GIs by using them on food products produced in the US. On the eve of the Ninth Round of the TTIP Negotiations in April 2015, the US acknowledged that there were a ‘large variety of American origin products’ that represented a ‘tremendous potential for the US agricultural sector in terms of sustainable development … and product differentiation’ and that ‘protecting unique products through fair and balanced IP systems must be part of

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843 O’Connor and Company, above n 869, 14.
trade agreements moving forward’. Some of these terms included ‘Michigan Apples’, ‘Kona Coffee’ and ‘Louisiana Shrimp’.

The US’s enquiry into the potential value US GIs can provide might make it more willing to provide some GI protection for EU’s food GIs should the TTIP negotiations resume. It might also provide a catalyst for the US to require the EU to acknowledge some US food GIs. In the latter rounds of the TTIP negotiations, there was a clear ‘growing economic interest of the US in protecting its domestic industries that entails the likelihood that the US will seek GI protection for its unique and distinctive products’. Given that the US is a ‘key driver in establishing international norms’, such a move would have an effect at an international level. Any US GI recognition would affect the US’s position on GIs in relation to the Extension Debate, the Multilateral Register and in its negotiations and current arrangements with other countries in FTAs and bilateral agreements. The outcome of the US’s interest in identifying and protecting US GIs be important for the EU GI agenda in relation to the TTIP negotiations (if they resume) and US’s position in relation to the Extension Debate and Multilateral Register. Further, it will affect the Australian government’s perspective of GI protection. If the US decides to identify and protect US GIs and request protection of US GIs from trading countries, then this would encourage the Australian food industry and government to also identify and protect Australian food GIs.

As explained throughout this chapter, given the relevance of GIs in the context of international trade, the Australian government must identify the assets that it has in Australian regional names as identifiers of food products that have a clear and strong connection with Australian regions. These should be protected as GIs under a sui generis GI system, rather than merging protection into trademark laws, given the benefits of strict protection that come from implementing a GI system. Implementation of a dedicated GI system is important as:

- GIs are a significant trading concession in many FTAs
- GIs serve a different purpose to trademarks
- GI systems provide strict protection against misuse of GIs
- current trademark, consumer protection and passing off laws are deficient in regulating the usage of regional names on food products.

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845 Richard Mendelson and Zachary Wood, Geographical Indications in the United States: Developing a preliminary list of qualifying product names (oriGIn, 2013), Appendix B, Part II.

As more FTAs are entered into by the EU and by Australia’s neighbouring countries, the Australian government and food industry needs to become more proactive in protecting Australian GIs and implementing a GI system that is tailored to meet Australian food industry and export needs. This will assist the Australian food industry in securing market access and exporting quality and authentic regional food products that have a strong and clear connection with Australian regions. This is a further reason that supports the implementation of a *sui generis* food GI system. Such a system will assist with the international trade issues explained throughout this chapter and with proper regulation of food GIs on the domestic market by overcoming the deficiencies of current laws on trademarks, consumer protection and passing off.

The Australian wine GI system provides valuable insight into the elements that are required for a GI system, as discussed in Chapter 2. It is also useful to review an existing food GI system from which lessons can be learned regarding the benefits and risks involved with implementing a food GI system. Chapter 5 analyses the EU food GI system that operates under *Regulation EU No. 1151/2012 of the European Parliament and Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs*. This system has been operating since 1992 and is a valuable case study on the level of protection a food GI system provides to the connection between food and origin. The Italian fieldwork provided practical insight into the EU food GI system.

Chapter 6 explores the elements that the South Australian interviewees consider are required for an effective food GI system. It examines the current problems that Australian regional food producers face in protecting the reputation of their regions and the value that accordingly exists in their region’s names in the context of Regional Branding. It emphasises the deficiencies of the current consumer protection, passing off and trademark laws. Chapter 6 explains what the South Australian interviewees consider is required to adequately protect the:

- value that exists in Australian regional names as identifiers of authentic regional food that has a strong and clear connection with Australian regions
- reputation that Australian regions have for producing quality regional food.

Chapter 7 provides recommendations on the elements that an Australian *sui generis* food GI system should include. These recommendations reflect the:

- deficiencies of current trademark, consumer protection and passing off laws in regulating the usage of Australian regional names on food products and the problems arising from these deficiencies
- international trade issues that are relevant to GI protection
- observations made from the Italian fieldwork and the lessons that can be learned from the EU food GI system
- observations made from the South Australian fieldwork
- manners in which food is connected to Australian regions (as discussed throughout Chapters 3 and 6).

Chapter 7 provides a view to assisting Australian regional food producers, the Australian food, agrifood and agricultural industries and the government to implement a *sui generis* food GI system that will provide effective regulation and
protection of the connection between Australian regional food and Australian regions at both a national and an international level.
Chapter 5. EU Food GI System Case Study: Italy

5.1. Introduction

This chapter analyses the EU food GI system that operates under Regulation EU No. 1151/2012 of the European Parliament and Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs. It focuses on Italy as a case study of a EU country that has been operating under the EU GI system since 1992. The focus is on Italy’s application of the EU GI system for food. The Italian fieldwork provided insight into Italy’s application of the EU food GI system. Therefore, the analysis of the EU food GI system is limited to Italy’s usage of the EU food GI system and how Italy has implemented it into its legal framework and agricultural industry (EU–Italian food GI system). The analysis does not extend to other EU countries’ implementation of the EU food GI system. While parts of the analysis might apply to other EU countries, there is no evidence to support that from the Italian fieldwork, nor was it researched.

The purpose of this chapter and the Italian fieldwork is twofold:

1) First, to provide insight into the impact that the EU food GI system has had for Italy. A core focus of the Italian fieldwork was to determine whether the EU food GI system has been a worthwhile system for Italian food producers, the agricultural industry and consumers in terms of identifying, recognising, and protecting the connection between food and origin. Another was to determine whether the EU–Italian food GI system still has as its core purpose the ideal to protect and promote the

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847 Regulation EU No. 1151/2012 of the European Parliament and Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs (‘EU Regulation 1151/2012’).

848 In Chapter 4 I discussed EU’s sui generis GI system of legislation and regulations. The current Regulations are as follows: Regulation EU No. 1151/2012 of the European Parliament and Council of 21 November 2012 on quality systems for agricultural products and foodstuffs (‘EU Regulation 1151/2012’). Regulation 1151/2012 will be the focus EU Regulation in this chapter. The EU also has a registered GI system for wines pursuant to Council Regulation EC No. 479/2008 of 29 April 2008 on the common organisation of the market in wine and for spirits pursuant to Regulation EC No. 110/2008 of the European Parliament and Council of 15 January 2008 on the definition, description, presentation, labelling and the protection of geographical indications of spirit drinks. In July 2014, the EU submitted a Memo on the Green Paper on the protection of geographical indications for non-agricultural products with the hope of also introducing a EU GI system for non-agricultural products such as glass, leather goods, and ceramics. Pursuant to the EU’s GI system, the GI is used to represent that the good originates in the geographical location indicated, and also to represent that the good has a reputation or certain qualities or characteristics associated with the origin. A GI is therefore partly descriptive because a place-name is used to indicate that the good originates in a certain place.

849 See part 5.6 of this Chapter for details of the EU/Italian Food GI System.
connection between food and origin or whether the EU–Italian food GI system has lost sight of this ideal.

2) Second, to provide guidance to the Australian food industry and government in relation to food GI systems. As explained throughout Chapters 2 to 4, a *sui generis* food GI system would provide better protection and enforcement of the connection between regional food and origin than what is currently offered under existing consumer protection, passing off and trade mark laws. Having identified the deficiencies of these laws and regulations in Chapter 2, as well as the significant interest that exists in Regional Branding in the Australian food and agrifood industries, there is a strong case for Australia to implement a *sui generis* food GI system. This is further supported by international trade issues that, as explained in Chapter 4, require that the Australian government reconsider its position on the protection of food GIs in order to place the Australian food, agrifood and agricultural industries in a stronger trading position at an international level.

Given the similarities between the Italian Regions and the South Australian Regions (in terms of geographical factors and food products that are produced in the regions as explained further below) the observations made in the Italian Regions regarding the effectiveness of the EU–Italian food GI system provide valuable insight into:

- The worth of using GIs on food labels under a regulated food GI system;
- How a food GI system might apply to the South Australian Regions and regional food producers; and
- What features are required for an effective food GI system.

The key benefit of the Italian fieldwork was learning about and considering the risks, benefits and costs associated with a food GI system. In this chapter, I contribute the knowledge that I acquired in that regard to Australian law; government; food, agrifood and agricultural industries. This knowledge is offered with a view to providing practical and substantive guidance and directions to the State and Federal Australian governments; food, agrifood and agricultural industries on the elements that must be considered and worked through in order to implement a *sui generis* food GI system that better protects the connection between regional food and origin than is currently offered under existing laws and regulations. The guidance and directions are also offered to assist in balancing the different rights and interests involved in a food GI system as discussed in Chapter 4; namely the qualitative connection between food and origin and the trade related aspects of food GIs.

As a preface to the observations that will be made of the EU–Italian food GI system as a result of the fieldwork the following should be noted:

- The EU/Italian approach to protecting GIs is very different to Australia’s approach for reasons explained in Chapter 4, some of which will be reiterated throughout this chapter.
- Australia’s political and legal frameworks are vastly different to the EU’s and Italy’s political and legal frameworks and these differences must be taken into consideration in implementing a food GI system for Australia.
• Australia has its own international and trade obligations with both World Trade Organisation Members and non World Trade Organisation Members that must be considered in implementing a food GI system.

Notwithstanding these differences between the EU, Italy and Australia, the observations that are made in this chapter are useful to gain a better understanding of what are the risks, benefits and costs involved with a food GI system and how Australia might tailor a food GI system to meet its trading needs and obligations.

5.2. Methodology

5.2.1. Italian regions

I undertook the Italian fieldwork in Italy in September 2014 and focused on three Italian regions. I specifically focused on the Italian regions of Piedmont in northwest Italy, Emilia-Romagna in north-central Italy and Tuscany in upper central Italy (Italian Regions). I chose these Regions on the basis that they have very similar geographical features to the South Australian Regions and the food products produced in the Italian Regions, namely cheese, meat and smallgoods, vinegars, olive oil, and wine are also very similar to the food products produced in the South Australian Regions.

The region of Piedmont is similar to the Adelaide Hills. Some of the main geographical factors of Piedmont include that it is located in the foothills of the Alps near the borders of France and Switzerland and in the Po Valley. As a result, Piedmont has a cold, continental winter climate. The Alps create a rain shadow for Piedmont so that its highest rainfall occurs during the spring months, rather than in winter. Its soils are mainly sandstone and ‘calcareous marl’ (a grey soil with high limestone content).

The Italian region of Emilia-Romagna is similar to the Barossa Valley. Emilia-Romagna’s main geographical factors include that it is located between the River Po and the Apennine Mountains, and the Adriatic Sea. Given its position between sea and mountains, it is one of the most fertile and productive regions of Italy. It has a subtropical climate that is mild and has year-round rainfalls causing the soils to be fertile brown-gold in Emilia-Romagna.

The Italian region of Tuscany is also similar to the Barossa Valley. Tuscany’s main geographical factors include that it is located near the Mediterranean Sea and the Apennines in northern and eastern Tuscany. While overall Tuscany has a dry climate, given that Tuscany is located near the sea and also has Apennine hills and valleys, this creates variations in its climate. Therefore, it has a more seasonal microclimate for its inland areas, and a maritime microclimate for the areas located near the sea. Tuscany also has a wide variation of soil types: galestro (a mix of marl and limestone), alberese (clay-limestone), clay, volcanic and sandstone.

850 Qualivita, *Qualigeo Atlas* (Fondazione Qualivita, 2009).

851 Ibid.

852 Ibid.
5.3. Italian Interviewees

5.3.1. Selection criteria of Italian interviewees

In the Italian Regions, I interviewed a variety of food producers who have been operating under the EU/Italian GI system since 1992, as well as agricultural industry based organisations and GI Consortiums. The Italian food producers were from the Italian dairy, meat and smallgoods, olive oil, and wine industries. Two industry based organizations that I interviewed included Qualivita and Academia Barilla. Qualivita is the central Italian GI organization that works closely with the Italian Ministry of Agriculture, gathering information on all Italian GI products and promoting the Italian GI system both nationally and internationally, as well as educating consumers and other organizations about the GI system. Academia Barilla is a privately owned company (owned by the Barilla family known for Barilla pastas and condiments) that defends, promotes and develops Italian gastronomy by educating consumers about Italian food products, as well as training chefs and food professionals.

853 Mauro Rosati, ‘Geographical Indications: A different way to access the global food market; The DOP IGP as a success factor’ (2015), 17-20, <http://www.qualivita.it/en/>: GIs are closely related to CAP (discussed below) in the EU and require rules and regulations set down by Consortiums (published as Ministerial Decrees and Laws in Italy in the *Gazzetta Ufficiale della Repubblica Italiana* and filed and registered with the EU on registration of the relevant GI pursuant to the EU/Italian Food GI System), and systems of control regulated either by independent private bodies or a mix of public and private bodies. A Consortium’s role with regards to GIs is to: protect; promote; build reputation; provide correct information to consumers; and generally safeguard the GIs. The independent control bodies (in Italy these are either private bodies accredited by *Accredia* or a mix of public and private bodies authorised by *Mipaaf*) have the following duties in relation to GIs: to verify compliance with GI product specification requirements set out in the rules and regulations drafted by the Consortiums (published as Ministerial Decrees and Laws in Italy in the *Gazzetta Ufficiale della Repubblica Italiana* and filed and registered with the EU on registration of the relevant GI pursuant to the EU/Italian Food GI System); to carry out on-site inspections and product controls; and to prepare GI control plans. Control plans are documents that specify how to guarantee compliance with the product specification set down in the rules and regulations for the GI. It sets out the controls and checks that must be performed. This document is prepared by the designated control body and must be approved by *Mipaaf*. It sets out the control activities that need to be carried out by the control body in order to issue GI certification. The costs of control are usually borne by the producers, although EU Member States can choose to contribute to the costs. Once a place name is registered as a GI, a producer within the region who does not adhere to the conditions of use, as set down and controlled by the Consortium, cannot in any form use the place-name in relation to their goods. The producer is then also unable to take advantage of the reputation resulting from using the GI. I interviewed five Consortiums, namely the Consortium for the aged vinegar product *Aceto Balsamico Tradizionale di Modena PDO*, the Consortium for the cheese *Pecorino Toscano PDO*, the Consortium for the ham *Prosciutto di Parma PDO*, the Consortium for *Toscano Extra Virgin Olive Oil PGI* and the Consortium for the ham *Prosciutto di Cuneo PDO*.

854 Even though the focus of the fieldwork was on food GI producers, I did interview two winemakers in the Italian Regions because they are also involved with food production and agritourism and I wanted to obtain their thoughts on the overall EU GI system. Italy’s wine GI law will not be reviewed as it is outside the scope of this thesis.
The Italian Interviewees were selected through existing networks of contacts or from publicly available information. The Italian Interviewees were emailed (email details were obtained from publicly available sources or from existing contacts) in the first instance to determine if they would be willing to meet with me and discuss their experience with the EU/Italian Food GI system in their respective capacity as a food producer, Consortium, representative of a food industry based organisation or wine maker.

Once the Italian Interviewees responded and confirmed that they were interested in meeting with me, they were sent the following documents before the agreed meeting time: 855

- ‘Participant Information Sheet’ that set out information about the research project that explained that if they agreed to be interviewed, the discussion at the interview would include questions along the lines of those covered in the ‘Participant Information Sheet’ and that the interview would be recorded 856;
- ‘Consent Form’; 857 and
- ‘Independent Contacts and Complaints Procedure Sheet’. 858

All of these documents were translated into Italian from English for the Italian Interviewees.

5.3.2. Questions asked at interviews

The following questions were asked of all interviewees in the Italian Regions:

- General background about food product and producer and/or organization/Consortium.
- What GI level 859 is applicable to the producer, organization and/or Consortium?
- How long has the producer operated under a GI registration?
- Is there a Consortium that controls the usage of the GI relevant to your products?
- With what quality, attributes, characteristics and/or processes must the food producer comply? With what quality, attributes, characteristics and/or processes must the Consortium ensure compliance?
- What costs have food producers/Consortiums incurred in being part of the EU/Italian Food GI system?

855 These documents were sent to the Italian Interviewees in accordance with Ethics Approval No. HP-2013-075.

856 See Annex IV.

857 See Annex V.

858 See Annex VI.

859 The three GI levels will be explained further in part 5.6.2.1 of this Chapter.
• What have been some of the risks that food producers/Consortiums have incurred associated with operating under the EU/Italian Food GI system?
• What have been the benefits of operating under the EU/Italian GI system, such as marketing, recognition, authenticity of products?
• Do food producers, Consortiums and organizations see the EU/Italian GI system as worthwhile?
• Any other issues, locally or internationally, that need addressing, such as differences between sui generis GI protection vis-à-vis GI protection under trademark laws?

These questions were all translated for the Italian Interviewees from English into Italian. The semi-structured interviews were all conducted in Italian and were recorded, taking between 1-2 hours each. Following the interviews, the interview transcripts were collated and interpreted from Italian into English. The Italian Interviewees all had the right to withdraw from the research project at any point and this was stated in the ‘Consent Form’ and ‘Participant Information Sheet’, copies of which were left with the Italian Interviewees.

The answers provided by the Italian Interviewees to these questions have been drawn on to make the observations set out in parts 5.4.1 and 5.7 of this chapter. The answers reflect the Italian Interviewees’ personal experiences with their relevant Consortium and GI product. In most instances there were consistent responses to the questions. However, in some instances, the responses to the questions varied depending on whether the interviewee was a producer, a representative of an industry organization or a Consortium and depending upon the Italian Interviewees’ particular experiences with the EU/Italian Food GI system.

5.3.2.1 Aims and objectives of the interview questions

In relation to the EU/Italian Food GI system, I asked these questions with the intention to determine the following about the EU/Italian GI system:

• Does the EU/Italian Food GI system focus on protecting and recognizing the connection between product and origin, or is it more about trade rights and power?
• Does being part of the EU/Italian Food GI system provide Italian food producers with better legal protection and recognition for the connection between their food products and their origin, than trademark law and other laws such as passing off and anti-competition?
• Does the EU/Italian Food GI system provide producers with more recognition and value for their food products both at a national and international level?
• What are the costs, benefits and risks for producers and Consortiums involved with being part of the EU/Italian GI food system?
• What are their overall thoughts on the EU/Italian GI system?

5.4. Executive Summary

When the EU/Italian Food GI system was initially implemented in Italy in 1992, one of its core focuses was to legally recognise, protect and promote the connection between food and origin. However, over time this ideal has been somewhat lost. As
a result of conducting the Italian fieldwork it became apparent that some of the larger Consortiums involved in regulating the EU/Italian Food GI system are not effectively regulating the connection between food and origin. Instead of certifying and regulating that food products are clearly and strongly connected to a GI area in accordance with the prescribed rules for the relevant GIs, some of the larger Consortiums have become more concerned with their financial position than the quality of food products labelled with an EU/Italian GI. Therefore, many of the Italian Interviewees who were food producers discussed with me the problems that they have incurred with Consortiums in enforcing the EU/Italian Food GI system. As a result of ineffective regulation by some of the larger Consortiums, there are inferior quality products being labelled with an EU/Italian GI. This has undermined the value that exists in some EU/Italian GIs as indicators of food products that have a clear and strong connection with an Italian GI area. It has also created a disincentive among the relevant food producers to keep on investing in the EU/Italian Food GI system on the basis that other food producers who do not meet the prescribed criteria for a relevant GI can still use the relevant EU/Italian GI on their food product.

5.4.1. Observations of the EU–Italian food GI system

The following points summarise the key observations drawn from the Italian fieldwork:

- When the EU/Italian Food GI system was first introduced in Italy, the initial intentions behind the System were to: promote the products’ qualitative connection with its origin – often an Italian region - that brought with it benefits such as agritourism and regional food tourism; ensure that high-quality regional artisan food was produced and protected and identified with a GI; and provide education to consumers about the importance of regional artisan food and what it meant to have a GI attached to such food.

- Some of the larger Consortiums regulating the usage of EU/Italian GIs are not effectively regulating the connection between food and origin. Instead of certifying and regulating that food products are clearly and strongly connected to a GI area in accordance with the prescribed rules for the relevant GIs, some of the larger Consortiums have become more concerned with their financial position than the quality of food products labelled with an EU/Italian GI. As a result, the qualitative connection between food and origin has been undermined for the relevant GI food products. Inconsistency in the quality of products, and in the level of governance administered by some larger Consortiums has made Italian food producers who use the

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860 Saan Ecker, Rachel Clarke, Sophie Cartwright, Robert Kancans, Patty Please and Bill Binks, 'Drivers of regional agritourism and food tourism in Australia' (Australian Government Australian Bureau of Agricultural and Resource Economics - Bureau of Rural Sciences, 2010), 2: The terms agritourism and food tourism are used to refer to the act of going to a region for the purpose of visiting a working farm, winery or other food or fibre related operation (including restaurants, markets, produce outlets and natural attractions) for enjoyment, education or active participation in activities and events.
relevant EU/Italian GI question the credibility of the EU/Italian Food GI system.

• Not all Consortiums provide the same assistance to producers and many producers do not agree with the direction that Consortiums are taking. For Italian producers who have not had a very positive experience with their respective Consortium, they believe that Consortiums are more interested in making money quickly rather than ensuring a qualitative connection exists between product and origin and that all producers are in fact meeting the criteria necessary for them to be able to take advantage of using a GI on their products. Producers would like to be more involved with GI protection given their product knowledge and real appreciation for the connection between product and origin.

• Some Italian food producers have been faced with increasing costs in being part of the EU/Italian Food GI system and are not content with their return, many pulling out of the System and spending the money that they are saving in promoting their own products and brands.

• Notwithstanding GI protection, some Italian food producers face ongoing issues with competitors particularly international based companies that use Italian GIs on products made outside Italy that have no connection with the Italian GI. There have been disputes over trademark rights versus GIs with countries such as USA and Australia that rely on trademark systems to protect food GIs and generic terms.

• There has not been enough education for consumers on the EU/Italian Food GI system and what it means when a GI is attached to a food product. This is particularly true of international consumers outside the EU. Many of these consumers do not appreciate why GI branded products cost more than the non-GI version. They do not recognise that a region can influence a food’s flavour, quality and characteristics. On the other hand, most Italian and EU consumers do understand the EU/Italian Food GI system and can differentiate between GI products and non-GI products. The EU/Italian Food GI system could potentially add more value to products if there was proper education of what the system means for all consumers. Producers would like to see Consortiums take a more active role in educating consumers in this regard. They want consumers to better understand what a GI means in terms of quality and characteristics of product and that a GI also represents that there is a system of control of how the product is made and criteria that needs to be met before a GI can attach to a product.

5.5. Italian Fieldwork Findings on a Successful Food GI System

As a result of the Italian fieldwork, I made the following findings in relation to features that are beneficial in, and crucial to, supporting an effective *sui generis* food GI system:

• There must be a qualitative connection between product and origin. This is what a food GI system should be about and while many Italian GI Consortiums still regulate this connection, some of the larger Consortiums do not.

• There must be clear *ex ante* guidance and criteria in place for producers to refer to in order to understand when and how they can use a GI on their food
products. The criteria must be practical reflecting the actual connection that does exist between product and origin and must establish a uniform standard across producers. To this end, it is useful to involve producers in establishing the rules/criteria that are relevant to their products in order to have a GI attached to them.

- There needs to be one main governing body that carries out the due diligence of the food GI system to ensure that all criteria is applied fairly and equally to producers wishing to use the GI on their products. This body must regulate that GIs are only attached to products that meet the relevant criteria. It is important that the governing body consistently and effectively regulate the connection between food and origin.

- Costs involved with using a food GI system need to be maintained at a fair standard so that all participating producers can afford to be part of the system.

- Education on what a food GI system represents and how it works is needed for food industry organizations (from manufacturers and retailers to restaurants), producers and consumers. Education is required early in the process of implementing a food GI system so that everyone understands what a GI represents in terms of: the quality and characteristics of the product (including information about its origin and core ingredients sourced from there); and signifying that a legal framework of control/audit exists to ensure that criteria has been met for the product to qualify having a GI attached to it.

- A food GI system needs to cater for a country’s international trade obligations regarding GIs and food terms, as well as other general trade obligations, in order to secure a proper balance of the ideal of protecting the qualitative connection between food and origin with trade, economic, and political issues.

All these elements will be further addressed throughout this chapter as well as in Chapters 6 and 7.

5.6. EU–Italian Food GI System

5.6.1. EU and its Common Agricultural Policy

Since the EU’s inception in November 1993, the EU has recognised, promoted and protected the value in its ‘agri-food’ sector across all of its Member States. Agri-food quality is one of the EU’s key focus pillars in its Common Agricultural Policy (CAP) as discussed in Chapter 4. As part of the CAP’s rules, European agri-food products are subject to a wide range of legislation covering food safety,

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861 Italy was one of the original six founders of the EU.

862 Rosati, above n 659, 4: ‘Agri-food’ quality is “closely related to the identity, tradition and culture of Europe, as well as to respect for the right to food, which is an integral part of a person’s fundamental rights. Quality is synonymous with authenticity, typicality and tradition, with the vitality of disadvantaged areas, local employment, consumer rights, the preservation of rural landscapes and biodiversity and it represents productions that respect public health, the welfare of animals and plants as well as the environment.”
marketing, labelling and European quality systems. The following three different EU quality systems, with specific regulations, apply to EU agri-food products:

- Geographical Indications - recognised at EU level and based on regulations regarding Protected Designations of Origin (PDO), Protected Geographical Indications (PGI) and Traditional Specialties Guaranteed (TSG) products (EU/Italian Food GI system);
- Organic agricultural products – recognised at European level and based on a specific regulation,\(^\text{863}\) and
- Quality products – recognised at national level through Superior National Quality Systems provided for by single member states.\(^\text{864}\)

The focus in this chapter is on the EU/Italian Food GI system given that it is an example of a \textit{sui generis} food GI system that has been operating since 1992. Italy currently has 294 food GI registrations\(^\text{865}\) under the EU/Italian Food GI system, the highest number of food GI registrations in the EU.

5.6.2. EU food GI system

5.6.2.1 Overview of EU Food GI Regulations from 1992 to today

1992: Regulation 2081/92

In 1992, the Council of the European Communities Regulation (EEC) No 2081/1992 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (“Regulation 2081/92”)\(^\text{866}\) was introduced. Regulation 2081/92 established a sui generis food GI system that provided strict protection for EU food GIs.

Regulation 2081/92 provided for EU-wide protection of names of agricultural products and foodstuffs that had a close link to their geographic region of production. It prevented the use of registered names unless the products were produced in a specified territory and according to a certain production specification.\(^\text{867}\) Regulation 2081/92 aimed to add value to specific high-quality products from a demarcated geographical area, and to promote the diversification

\(^{863}\) EC Regulation 834/2007; EC Regulation 203/2012.

\(^{864}\) EC Regulation 1974/2006 and EC Regulation 1698/2005; Law 4 of February 3 2011 – Labelling provisions and food quality; MD March 4\textsuperscript{th} 2011 – Regulation of the national quality scheme for zoo-technology.

\(^{865}\) This number is current as at October 2017. Sourced from Qualivita http://www.qualivita.it/statistiche-italia/.


of agricultural production by acknowledging the value of rare or disappearing resources.\textsuperscript{868}

Furthermore, Regulation 2081/92 provided protection to names of products produced in third countries (that is outside the EU), where those names were themselves protected in their own country of origin.\textsuperscript{869} Article 2 of Regulation 2081/1992 introduced two levels of protection for agricultural products and foodstuffs - Protected Designation of Origin (PDO)\textsuperscript{870} and Protected Geographical Indication (PGI).\textsuperscript{871}

The main differences between a PDO and PGI registration are that a PDO registration requires that the food product to which it attaches originate from a defined territory where the production stages are carried out and where the recognised specific product qualities come from. This is the highest level of protection given it has the strictest requirements for connection between product and the geographical location.\textsuperscript{872} On the other hand, a PGI registration requires that the food product originates from a territory to which a given quality, reputation or other characteristic can be attributed and in which at least one of the production stages took place. This still requires a connection between product and the geographical location but the link with the geographical area does not need to be ‘essential or exclusive’, only causal.\textsuperscript{873}

These two levels of GI protection therefore accommodate different types of food producers and products. The PDO is the highest GI level of protection provided to food products that are made using locally sourced ingredients and within a region and that also have a quality, characteristic or reputation that is ‘essentially

\textsuperscript{868} Fabio Parasecoli, Food Culture in Italy (Greenwood Press, 2004), 37.

\textsuperscript{869} Ibid.

\textsuperscript{870} Regulation 2081/92 art 2.2(a) provided that a PDO was: the name of a region, a specific place or, in exceptional cases, a country, used to describe an agricultural product or a foodstuff: originating in that region, specific place or country; and the quality of the characteristics of which are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors; and the production, processing and preparation of which take place in the defined geographical area. Art 2.4 further explained that in relation to PDOs: certain geographical designations shall be treated as designations of origin where the raw materials of the products concerned come from a geographical area larger than or different from the processing area, provided that: the production area of the raw materials is limited; special conditions for the production of the raw materials exist; and there are inspection arrangements to ensure that those conditions are adhered to.

\textsuperscript{871} Regulation 2081/92 art 2.2(b) provided that a PGI was: means the name of a region, a specific place or, in exceptional cases, a country, used to describe an agricultural product or a foodstuff: originating in that region, specific place or country; and which possesses a specific quality, reputation or other characteristics attributable to that geographical origin; and the production and/or preparation of which take place in the defined geographical area.

\textsuperscript{872} London Economics and ADAS and Ecologic, above n 900, 6.

\textsuperscript{873} Ibid.
attributable’ to its regional origin. This might include that a food product has been made using processes and methods that are traditionally used within a GI area to make the food product, or that the food product has been made in accordance with a prescribed method. Examples of Italian PDO food products are explained throughout this chapter in the context of the Italian food products researched as part of the Italian fieldwork.

The second level of GI protection is the PGI registration. A PGI registration applies to a food product that has been made using locally sourced ingredients from the GI area, and that has been either totally or partially made within a GI area. This GI level therefore accommodates food products that have some production stages that need to take place outside the GI region. A PGI registration also does not require that a given quality, reputation or other characteristic be ‘essentially attributable’ to the GI region. There still needs to be a connection between food and origin based on locally sourcing ingredients used to make the food product and place of production but does not necessarily require that a food product have a quality, reputation or other characteristic that is ‘essentially attributable’ to the regional origin.

In Chapter 3, I recommended that an Australian sui generis food GI system provide two levels of GI protection in a similar vein to the PDO and PGI levels provided under the EU/Italian Food GI system. The first basic-level GI proposed is similar to the PGI registration in that it requires that regional food products be made using locally sourced core ingredients and that it be made within the GI region. As explained in Chapter 3 in the context of the first and second criterion recommended for an Australian sui generis food GI system, I recommend that a high percentage of locally sourced core ingredients and production stages be required. Where these criteria are met by a food producer, then this would allow them to use a first level food GI on their food product.

Where a food producer establishes the first and second criterion and also establishes that their food product has a quality, reputation or other characteristic that is ‘essentially attributable’ to its regional origin, I recommend that they be able to use a second, higher-level GI on their food products. This would be very similar to a PDO registration under the EU/Italian Food GI system. A food product might have been made using a particular process and method that is only used within the GI region to make the regional food product. A food product might have been made using a prescribed method or the food might have a particular flavour that is essentially attributable to its regional origin. This could be as a result of geographical and/or human factors. Where a food product satisfies this criteria, it will be able to be labelled with a second, higher-level GI. In order to distinguish between the two levels, different logos/seals will need to be designed similar to the PDO and PGI seals displayed above. This will be discussed further in Chapter 7.

2006: Regulation 510/2006

Regulation 2081/92 was revoked by the Council of European Union Regulation (EC) No 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (‘Regulation
The main differences between Regulation 2081/92 and Regulation 510/2006 were:

- Direct applications could be made from third country producers for PDO/PGI Registration in the EU, while previously these producers had to apply through their national authorities that may not have always been able, or willing, to process the application.
- The application process had to be examined by EU Member States using rules set at EU level to ensure uniformity across the EU Member States.
- Enforcement activities were prescribed relating to official controls performed to ensure verification of compliance with feed and food law, animal health and animal welfare rules. 875
- Labelling of products marketed under a registered name needed to include either the European Community indications of geographic origin or the European Community symbols as follows:

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875 London Economics and ADAS and Ecologic, above n 900, 16-17.

On the same day as Regulation 510/2006 was introduced, *Council of European Union Regulation (EC) No 509/2006 of 20 March 2006 on agricultural products and foodstuffs as traditional specialties guaranteed* also commenced (‘Regulation 509/2006’). This Regulation applied to agricultural products and foodstuffs that

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876 Regulation 510/2006 art 8.


878 Council of European Union Regulation (EC) No 509/2006 of 20 March 2006 on agricultural products and foodstuffs as traditional specialties guaranteed also commenced (‘Regulation 509/2006’).
were produced using traditional raw materials or according to traditional production or processing method.\textsuperscript{879}

These products would come to be known as products that had Traditional Specialties Guaranteed (TSG). Unlike PDOs and PGIs, the TSG designation does not refer to an origin, but identifies a traditional composition or means of production of the product. The name must be specific and indicate the specific character of the agricultural product or foodstuff that distinguishes it clearly from other similar products or foodstuffs of the same category.\textsuperscript{880} In order to qualify as ‘traditional’, Article 2 of Regulation 509/2006 stated that ‘traditional’ referred to products that, at the time of enactment of the Regulation, had proven usage on the EC market for a time period of at least 25 years.\textsuperscript{881} Names of a general nature, or that were misleading for consumers, were not to be registered.

The following symbol was introduced under \textit{European Commission Regulation (EC) No 1216/2007 of October 2007 laying down detailed rules for the implementation of Council of European Union Regulation (EC) No 509/2006 of 20 March 2006 on agricultural products and foodstuffs as traditional specialties guaranteed} (‘\textit{Regulation 1216/2007}’)\textsuperscript{882} to identify TSG food products:

\begin{center}
\includegraphics[width=0.3\textwidth]{https://passionhorticulture.files.wordpress.com/2014/05/protected-food.jpg}
\end{center}

\noindent\textbf{Figure 5.3: TSG food labeling}

\noindentSource: https://passionhorticulture.files.wordpress.com/2014/05/protected-food.jpg

\textit{2012 and today: Regulation 1151/2012 - Current law for EU food GI system}

In 2012, Regulation (EU) No. 1151/2012 of the European Parliament and Council of 21 November 2012 on quality systems for agricultural products and foodstuffs (‘\textit{Regulation 1151/2012}’) was passed and repealed Regulation 509/2006 and

\textsuperscript{879} Regulation 509/2006 art 4.

\textsuperscript{880} Regulation 509/2006 art 2.

\textsuperscript{881} Regulation 509/2006 art 2.

Regulation 510/2006. Regulation 1151/2012 “today represents the common point of reference for all the certified quality systems for Geographical Indications of agri-food products” for the EU.

Regulation 1151/2012 was implemented to bring more clarity and transparency to EU food GIs than was offered under Regulation 510/2006. It has the following effects:

- It limits the scope for PDOs and PGIs to apply to products that have an “intrinsic link between product or foodstuff characteristics and geographical origin.”
- It requires information on products with specific characteristics linked to geographical origin to enable consumers to make more informed purchasing choices. This is to assist with securing a fair return for farmers and producers for the qualities and characteristics of a given product, or of its mode of production.
- It clarifies and simplifies some rules by streamlining the procedures of the EU food GI system as a result of workings under Regulation 2081/92 and Regulation 510/2006.
- It also modifies definitions of PDO and PGI in order to better take into account the definition of GI in the TRIPS Agreement and to make them easier to understand, with a focus on clarifying how to identify the link between the product and its geographical origin.

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883 Regulation EU No. 1151/2012 of the European Parliament and Council of 21 November 2012 on quality systems for agricultural products and foodstuffs (‘EU Regulation 1151/2012’) art 1 summarises its main purpose as follows: This Regulation aims to help producers of agricultural products and foodstuffs to communicate the product characteristics and farming attributes of those products and foodstuffs to buyers and consumers, thereby ensuring: (a) Fair competition for farmers and producers of agricultural products and foodstuffs having value-adding characteristics and attributes; (b) The availability to consumers of reliable information pertaining to such products; (c) Respect for intellectual property rights; and (d) The integrity of the internal market. The measures set out in this Regulation are intended to support agricultural and processing activities and the farming systems associated with high quality products, thereby contributing to the achievement of rural development policy objectives. Article 2 further elaborates on the quality systems established pursuant to the Regulation as follows: This Regulation established quality systems which provide the basis for identification and, where appropriate, protection of names and terms that, in particular, indicate or describe agricultural products with: (a) Value-adding characteristics; or (b) Value-adding attributes as a result of the farming or processing methods used in their production, or of the place of their production or marketing.

884 Rosati, above n 659, 5.

885 EU Regulation 1151/2012 para 14.

886 EU Regulation 1151/2012 para 17.

887 EU Regulation 1151/2012 para 18.

888 EU Regulation 1151/2012 para 21.

889 EU Regulation 1151/2012 para 22.
• It “improves, clarifies and sharpens” the TSG system started off by Regulation 509/2006 given that only a few names had been registered by the time Regulation 1151/2012 was introduced. The aim was to “make the system more understandable, operational and attractive to potential applicants” and “to help producers of traditional products communicate to consumers the value adding attributes of their product.”\textsuperscript{890} Articles 17 to inclusive of Regulation 1151/2012 set out the new system for TSG registrations.

2012: Three further Regulations enacted relating to the practical application of Regulation 1151/2012 – Quality Package

In addition to Regulation 1151/2012, three further Regulations were issued by the EU relating to the practical application of the system set out in Regulation 1151/2012:

• Commission Delegated Regulation (EU) No 664/2014 of 18 December 2013 supplementing Regulation (EU) No 1151/2012 of the European Parliament and of the Council with regard to the establishment of the Union symbols for protected designations of origin, protected geographical indications and traditional specialties guaranteed and with regard to certain rules on sourcing, certain procedural rules and certain additional transitional rules (‘Delegated Regulation 664/2014’).\textsuperscript{891} This Regulation replaces the rules in Regulation 510/2006 and Regulation 509/2006, and their respective implementing rules of regulation, regarding the EU symbols for PDOs, PGIs and TSGs.


\textsuperscript{890} EU Regulation 1151/2012 para 34.

\textsuperscript{891} Commission Delegated Regulation (EU) No 664/2014 of 18 December 2013 supplementing Regulation (EU) No 1151/2012 of the European Parliament and of the Council with regard to the establishment of the Union symbols for protected designations of origin, protected geographical indications and traditional specialties guaranteed and with regard to certain rules on sourcing, certain procedural rules and certain additional transitional rules (‘Delegated Regulation 664/2014’).


These three Regulations, together with Regulation 1151/2012, are collectively referred to as the ‘EU Food GI Quality Package’. Implementing Regulation 668/2014 does provide the clarity and transparency promised by Regulation 1151/2012, on various important aspects of the EU system for foodstuff. Article 2 clearly sets out that the geographical area used on a product needs to be “defined in a precise way that presents no ambiguities, referring as far as possible to physical or administrative boundaries.” Article 4 sets out clear rules in relation to proof of origin of a product, requiring that a PDO or PGI product identifies “the procedures which operators must have in place as regards the proof of origin concerning the product, raw materials, feed and other items that...are required to come from the defined geographical area.” In Article 7, there are specific rules set out for the description of PDO, PGI and TSG products, and the production method. Article 13 refers to the PDO, PGI and TSG symbols that must be used on products to clearly identify them and distinguish which registration they have. Once there is a legal instrument registering a PDO, PGI or TSG, the

894 Rosati, above n 659, 4.
897 Commission Implementing Regulation (EU) No 668/2014 of 13 June 2014 laying down rules for the application of Regulation (EU) No 1151/2012 of the European Parliament and of the Council on quality systems for agricultural products and foodstuffs art 7. For a PDO or PGI, art 7.1 provides that the description must focus on the: specificity of the product bearing the name to be registered, using measurement units and common or technical terms of comparison, without including technical characteristics inherent to all products of that type and related mandatory legal requirements applicable to all products of that type. For a TSG, art 7.2 provides that the description need only mention the characteristics necessary to identify the product and its specific characteristics. It shall not repeat general obligations, and...technical characteristics inherent to all products of that type and related mandatory legal requirements. The description of the production method...shall only include the production method in force. Historical practices are only to be included if they are still allowed. Only the method necessary for obtaining the specific product shall be described and in way that enables reproduction of the product anywhere. The key points proving the product’s traditional character shall include the main elements that have remained unchanged, with precise and well-established references.
898 See Figures 5.1 to 5.3 for these symbols.
EC must record data in the Register of PDOs, PGIs and TSGs, in accordance with requirements that are specifically set out in Article 14.899

5.6.3. Italy’s national food GI laws

Italy has a long history of protecting regional names used on food products and providing GI protection to the connection between food and origin. Before Italy was part of the EU and adopted EU laws and regulations regarding GIs for wines and foods, Italy had its own national GI laws. Italy’s first food GI law was introduced in 1954 with a system for the protection of designations of origin for cheeses, to regulate original and typical products.900 This Law was subsequently enforced by Presidential Decrees No. 667/1955 and 1269/1955 that provided for the recognition of designation of origin for cheeses such as Fontina, Gorgonzola, Grana Padano, Parmigiano-Reggiano, Pecorino Romano, Pecorino Siciliano and Asiago.901 A Consortium902 regulated the cheese system to ensure that the protected cheeses were made according to prescribed production methods in regulated production areas and had the necessary characteristics and qualities to be valid for the designation of origin protection.

In 1951 Italy became a party member to the Stresa Convention of 1 June 1951 on the use of Designation of Origin and Names for Cheeses, which was implemented in Italy with Presidential Decree No. 1099/1953. In 1954, Law No. 125 was enacted in Italy and contained a “description of the qualities and the production areas of certain types of cheese” whose designation of origin had already been protected under the obligations undertaken with the Stresa Convention.903 The first cheeses to be protected under Law No. 125/54 were Gorgonzola, Parmigiano-Reggiano and Pecorino Romano.

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899 Commission Implementing Regulation (EU) No 668/2014 of 13 June 2014 laying down rules for the application of Regulation (EU) No 1151/2012 of the European Parliament and of the Council on quality systems for agricultural products and foodstuffs art 14. For PDO and PGI registrations, the Commission needs to record the following data in the Register of PDOs “(a) the registered name of the product; (b) the class of the product as referred to in Annex XI to this Regulation; (c) reference to the instrument registering the name; (d) information that the name is protected as a GI or as a designation of origin; (e) indication of the country or countries of origin.” For TSG registrations, the Commission needs to record the following data in the Register of TSGs: (a) the registered name of the product; (b) the class of the product as referred to in Annex XI to this Regulation; (c) reference to the instrument registering the name; (d) indication of the country or countries of the group or groups that made the application; (e) information whether the decision on registration provides that the name of the TSG is to be accompanied by the claim as referred to in Article 18(3) of Regulation 1151/2012; (f) only for applications received before the entry into force of Regulation 1151/2012, information whether the registration is without reservation of the name.

900 Law No. 125/1954 D.P.R.


902 The Consortium was called Consorzi Volontari di Produzione.

903 O'Connor, above n 934, 186.
After 1970 Italy began to introduce protection of GI and designations of origin for other agricultural products. Separate Italian legislation for designations of origin of Parma (Law No. 506 of 4 July 1970), San Daniele (Law No. 507 of 4 July 1970), and Berico-Euganeo hams (Law No. 628 of 4 November 1981) were introduced. “Each of these acts was followed by an implementing regulation. The legislation allowed the Ministries of Agriculture and Industry and Trade to entrust specific consortia with the task of ensuring the respect of production standards. Even though the rules [were] product specific, the general approach [was] the same in relation to each product.” Law No. 11 of 12 January 1990 and then Law No. 24 of 30 January 1992 introduced a protected designation of origin for Modena ham.

Olive oil was the next product to be granted a protected designation of origin with Law No. 169/1992 which provided for the establishment of a National Committee for the Protection of Designations of Origin of Oils. That Committee had a consultative role with regard to the rules on the production of oils bearing a designation of origin and made proposals for the improvement of production and distribution of products. Article 19 of Law No. 169/1992 provides for the “constitution and the recognition of product consortia, whose task is to supervise the use of the designation of origin for a specific type of oil. The members of the consortium must produce at least 30% of the oil bearing the designation of origin concerned.”

In addition to Italy’s national food GI/designation of origin legislation, Italy also entered into various bilateral agreements with France, Germany, Spain and Austria, from the 1940s to early 1990 (before the EU was established) with an effort to protecting its GIs/designations of origin. Some bilateral agreements included:

- Agreement of the protection of designations of origin and the protection of names of certain products, signed in Rome between Italy and France on 29 May 1948;
- Agreement between Italy and the Federal Republic of Germany concerning the protection of GI, signed in Bonn on 23 July 1963;
- Agreement between Italy and Spain on the protection of GI, designations of origin and names of certain products, signed in Madrid on 9 April 1975; and

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905 Law No. 45 of 23 March 1990 replaced the 1970 law relating to San Daniele ham.

906 O’Connor, above n 934, 187.

907 Ibid.

908 Ibid.

909 Ibid.

910 Law No 766 of 18 July 1949, GURI, 29/10/1949 No 250.


• Agreement between Italy and Austria on geographic origin names and designation of certain products signed in Vienna on 17 December 1969.\textsuperscript{913}

5.6.4. Italy’s adoption of the EU food GI system

Italy, as a Member State of the EU, has adopted the EU food GI system since its inception in 1992. The Industrial Property Code (Legislative Decree No. 30 of February 10, 2005 as amended up to Decree-Law No 1 of January 24, 2012, converted into law with changes by Law No. 27 of March 24, 2012) (‘Italian Code’)\textsuperscript{914} is Italy’s current national law in relation to GIs for food and agricultural products. The Italian Code was drafted in the context of the EU’s Food GI System, and captures the main elements of EU Regulation 1151/2012 and the EU Food GI Quality Package. The Italian Code together with EU Regulation 1151/2012 and the EU Food GI Quality Package are referred to throughout this thesis as the \textbf{EU/Italian Food GI system}.\textsuperscript{915} The Italian laws that preceded the various EU food GI Regulations have remained in force, but only in so far as they are compatible with EU Regulation 1151/2012 and the EU Food GI Quality Package.\textsuperscript{916}

Under the EU/Italian Food GI system, the connection between food and origin can be protected as EU and nationally recognised GIs adopting Regulation 1151/2012 definitions of PDO, PGI and TSG and as ‘traditional products’. In Italy, a PDO, PGI or a TSG registration can be applied for by a public entity – such as a region or a private entity – such as a Consortium or an association of producer groups. An application for GI registration must comply with the criteria in Regulation 1151/2012 and must be sent to the National Committee for Designations of Origin and then forwarded to the Minister of Agricultural Policy who makes the decision on registration and national protection. The \textit{Italian Code} provides that for every registered product there must be an inspection body, public or private, formally authorized by the Ministry of Agricultural Policy. The \textit{Ispettorato Centrale Repressioni Frodi} and the relevant local authorities oversee the inspection work conducted by these independent bodies. The Ministry of Agricultural, Food and Forestry Policies is the national authority in charge of coordinating inspection activities. A formally appointed public or private body authorized by ministerial decree carries out the inspections. Each body may be in charge of inspecting one or

\textsuperscript{913} Presidential Decree No 394 of 8 April 1972, GURI, 9/8/1972, No 207.

\textsuperscript{914} Industrial Property Code (Legislative Decree No. 30 of February 10, 2005 as amended up to Decree-Law No 1 of January 24, 2012, converted into law with changes by Law No. 27 of March 24, 2012) (‘Italian Code’).

\textsuperscript{915} The Italian national authority responsible for GIs is the Ministry of Agricultural, Food and Forestry Policies, and the current Minister is Maurizio Martina.

\textsuperscript{916} O’Connor, above n 934, 188: for example, \textit{Italian Article 53 of Law} 128/1998 implemented aspects of EU Regulation 2081/92 that related to inspection structures, stipulating that an independent body should manage these. \textit{Italian Article 14 of Law} 526 of 21 December 1999 redefined the role and limits of Consortiums. \textit{Italian Ministerial Decree of 3 November 1995} established the Ispettorato Centrale Repressioni Frodi as the central inspection body, and \textit{Italian Ministerial Decree of 18 December 1997} gave the Ministry of Agriculture the role of coordinating inspection at the national level.
more PDO products. The Italian Code provides for the rules on cooperation between the private consortia for the protection of PDOs and PGIs with the Ispettorato Centrale Repressioni Frodi.\footnote{Industrial Property Code (Legislative Decree No. 30 of February 10, 2005 as amended up to Decree Law No 1 of January 24, 2012, converted into law with changes by Law No. 27 of March 24, 2012) s II.} Currently Italy has the highest EU food and wine GI registrations with a total of 858 GIs. Italy also has the highest food GI registrations with 294 namely, 167 PDOs, 125 PGIs and 2 TSGs.\footnote{This number is current as at October 2017. Sourced from Qualivita \url{http://www.qualivita.it/statistiche-italia/}.}

Italy also has specific protection for ‘traditional products’. Article 8 of Legislative Decree No 173 of 30 April 1998 defines ‘traditional products’ as “products distinguished in relation to their production, preservation and maturing methods, which must have been used for a relevant period of time”\footnote{Legislative Decree No 173 of 30 April 1998, Article 8.} (Article 8)\footnote{Ibid.}. Article 8 stipulates that the Regions and the Autonomous Provinces of Trento and Bolzano must draft a list of traditional products recognised at a local level. The Regions and the Autonomous Provinces have the duty to ensure that the production methods of traditional products have remained unchanged for at least 25 years. The list of traditional products contains the following information regarding the traditional products: the names; the main features; the production method; materials and tools used for the production and conditioning and packaging.\footnote{Ministerial Decree 20 June 2014.} Once the regional lists are completed, the Ministry of Agriculture set up a national list of traditional products that is updated yearly. As at June 2014, there are 4000 products registered as ‘traditional products’.\footnote{O’Connor, above n 934, 190.}

The main difference between a PDO, PDI and TSG registration compared to being listed as a ‘traditional product’ is that “the inclusion of certain products in the national list does not confer any exclusive rights. In particular, such registration cannot be considered as recognition of the provenance of a product from the territory to which the registered name relates. The purpose of this list is to protect and promote national food heritage.”\footnote{It is therefore apparent that food GIs have been historically recognised in Italy and that GI protection is embedded in Italian food culture. As explained in Chapters 3 and 4 this is vastly different to Australia’s position that has historically not placed much significance or emphasis on GI protection other than in relation to wines and spirits that came as a result of the trade concessions that the Australian wine industry received from the EC/EU in negotiating the 1994 and 2010 Wine Treaties.}

5.6.5. Focus on Italian PDO and PGI registrations

As part of the fieldwork in the Italian Regions, I focused on the following PDO and PGI registrations and interviewed the corresponding producer and/or Consortiums.
Table 5.1: Italian PDO and PDI Registration Producers and Consortiums

<table>
<thead>
<tr>
<th>Region</th>
<th>Product</th>
<th>PDO</th>
<th>PGI</th>
<th>Producer</th>
<th>Consortium</th>
</tr>
</thead>
<tbody>
<tr>
<td>Piedmont</td>
<td>Grana Padano (cheese)⁹²³</td>
<td>√</td>
<td></td>
<td>Fattorie Fiandino</td>
<td></td>
</tr>
<tr>
<td>Piedmont</td>
<td>Toma (cheese)</td>
<td>√</td>
<td></td>
<td>Fattorie Fiandino</td>
<td></td>
</tr>
<tr>
<td>Piedmont</td>
<td>Taleggio (cheese)</td>
<td>√</td>
<td></td>
<td>Giolito Formaggi</td>
<td></td>
</tr>
<tr>
<td>Piedmont</td>
<td>Prosciutto di Cuneo (cured meat)</td>
<td>√</td>
<td></td>
<td>Prosciutto di Cuneo</td>
<td>Consorzio di Tutela di Prosciutto di Cuneo</td>
</tr>
<tr>
<td>Emilia-Romagna</td>
<td>Prosciutto di Parma (cured meat)</td>
<td>√</td>
<td></td>
<td>Ruliano Prosciutto</td>
<td>Consorzio di Tutela di Prosciutto di Parma</td>
</tr>
<tr>
<td>Emilia-Romagna</td>
<td>Aceto Balsamico</td>
<td>√</td>
<td></td>
<td>Acetaia Villa Bianca</td>
<td>Consorzio Produttori Antiche Acetaie</td>
</tr>
<tr>
<td>Tuscany</td>
<td>Pecorino Toscano (cheese)</td>
<td>√</td>
<td></td>
<td></td>
<td>Consorzio del Pecorino Toscano</td>
</tr>
<tr>
<td>Tuscany</td>
<td>Toscano Extra Virgin Olive Oil (oil)</td>
<td>√</td>
<td></td>
<td>OL.MA and Tenute Bruni</td>
<td>OL.MA</td>
</tr>
</tbody>
</table>

⁹²³ Mauro Rosati, 'Geographical Indications: A different way to access the global food market; The DOP IGP as a success factor' (2015), 11, ('Geographical Indications: A different way to access the global food market') <http://www.qualivita.it/en/>: Grana Padano PDO cheese is one of Italy’s current top 10 Italian GI exports worth approximately 530 million Euros.

⁹²⁴ Mauro Rosati, ‘Geographical Indications: A different way to access the global food market; The DOP IGP as a success factor’ (2015), 11, ('Geographical Indications: A different way to access the global food market') <http://www.qualivita.it/en/>: Prosciutto di Parma PDO is one of Italy’s current top 10 Italian GI exports worth approximately 241 million Euros.
I also interviewed the following food industry based organisations and winemakers:

<table>
<thead>
<tr>
<th>Region</th>
<th>Organisation</th>
<th>Industry</th>
</tr>
</thead>
<tbody>
<tr>
<td>Piedmont</td>
<td>Cascina Corte</td>
<td>Wine(^{925})</td>
</tr>
<tr>
<td>Piedmont</td>
<td>Ascheri</td>
<td>Wine, food and agritourism</td>
</tr>
<tr>
<td>Emilia-Romagna</td>
<td>Academia Barilla</td>
<td>Food, education centre for Italian Gastronomy</td>
</tr>
<tr>
<td>Tuscany</td>
<td>Qualivita</td>
<td>Organisation that gathers information on all Italian GIs and works closely with the Ministry of Agriculture</td>
</tr>
<tr>
<td>Tuscany</td>
<td>Tenute Bruni</td>
<td>Wine</td>
</tr>
</tbody>
</table>

I refer to the producers, Consortia, food industry based organisations and winemakers, collectively as the ‘Italian Interviewees.’

5.7. Findings from Fieldwork: Practical Effect of EU–Italian Food GI System

As set out in part 5.3.2.1 of this Chapter, my aims and objectives in interviewing the Italian Interviewees were to obtain the following insights into the EU/Italian Food GI system:”

5.7.1. Does the EU–Italian Food GI system focus on protecting and recognising the connection between product and origin or is it more about trade rights and power?

Many of the Italian Interviewees told me that while the EU/Italian Food GI system started off with the right intention of recognising and protecting the connection between food and origin, the EU/Italian Food GI system has to a certain extent, lost sight of this ideal, during the last 15 years. This was predominantly the opinion of those Italian Interviewees who are food producers and who have been operating under the EU/Italian Food GI system as regulated by a large Consortium. Those Italian Interviewees expressed their concerns that the EU/Italian Food GI system

\(^{925}\) Parasecoli, above n 901, 37: While Italy’s Wine GI System is not the focus of this thesis, I interviewed three wine producers given that they have operated pursuant to a GI system since the 1980s and have useful insight into the workings of a GI system. In 1963, Italian *Law No. 930 of 1963* (Law No. 930) introduced the concept of Controlled Denomination of Origin (DOC) and Denomination of Controlled and Guaranteed Origin (DOCG) and defined the precise role of the Wine Consortia. Law No. 930 introduced a very similar wine protection system to that of the French Appellation of Origin Control, which for France had the effect of enhancing “wine quality…and consumers [being] ready to pay more for wines that had received some sort of recognition from the state. It was a system that had paid off.” In fact, this has also been Italy’s wine experience. O’Connor, above n 934, 181: *Law No. 930* established a difference between table wines and quality wines. As O’Connor identifies, *Law No. 930* “defined the fundamental principles and the main features of the system for the protection of geographical indications of wines in Italy. The Presidential Decree represents the model for the subsequent legislation applicable to GI for foodstuffs.” In 1992, a new wine classification Typical GI (IGT) was introduced pursuant to *Law No. 164 of 1992.*
has become more about the Consortiums’ financial position rather than quality control, and that the true meaning of protecting the connection between food and origin has been somewhat lost. In their view, the large Consortiums do not regulate the connection between food and origin as they used to when the System first started. In their view, lack of regulation by larger Consortiums, means that Italian PDO and PGI registrations have lost some of their original value and significance. Those Italian Interviewees explained that when the EU/Italian Food GI system commenced, it represented quality and was a trustworthy System for producers and consumers alike. In interviewing Qualivita’s General Director, Mauro Rosati, he provided historical background information regarding why Italy was keen to implement the EU food GI system. Italy wanted a system that “people could trust in so that they could know that they were eating an Italian product and that it was of high quality and made to a certain standard.” However, in the view of some of the Italian Interviewees, today the System in is not as effective and the value that a PDO/PGI registration brings to food products and producers has decreased because of inconsistent regulation and monitoring by some of the larger Consortiums. This has undermined the trustworthiness in the fact that PDOs and PGIs represent that there is a qualitative connection between food and origin. Cheese producer Giolito Formaggi recounted that the EU/Italian Food GI system:

Started off well and with the right intentions, but then things changed. PDO registration is meant to give you a name and a certification of origin. Where this is actually true and authentic—that is the origin and product is true to the label—then the System is working well. The problem arises where many times other users use a geographical location name on their product and it’s not true to the product. They use it to pass off as having some quality or association connected with the true origin and product. They know that there is value in attaching a PDO, but are falsely doing so...If there was a system of control and governance behind the PDO system, then this type of passing off would not be happening. The rules and regulations need to be adhered to and need to be governed. Consortiums need to be serious and carry out proper governance all the time. Many Consortiums do not do this.

Therefore, for the Italian Interviewees who are food producers and who have been operating under the EU/Italian Food GI system as regulated by a large Consortium, their view of the EU/Italian Food GI system is that while it started off with the right intention of recognising and protecting the connection between food and origin, the EU/Italian Food GI system has to a certain extent lost sight of this ideal.

926 Interview with Mauro Rosati, General Director, Qualivita, (Siena, Tuscany, Italy 19 September 2014).
927 Interview with Fiorenzo Giolitto, Director of Giolitto Formaggi, (Bra, Piedmont, Italy, 11 September, 2014).
5.7.1.1 Example of PDO registration/large consortium: Grana Padano PDO cheese

An example of a PDO product that is not as regulated as it once was is the Grana Padano PDO cheese. As there has been an increase in the number of producers making the cheese, and using the PDO registration, to meet market demand, Fattorie Fiandino and Giolito Formaggi explained that the Consortium does not have the time to go out and visit all the cheese producers, and carry out proper regulation of the criteria required to be met by producers to be able to use the PDO registration on their cheese. As a consequence, the regulation required to ensure that there is the qualitative connection between the cheese and origin, and that the cheese has been made in compliance with the prescribed production method, is

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928 Rosati, above n 659, 71. Grana Padano PDO is a hard and fine-grated cheese produced from raw cow’s milk originating from cows that are milked twice a day and fed with green or preserved fodder from the immediate production area. The production areas of Grana Padano PDO are throughout the regions of Piedmont, Lombardy, Trentino-Alto Adige, Veneto and Emilia-Romagna. This is a large production area and contributes to some of the problems that the Consortium has in carrying out consistent governance across all producers. In relation to the fieldwork, the focus production area for the cheese was within the territory of the provinces Alessandria, Asti, Biella, Cuneo, Novara, Turin, Verbania and Vercelli in the Piedmont region. The production method that is required for the cheese to be branded with the PDO registration is: The milk is partially skimmed throughout the natural separation of the cream at a temperature of between 8 and 20°C. The milk is put into copper or copper-lined cauldrons with a characteristic bell-shape. Coagulation is achieved with calf’s rennet. The curd cheese is broken into fine grains and cooked at a maximum temperature of 56°C until the lumps become elastic. It is then left fully immersed in the whey for a maximum of 70 minutes. The curd cheese is placed in moulds for at least 48 hours, which imprint the cheese with the mark of origin; it is then salted in brine for 14 to 30 days. Natural maturation occurs at a temperature of 15 to 22°C, for a period that varies from a minimum of nine months to more than 20. At the end of the eighth month, the cheese is submitted to a series of product tests to assure that it meets the required standards established by the product specification. At this stage, it is either fire-branded or, if the cheese does not possess the obligatory characteristics, the mark of origin imprinted by the mould is removed by shaving. For all types of packaging and sizes, the product must be packaged immediately within the same production area.

929 Interview with Egidio Fiandino, Director of Fattorie Fiandino, (Saluzzo, Piedmont, Italy, 9 September, 2014) and Fiorenzo Giolitto, Director of Giolitto Formaggi, (Bra, Piedmont, Italy, 11 September, 2014).

930 Consorzio per la Tutela del Formaggio Grana Padano.

931 Several of the Italian Interviewees suggested that increased numbers of producers of cheeses and salumi/smallgoods has resulted because the larger Consortiums have been recruiting more producers to obtain more fees and provide a higher profit for Consortiums. In this regard, the trustworthiness of larger Consortiums has been questioned throughout Italy. Many producers are not happy with their respective Consortiums given that producers are not obtaining the proper protection and regulation from the Consortium in return for the high fees that they need to pay to be part of the Consortium and to be able to use the GI registration on their products.

932 As set out in footnote above n 961.
not as strictly regulated as it used to be when there were less producers of the cheese. This has led to a variety of issues, such as many Grana Padano PDO cheeses containing preservatives. Fattorie Fiandino explained that this goes against the prescribed production method for the cheese, and therefore those Grana Padano PDO cheeses containing preservatives should technically not carry a PDO registration or be protected as such.\textsuperscript{933}

A lack of adequate regulation causes inconsistency in the quality of cheeses that are labelled with the Grana Padano PDO. Inconsistency in quality affects cheese producers who use the Grana Padano PDO on their products because an inferior quality cheese can impact on the sales of other Grana Padano PDO cheeses as consumers turn away from buying the cheese.\textsuperscript{934} This is notwithstanding that the other cheeses labelled with the Grana Padano PDO might be of a higher quality and be made according to the prescribed production method for the PDO registration.

Fattorie Fiandino explained the effect that this lack of regulation is having on the credibility of the EU/Italian Food GI system as follows:

\textit{When PDOs continue to be used, even though the rules and regulations are not being adhered to, that to me means that PDOs and the EU/Italian Food GI system is political and corrupt. There’s someone at the top of the Consortium who is allowing this to happen without caring about it, and so it becomes a corrupt System. This turns people off of it...The System is helping the dodgy producer more than anyone else because they are making inferior cheeses, but are still able to call it Grana Padano and free-ride off its reputation. The more dodgy producers there are though, and that get away with it, the more this undermines the PDO value and System.}\textsuperscript{935}

In Fattorie Fiandino’s view, this undermines the System’s credibility as a regulated system that adequately monitors whether there is a connection between food products and origin before various EU/Italian food GIs are used on food products.

The fieldwork revealed that some of the larger Consortiums do not rely on the EU/Italian Food GI system as much as small-medium sized food producers and Consortiums, and that this is part of the reason why some larger Consortiums are not as strict about governance of the System as smaller Consortiums. In particular from my interview with Mauro Rosati of Qualivita, I observed that in many instances the demand for a larger food company product, such as Grana Padano PDO cheese, both within Italy and internationally, has meant certain aspects of regulation and control have been done away with to meet trade demands. In addition, Mauro Rosati explained that larger company products, such as Parmigiano-Reggiano PDO, Grana Padano PDO and Prosciutto di Parma PDO,

\textsuperscript{933} Interview with Egidio Fiandino, Director of Fattorie Fiandino, (Saluzzo, Piedmont, Italy, 9 September, 2014).

\textsuperscript{934} Interview with Egidio Fiandino, Director of Fattorie Fiandino, (Saluzzo, Piedmont, Italy, 9 September, 2014).

\textsuperscript{935} Interview with Egidio Fiandino, Director of Fattorie Fiandino, (Saluzzo, Piedmont, Italy, 9 September, 2014).
were already well known before the EU/Italian Food GI system started, given their productivity output and brand recognition on a global scale.\textsuperscript{936} As a consequence, some larger Consortiums have become complacent in carrying out proper governance of the System because they are not as reliant on the PDO/PGI recognition as much as medium sized producers for whom the System has been more beneficial. For the larger Consortiums, many of them are more concerned with their financial position than regulating the quality of food products that are sold with their respective PDO/PGI label.

5.7.1.2 Example PDO registration/small consortium: Prosciutto di Cuneo

The fieldwork revealed that where a smaller sized Consortium governs a PDO or PGI food product, there are fewer problems of inconsistent regulation and more of an effective focus on ensuring that a qualitative connection between food and origin exists. An example of this is Prosciutto di Cuneo PDO, governed by the Consorzio di Tutela di Prosciutto di Cuneo.\textsuperscript{937} To be able to use the PDO registration, producers of the Prosciutto di Cuneo PDO must adhere with the strict guidelines set down by the Consortium and comply with the EU/Italian Food GI system.

Given that the production area for this Prosciutto is relatively small, Luigi Allasia, director of Prosciutto di Cuneo, and major holder in the Consorzio di Tutela di Prosciutto di Cuneo, for the Cuneo province, explained that the Consortium effectively regulates that there is a qualitative connection between the Prosciutto di Cuneo PDO and the area of production and therefore protects the connection between the Prosciutto and its origin. The Consortium effectively regulates that the Prosciutto di Cuneo PDO is authentic, produced in accordance with the prescribed production method, and that no imitations are able to use the PDO registration.

\textit{The PDO area of production is a very limited territory that is demarcated very clearly in the PDO regulations for the Prosciutto di Cuneo. Moreover, the regulations set out clear guidelines relating to the: breeding, butchering, producing and processing (including the salting, drying,}

\textsuperscript{936}Interview with Mauro Rosati, General Director, Qualivita, (Siena, Tuscany, Italy 19 September 2014).

\textsuperscript{937}Interview with Luigi Allasia, Director of Prosciutto di Cuneo, and majority holder in the Consorzio di Tutela di Prosciutto di Cuneo for the Cuneo province, (Lagnasco, Piedmont, Italy, 10 September 2014): The production area for Prosciutto di Cuneo PDO is very limited to the provinces of Cuneo and Asti in the region of Piedmont, as well as limited provinces of Turin. All stages of production, from the birth of the pigs used to make the Prosciutto to the curing of the meat, must be carried out in the areas of Cuneo and Asti, and the limited provinces of Turin. This small production area makes the task of proper governance easier for the Consortium. The production method for the Prosciutto di Cuneo PDO is that the prosciutto must be made: \textit{from thighs of pigs born and bred in the area and fed with local cereals. It is seasoned with salt, and sometimes with a salt flavoured with pepper and other spices. It is left to dry in the cold and put to season in ventilated places. The air that is used to dry the pigs is very important. It is Piedmontese air. The air in the Piedmontese area is a significant component of the PDO registration as the air is not too dry or humid and therefore dries out the meat really well. The Alps in the area make it possible for winds to keep the humidity level down to help with the aging of the Prosciutto.}
Comparing itself to the larger Prosciutto di Parma PDO, Prosciutto di Cuneo PDO pointed out that the bigger the Consortium, and production area of a product, the more likely that there will be errors made with administration and control.

_The drama of the bigger Consortiums needs to be restrained and maintained, so that the original idea behind the EU/Italian Food GI system is not lost. Consortiums are meant to guarantee an authentic product, but governance over the production is essential. If there are too many dramas or politics, then this governance gets lost...and inferior products impact on the better quality products and start to undermine the EU/Italian Food GI system._

Therefore, smaller to medium sized Consortiums provide fewer problems to Italian food producers because they are able to effectively regulate the connection between their respective food products and origin. Smaller to medium sized Consortiums enforce the EU/Italian Food GI system effectively and adequately regulate the quality of food products that are labelled with a PDO/PGI.

Reoccurring theme: *Inconsistency in the quality of products has impacted on the credibility of the EU/Italian Food GI system and undermines the qualitative connection between food and origin*

The ‘inconsistency in the quality of products’, that has resulted over the years of the EU/Italian Food GI system, as a result of lack of effective administration of the System by larger Consortiums in particular, was a common theme throughout all the Italian interviews. Many of the Italian Interviewees expressed their disappointment with how the Italian Government and Consortiums have allowed this to happen. Having inferior quality products branded with the same PDO or PGI registration as a worthy higher quality version of the same product, has affected producers’ and consumers’ trust in the EU/Italian Food GI system. To a certain extent, this has undermined the credibility of the System as one that adequately regulates and controls the qualitative connection between food and origin.

Even among the food industry based organizations, such as Academia Barilla, strong statements were made that there are double standards within the EU/Italian Food GI system.

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938 Interview with Luigi Allasia, Director of Prosciutto di Cuneo, and majority holder in the Consorzio di Tutela di Prosciutto di Cuneo for the Cuneo province, (Lagnasco, Piedmont, Italy, 10 September 2014).

939 Interview with Luigi Allasia, Director of Prosciutto di Cuneo, and majority holder in the Consorzio di Tutela di Prosciutto di Cuneo for the Cuneo province, (Lagnasco, Piedmont, Italy, 10 September 2014).
You can have good and bad producers of a product within an area and they can still use PDO on their labels because there is a lack of control. Not all producers have the same standard and so if the same name is being used across the board, they will bring the good ones down. This inconsistency in the quality of products that are all branded with the same PDO means that ‘origin’ doesn’t guarantee anymore that it is a good product. It just means that it’s from that area, but it can be bad quality.\footnote{Interview with Gianluigi Zenti, Executive Director, Academia Barilla, (Parma, Emilia-Romagna, Italy, 18 September 2014).}

In his interview, Zenti suggested that a reason for this inconsistency in quality, particularly in relation to food products regulated by larger Italian Consortiums, is that when the EU food GI system first started in 1992, there was a sense of competition among EU countries as to which one could obtain the highest number of GI registrations for food products. In his interview Zenti suggested that Italy was very ambitious in this regard and many organizations behind already well-known Italian food products, such as Grana Padano cheese, Parmigiano-Reggiano cheese, and Prosciutto di Parma, wanted to dominate the System and obtain more international recognition and protection. To that end, these larger organisations created very large Consortiums by involving as many producers in them as possible, so as to have a high number of products being rolled out, generating high sales and returns. In Zenti’s view, the larger Consortiums were very much driven by Italy’s political culture that:

\textit{In order to create a significant PDO, you need to have a bigger size Consortium and involve as many producers as you can. But, once you start involving a very large number of producers, then you have to allow for a wide standard; that is, variations in quality levels of a product so that all producers can comply with the ranging pendulum of quality, and this starts to undermine the quality of a product and its true connection to its origin. Just because Italy has the highest number of food GI registrations doesn’t mean we are the best if the quality is not there.}\footnote{Interview with Gianluigi Zenti, Executive Director, Academia Barilla, (Parma, Emilia-Romagna, Italy, 18 September 2014).}

The interview with Giolitto Formaggi suggested that another reason for this inconsistency in quality was that some of the larger Consortiums have too many ‘industry players’ and ‘political and bureaucratic players’ as their members,\footnote{Interview with Fiorenzo Giolitto, Director of Giolitto Formaggi, (Bra, Piedmont, Italy, 11 September, 2014).} members who do not have a proper understanding of the real connection between food and origin and are more concerned with the Consortium’s financial position being improved by selling products that have a GI attached to them. Where these types of Consortiums exist, they do not accurately regulate that GI criteria has been consistently satisfied. Rather they make exceptions and these exceptions cause
inconsistency in quality of products and serve to undermine the GI attached to them.  

Many of the Italian Interviewees suggested that the Italian Government’s lack of regulation of the EU/Italian Food GI system has contributed to the inadequate regulation provided by many of the larger Consortiums. The interview with Fattorie Fiandino revealed that:

Consortiums have become like Italy’s government – especially the big ones. For example, the food expos that they carry out; Consortiums spend so much money at the expos, walking around and having a party, but not one of the Consortium representatives actually knows much at all about the cheeses that they are meant to be representing and promoting. That does not make producers happy, and does not look good. Where does all the money go? The other problem is that the larger Consortiums are run by two or three people, who have a monopoly over the Consortiums and control over the producers, and sometimes have their own political agenda. It is therefore hard for all the producers to come together against the Consortium because they are faced with the monopoly running them.

The Italian Interviewees’ assessment of this situation is that the Italian Government, in many respects, has turned a blind eye to the corruption and political motivations of many of the Consortiums. This is based on their sentiment that the Italian Government is also, to a certain extent, corrupt and more interested in, and protective of, economic, political and trade issues, rather than protecting the connection between food and origin and ensuring quality products are being made to which a GI is attached.

Consortiums are needed to build brands internationally, but at the moment the management is not being handled correctly because there is a political approach that is wasting money. Power is based on how many products are made – if there is one producer who makes 300,000 legs of prosciutto and all the others make 10,000 legs of prosciutto, the producer who makes the most will dictate what the standards need to be and what the Consortium is

943 Interview with Fiorenzo Giolitto, Director of Giolitto Formaggi, (Bra, Piedmont, Italy, 11 September, 2014). Giolitto Formaggi explained that this happened with Bra PDO cheese. Once a cheese of excellent quality, the Consorzio Tutela Formaggio PDO Bra’s lack of governance has impacted on the cheese’s recognition as a high quality PDO cheese. Many of the members of the Consortium were political and industrious players who drafted the rules and regulations for the production method of the cheese without any clarity on the characteristics and requirements that needed to be met for the PDO to attach to the cheese. The Consortium has also made many exceptions over the year as to production methods used by some of its producers. Both of these actions by the Consortium have resulted in inconsistent quality of the Bra PDO cheese and a discrediting of the Bra Cheese name and PDO.

944 Interview with Egidio Fiandino, Director of Fattorie Fiandino, (Saluzzo, Piedmont, Italy, 9 September, 2014).
doing. Votes are based on how many products you produce. This will also dictate who is the president of the Consortium.\textsuperscript{945}

In Dr Matteo Ascheri’s interview, of Ascheri wines and agritourism, Dr Ascheri suggested that the Italian wine GI system that has been operating since 1963, is working a little more smoothly than the EU/Italian Food GI system.\textsuperscript{946} However, Dr Ascheri clarified that this is partly because the wine system is older and works better given that there has been time to draw out and resolve issues.

\textit{Under the Italian Wine GI system, producers know what to do and Consortiums and external auditors know what to do as well. We have had the benefit of more time though…In food, the process is much more complicated than wine because in the wine world there is a lot of history, and so producers understand that a GI system does work for them and that it should be done. But, for food, there are still many economic interests that are being protected to the advantage of only some, and therefore some governance is being sacrificed for economic interests, obligations and money. This is a problem. With food, some of the larger Consortiums are looking after their own interests, and are covering things up, for the sacrifice of ensuring proper governance. This is not right. Producers are paying a lot of money for little return and support.}\textsuperscript{947}

In order to achieve a more effective regulated food GI system, most of the Italian Interviewees would prefer that Italy not be so ambitious about obtaining the highest number of GI registrations. Instead they would prefer that Italy be more ambitious about having:

- Fewer GI registrations that recognise and protect a qualitative connection between food and origin;
- Smaller Consortiums overseeing high-quality producers meeting consistent standards across all producers;
- High-quality products that are protected by a GI registration which producers and consumers can trust in as representing a product that has a real connection with its origin and that has been verified as meeting criteria required to carry a PDO or PGI registration; and
- A trustworthy GI system for producers and consumers that represents a credible guarantee of quality and authenticity.\textsuperscript{948}

\textsuperscript{945} Interview with Gianluigi Zenti, Executive Director, Academia Barilla, (Parma, Emilia-Romagna, Italy, 18 September 2014).

\textsuperscript{946} Interview with Dr Matteo Ascheri, Cantine Ascheri Giacomo S.A.S., (Bra, Piedmont, Italy, 11 September 2014). \textit{Italian Law 930 of 1963 introduced the concept of Denomination of Origin (DOC) for Italian wines and defined the precise role of the Wine Consortia.}

\textsuperscript{947} Interview with Dr Matteo Ascheri, Cantine Ascheri Giacomo S.A.S., (Bra, Piedmont, Italy, 11 September 2014).

\textsuperscript{948} Interview with Gianluigi Zenti, Executive Director, Academia Barilla, (Parma, Emilia-Romagna, Italy, 18 September 2014) and interview with Massimo Felice Neri, President
In Qualivita’s opinion, the aim should not be to have the most registered GIs in the EU but rather to give more thought on how to make the EU/Italian Food GI system more effective so that there is consistent regulation by all Consortiums, large and small, monitoring that relevant criteria has been met to justify a PDO or PGI registration and use of it by producers.\textsuperscript{949}

5.7.2. Does being part of the EU–Italian Food GI system provide Italian food producers with better legal protection and recognition for the connection between their food products and their origin than trademark law and other laws?

A majority of the Italian Interviewees asserted that for the EU/Italian Food GI system to be successful it must be properly regulated and controlled by all Consortiums. Most of the Italian Interviewees see the need for uniform standards to be required across all producers for the same product so as to result in consistent quality products. The Italian Interviewees want the System to represent a qualitative connection between food and origin in which producers and consumers can trust. If these key factors could exist then a majority of the Italian Interviewees consider that the EU/Italian Food GI system would provide effective legal protection and recognition for the connection between food and origin. This has particularly been the experience for producers involved with smaller size Consortiums.

The fieldwork revealed that for food producers involved with smaller-medium size Consortiums, the experience of being part of the EU/Italian Food GI system has been quite positive for them. The System has provided them with effective legal protection and recognition for the connection between their respective food product and origin. The smaller to medium sized Consortiums are able to better manage regulation of their PDO/PGI than are larger Consortiums. The smaller to medium sized Consortiums are concerned with regulating the connection between food products and origin and regulating that all food producers have complied with all prescribed methods relating to the use of the PDO/PGI before they can attach the PDO/PGI to their food products. Therefore, smaller to medium sized Consortiums are providing adequate protection to the connection between food products and origin.

5.7.2.1 Example: Aceto Balsamico Tradizionale di Modena PDO

One of the smaller food producers who I interviewed was Acetaia Villa Bianca, a producer of Aceto Balsamico Tradizionale di Modena PDO (ABTM PDO).\textsuperscript{950}

\textsuperscript{949} Interview with Mauro Rosati, General Director, Qualivita, (Siena, Tuscany, Italy 19 September 2014).

\textsuperscript{950} Rosati, above n 659, 259: Aceto Balsamico Tradizionale di Modena PDO (ABTM PDO) (regulated pursuant to \textit{Italian Ministerial Decree no.124, 30 May 2000 and EC Regulation 813/2000, 17 April 2000}) is balsamic vinegar obtained from the must of the typical grapes from the Province of Modena. It is aged for at least 12 years and at least 25 years for the Extra Aged typology. The production method for ABTM PDO is that it must
Acetaia Villa Bianca is owned and operated by the Biancardi Family. I also interviewed the corresponding Consortium, Consorzio Produttori Antiche Acetaie.

During the interview, the Biancardi family spoke favourably of the Consorzio Produttori Antiche Acetaie, noting that the Consortium has worked very hard over the last 30 years to carry out proper administration of the ABTM PDO rules and regulations, to ensure that high quality ABTM has been consistently made among the ABTM PDO producers.\(^{951}\) ABTM PDO is world recognized for being a unique product of high quality and the Biancardi family believe that this is in part because of the hard work carried out by the Consortium in informing consumers about ABTM PDO, how it is made, the attention to detail taken by producers in complying with the prescribed production method, the fact that it is a product made within a very demarcated production area and the difference between ABTM PDO and ABM PGI. This has helped consumers understand what the PDO means for ABTM and it is a symbol in which consumers trust. The EU/Italian Food GI system has worked effectively for ABTM PDO.

In the interview with the Director of the Consorzio Produttori Antiche Acetaie, Andrea Galeotto, Galeotto suggested that this success is in part because the Consortium was established in ‘the correct manner’.\(^{952}\) That is, it is made up of ABTM producers who, when the Consortium first began, drafted the rules and regulations with which they, and their peers, would need to comply in order to take advantage of attaching the ABTM PDO to their balsamic vinegar. “These producers understood better than anyone else the: key characteristics that an ABTM should have; the product’s history; the traditions behind it; and the processes and ingredients required to make a high quality product.”\(^{953}\)

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\(^{951}\) Interview with Acetaia Villa Bianca, Famiglia Biancardi, (Modena, Emilia-Romagna, Italy, 17 September 2014).

\(^{952}\) Interview with Andrea Galeotto, Director of Consorzio Produttori Antiche Acetaie, (Modena, Emilia-Romagna, Italy, 17 September 2014).

\(^{953}\) Interview with Andrea Galeotto, Director of Consorzio Produttori Antiche Acetaie, (Modena, Emilia-Romagna, Italy, 17 September 2014).
Galeotto cautioned that it is important that a Consortium maintain some flexibility in its administration in dealing with producers, while still conducting proper governance. The Consorzio Produttori Antiche Acetaie drafted rules and regulations with some flexibility and variables to cater for small changes in production method over time. In particular, the Consortium requires producers to always have available a breakdown of the ingredients used in the ABTM and the composition details. This assists the Consortium with regulating that all producers are making ABTM at a consistent quality level, across the board. This monitoring eliminates the risk of any inferior quality ABTM bringing down the reputation of the ABTM PDO for all other complying producers. This is a positive for producers and consumers, given that it signifies that the ABTM PDO can be trusted as representing the fact that there has been proper control of production method. In this regard, the Consorzio Produttori Antiche Acetaie is effectively regulating its producers, and carrying out a system of control to monitor that there is a qualitative connection between ABTM and Modena.954

The fact that the production area of the ABTM PDO is only the Province of Modena, means that having a very precise demarcated area makes it easier for the Consortium to carry out its administration of the PDO rules and regulations, and to provide direction to producers as required. A small production area also means that the Consortium knows all of its producers very well. Therefore, in order to ensure impartiality in checking producers’ compliance with the ABTM PDO rules and regulations, Galeotto explained that an independent third party body, usually tied to the Ministry of Agriculture, regulates the PDO certification. In this manner, the third party body is unbiased towards any producer. While the Consortium regulates the rules and regulations for the ABTM PDO, and the day-to-day workings of the producers, the independent body carries out the governance of the PDO compliance. Having an independent party involved, makes the producers more vigilant of their practices and more motivated to meet the PDO criteria.

However, not all of the Italian Interviewees spoke this positively about their experiences with the EU/Italian GI system. Some of them spoke about their disappointment with various Consortiums’ lack of regulation and direction, on behalf of producers, regarding international usage of Italian PDOs and PGIs. Many would like to see Consortiums being more proactive in defending Italian GIs by taking more action in stopping overseas competitors from using Italian PDOs and PGIs. “Usage of Italian cheese names by foreign food companies and organizations is something that the Consortiums should be controlling and regulating, but they are not.”955

954 Interview with Andrea Galeotto, Director of Consorzio Produttori Antiche Acetaie, (Modena, Emilia-Romagna, Italy, 17 September 2014).

955 Interview with Egidio Fiandino, Director of Fattorie Fiandino, (Saluzzo, Piedmont, Italy, 9 September, 2014) and Fiorenzo Giolitto, Director of Giolitto Formaggi, (Bra, Piedmont, Italy, 11 September, 2014).
5.7.2.2 Example: Parmigiano-Reggiano PDO cheese

Academia Barilla spoke at length to me about the problems that Parmigiano-Reggiano PDO cheese\(^{956}\) and its consortium—Consorzio del Formaggio Parmigiano-Reggiano has had with the USA’s usage of the PDO name. In his interview, Zenti suggested that the USA does not recognize this PDO registration and that various USA producers, such as Kraft Foods Group Brands LLC, a subsidiary of parent company Kraft Heinz Company, use the translation of Parmigiano-Reggiano, namely ‘parmesan’, as part of their grated cheese product ‘Kraft 100% Grated Parmesan Cheese.’\(^{957}\) The interview with Academia Barilla revealed:

> People in the USA believe that they are buying Parmigiano-Reggiano cheese when they buy parmesan and this is a problem because consumers don’t understand that what they are getting is not the real Parmigiano-Reggiano. Companies, such as Kraft, are free-riding off of the reputation of

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\(^{956}\) Rosati, above n 659, 78. Parmigiano-Reggiano PDO cheese is a cooked and un-pressed hard cheese, produced with raw cow’s milk obtained from animals reared in the production area and fed mainly on local fodder. The production area of the cheese is: within the territory of the provinces of Parma, Reggio Emilia, Modena and Bologna (on the left side of the River Reno), in the Emilia-Romagna region; the Province of Manuta on the right side of the River Po, in the Lombardy region. The prescribed production method for the PDO registration is: The cheese is produced with milk taken from the evening milking, which is left to rest overnight in steel vat. After it has been partially skimmed, the evening milk is added to the morning milk in a characteristic copper boiler in the shape of an unturned bell; at this stage whey is added to the milk and the mixture is heated at a temperature of 33°C. Calf rennet is added at this point and the milk is curdled for 12-15 minutes. The cheese curd is stirred and broken before being cooked over a low flame. The mixture is then put into wooden or metal moulds, where the cheese obtains its characteristic shape and is given a casein marker, which becomes incorporated into the rind; the alphanumeric code unequivocally identifies each single wheel. The salting process involves the wheel being immersed for 20-25 days in a saturated salt solution. This is followed by maturing on wooden shelves situated in suitable humidity and temperature controlled; this stage can last anything from 12 months to two years. Only cheeses, which pass a strict selection, are labeled with the fire brand and stamped with the Parmigiano-Reggiano name on the rind.

\(^{957}\) USA Patent and Trademarks Office, http://tmsearch.uspto.gov/bin/showfield?f=doc&state=4801:zj3mug.2.7: the Kraft Heinz Company is the third-largest food and beverage company in North America, and the fifth-largest food and beverage company in the world, with eight $1 billion+ brands. A subsidiary of that company, Kraft Foods Group Brands LLC is the registered trademark owner of the trademark ‘Kraft 100% Grated Parmesan Cheese’, USA Serial Number 86547411/International registration number 1242461. The trademark registration includes the following disclaimer: *No claim is made to the exclusive right to use the ‘100% Grated Parmesan Cheese’ apart from the mark as shown.* This mark has been registered since 1 September 2015. Previously, Kraft Foods Group Brands LLC was the registered trademark owner of Serial Number 86502500, which was for the same words ‘Kraft 100% Grated Parmesan Cheese’. This mark was abandoned on 14 August 2015 and is currently listed with the status ‘dead’ on the USA trademarks register. [Reference: USA Patent and Trademarks Office, http://tmsearch.uspto.gov/bin/showfield?f=doc&state=4801:zj3mug.2.3]
the Parmigiano-Reggiano PDO; and there is no control of this by the Consorzio del Formaggio Parmigiano-Reggiano. It is exactly free-riding because Kraft has taken advantage of the PDO name and used it to its benefit. Kraft has taken an Italian cheese name, and EU protected PDO name, and has become the leader of that product in the market, without any connection to the Parma/Reggio region where Parmigiano-Reggiano is meant to come from.958

What Zenti is referring to is the tension that exists between Italian/EU producers of Parmigiano-Reggiano PDO cheese and American cheese producers of ‘parmesan.’ While Parmigiano-Reggiano PDO is a protected GI term in the EU and Italy, in countries such as the United States of America (USA), cheese producers use the term Parmigiano-Reggiano and its translation ‘parmesan’ as a generic product descriptor or common food term. As explained in Chapter 4 in the context of the United States of America’s negotiations with the EU in relation to the Transatlantic Trade Investment Partnership, this is a complex issue and not one that can be simply reduced to an issue of free-riding as Zenti suggests.

The Italian fieldwork endorsed that EU and Italian producers of Parmigiano-Reggiano PDO cheese are not in favour of cheeses that are not made:

- In the prescribed production area; nor
- Using the prescribed production method;

Using the name ‘Parmigiano-Reggiano’ or its translation ‘parmesan’. For the Parmigiano-Reggiano PDO cheese producers who are producing the cheese in accordance with the PDO prescribed method959 it is unacceptable that imitators can use the same name, and its translation, and thereby have an impact on the quality of their Parmigiano-Reggiano PDO cheese and on the value of the PDO registration.

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\text{Parmigiano-Reggiano is allowed to contain only three very simple ingredients: milk (producer in the Parma/Reggio region and less than 20 hours from cow to cheese), salt and rennet...Three other ingredients, Cellulose Powder, Potassium Sorbate, and Cheese Cultures are not found in Parmigiano-Reggiano – they are completely illegal in its production. Yet all three are in ‘Kraft 100\% Grated Parmesan Cheese’. It’s far enough from the real thing that Kraft was legally forced to stop selling its cheese labelled Parmesan in Europe.}^{960}
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958 Interview with Gianluigi Zenti, Executive Director, Academia Barilla, (Parma, Emilia-Romagna, Italy, 18 September 2014). Parmigiano-Reggiano PDO cheese is one of Italy’s current top 10 GI export products worth approximately 464 million Euros. [Reference: Rosati, Geographical Indications: A different way to access the global food market, above n 74].

959 See footnote above n 989.

As explained in Chapter 4, the EU would like to claw back the Old World term ‘Parmigiano-Reggiano’ from New World countries such as USA, and would like companies, such as Kraft, to be legally forced to stop using the PDO ‘Parmigiano-Reggiano’, or any translation of it, on any cheese products that are produced in the USA and in other countries. There are many other imitators of Parmigiano-Reggiano cheeses sold at higher end supermarkets, gourmet stores, and cheese specific shops, other than just ‘Kraft 100% Grated Parmesan Cheese’. In the USA, many of the imitators are either made in the USA or come from South American countries, such as Argentina. The interview with Academia Barilla revealed that in the USA it is possible to find the real Parmigiano-Reggiano PDO cheese near the New Jersey or Argentinean made parmesan. This also happens here in Australia.961 In Zenti’s view, Italian Parmigiano-Reggiano PDO cheese producers would like to see the Consorzio del Formaggio Parmigiano-Reggiano take more action on this issue in the following two main ways:

1) First, by being more proactive about stopping this from happening by carrying out proper control of international markets and enforcing the Parmigiano-Reggiano PDO rights; and
2) Second, by educating consumers on how to identify the real PDO cheese.962

961 Note that while Kraft Foods Group Brands LLC is the registered owner of several Australian trade marks for its cheese products, such as Trade mark Number 58568 ‘Kraft’, which has been registered since 1931, it has not registered ‘Kraft 100% Grated Parmesan Cheese’ in Australia. However, a USA company, Sartori Company, a Wisconsin corporation, has recently registered Trade mark Number 1680919, ‘Sartori Parmesan’, in class 29 for cheese, as from 13 March 2015. The trade mark registration includes the endorsement: “registration of this trade mark gives no exclusive right to use or authorise the use of the word PARMESAN”. The Consorzio del Formaggio Parmigiano-Reggiano is the registered owner of the following trade marks in Australia in class 29 for cheese: Trade mark Number 677876 certification composite mark for the words ‘parmigiano reggiano tutela consorzio’ and logo. This has been registered since 1995 and has the following endorsement: “It is a condition of registration that the mark will only be used in relation to cheese made in Italy. Provisions of subsection 177(2) and 44(3) applied”. Trade mark Number 677877 certification composite mark for the words ‘parmigiano reggiano export’ and logo. This has been registered since 1995 and has the following endorsement: “It is a condition of registration that the mark will only be used in relation to cheese made in Italy. Provisions of subsection 177(2) and 44(3) applied.” Trade mark Number 677878 certification composite mark for the words ‘parmigiano reggiano’ and logo. This has been registered since 1995 and has the following endorsement: “It is a condition of registration that the mark will only be used in relation to cheese made in Italy. Provisions of subsection 177(2) and 44(3) applied.” Trade mark Number 677892 certification fancy mark for the words ‘parmigiano reggiano’ and logo. This has been registered since 1995 and has the following endorsement: “It is a condition of registration that the mark will only be used in relation to cheese made in Italy. Provisions of subsection 177(2) and 44(3) applied.” [Reference: all information in this footnote obtained from IP Australia ATMOSS Database].

962 Interview with Gianluigi Zenti, Executive Director, Academia Barilla, (Parma, Emilia-Romagna, Italy, 18 September 2014).
However, it is unlikely that the Consorzio del Formaggio Parmigiano-Reggiano will be able to satisfy the first request. This is because of the tension that does exist between countries such as the USA and Australia with the EU in relation to EU food GIs/Old World terms. As explained in Chapter 4, it is because of these countries’ respective historical usage of these terms as protected GIs in the EU on the one hand and as generic food descriptors in Australian and the USA (initially to appeal to Italian immigrants) on the other, that makes it difficult for the Consorzio del Formaggio Parmigiano-Reggiano to be ‘proactive’ as Zenti suggests. As explained in Chapter 4 this is a complex issue and has been in negotiation for several years.

In relation to the second request, educating consumers, the Italian fieldwork revealed that Italian food producers want more Consortiums to educate consumers both within Italy and on international markets about what the PDO and PGI labels mean. In this regard, the interview with Zenti from Academia Barilla revealed that there is a need to educate consumers to look for the PDO/PGI mark on food products and trust in it as a symbol that the product has been regulated that it has been made in a certain place, under specific rules, with specific labelling requirements. However, in Zenti’s opinion, this is only worthwhile if there is proper regulation of the EU/Italian Food GI system by Consortiums large and small. The interview with Zenti therefore endorsed “that you can have a GI system and create whatever you want, but then if you don’t legally defend the system in your own country, and don’t keep a watch on everyone that is using a similar name, or passing off on a GI brand, and take action against those people, then what’s the point?”963

A further issue is that some Consortiums continually increase the fees that they charge food producers under the EU/Italian Food GI system. This is in order to be able to cover the costs involved with international monitoring and watching services of other food producers who use their respective PDO/PGI on food products that do not originate in the PDO/PGI region and that are not made in accordance with the prescribed method relevant to the PDO/PGI. The interview with Fattorie Fiandino suggested that some Consortiums are already recovering enough fees from food producers and should be using this money to carry out checks and controls on international markets for imitation products and false use of EU/Italian GIs rather than recovering more fees from food producers.964 However, the interview with the Director of Consorzio Produttori Antiche Acetaie, revealed that Consortiums are of the opinion that they need more money and time to be international watchdogs for their producers.965

963 Interview with Gianluigi Zenti, Executive Director, Academia Barilla, (Parma, Emilia-Romagna, Italy, 18 September 2014).

964 Interview with Egidio Fiandino, Director of Fattorie Fiandino, (Saluzzo, Piedmont, Italy, 9 September, 2014), Fiorenzo Giolitto, Director of Giolitto Formaggi, (Bra, Piedmont, Italy, 11 September, 2014) and Gianluigi Zenti, Executive Director, Academia Barilla, (Parma, Emilia-Romagna, Italy, 18 September 2014).

965 Interview with Andrea Galeotto, Director of Consorzio Produttori Antiche Acetaie, (Modena, Emilia-Romagna, Italy, 17 September 2014), Interview with Mauro Rosati, General Director, Qualivita, (Siena, Tuscany, Italy 19 September 2014), Interview with
5.7.2.3 Example of large consortium spending money to protect and enforce EU–Italian GI internationally: Prosciutto di Parma PDO

In contrast to the Parmigiano-Reggiano PDO example, the Consorzio del Prosciutto di Parma PDO\textsuperscript{966} offered insight into what it does to enforce its PDO registration and brand on an international scale given the lack of protection that it receives on that market. This provided an example of the efforts Consortiums need to go to protect their GIs and brands internationally because of the lack of recognition and protection of EU GIs outside the EU, other than if the GIs are protected separately in a FTA.

In interviewing the Consorzio del Prosciutto di Parma PDO, it became apparent that there have been ongoing issues and disputes between the Consortium and international food companies as to the usage of the PDO; the translation \textit{Parma Ham}; and of the ‘ducal crown’ logo used as part of the PDO brand.\textsuperscript{967}

\begin{figure}[h]
\centering
\includegraphics[width=0.5\textwidth]{parma-ham-logo}
\caption{Parma Ham logo}
\end{figure}

The brand ‘Parma Ham’ is currently registered in about 90 countries.\textsuperscript{968} The Consortium spends large amounts of time and money in protecting its EU GI and

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{966} Interview with Francesca Guidetti, Consorzio del Prosciutto di Parma PDO, (Ruliano, Langhirano, Parma, Emilia-Romagna, 16 September 2014). The Consortium was established in 1963 and is comprised of producers who use and safeguard the traditional processing method of Prosciutto di Parma.
\item \textsuperscript{967} Interview with Francesca Guidetti, Consorzio del Prosciutto di Parma PDO, (Ruliano, Langhirano, Parma, Emilia-Romagna, 16 September 2014) and ‘Prosciutto di Parma PDO’, (Consorzio del Prosciutto di Parma, 2013), 13: the 5 point ‘ducal crown’ logo is stamped on the prosciutto products, made in accordance with the Prosciutto di Parma PDO rules and regulations \textit{Law No.26 of 13.2.90, Decree No. 253 15.2.93}, pursuant to strict control and is the final guarantee of quality of the ham. The ‘ducal crown’ has a high value due to its dual function of identification and qualification: \textit{it identifies the product from all other hams, and assures its authenticity; it guarantees the envisaged production procedure at all stages. The crown mark is what makes the true Parma Ham recognizable to consumers.}
\item \textsuperscript{968} In relation to Prosciutto di Parma PDO, the Consorzio del Prosciutto di Parma is the registered owner of the following trade marks in Australia in class 29 for ham, pig meat
\end{itemize}
\end{footnotesize}
brand because of the lack of protection afforded to the GI and brand by international food companies and markets. “The Consortium actively protects the use of the PDO and the relative brands, stamps and ID seals. It controls any illegal use of the same, and any unfair competition relating to the marketing of Prosciutto di Parma PDO. To do this, the Consortium can take any suitable measure, including legal measures, in countries where the product is widely marketed.”

In her interview, Guidetti, from the Consorzio del Prosciutto di Parma PDO, revealed that Prosciutto di Parma has had to defend its GI and brand in overseas countries, particularly the USA, given that lower quality domestic imitations of the product are available, and referred to as prosciutto di parma, and the translation parma ham, when in fact these USA produced ham products have no connection with the Prosciutto di Parma PDO product or the production area in Parma and

969 Obtained from publication “Prosciutto di Parma PDO”, (Published by the Consorzio del Prosciutto di Parma, 2013) 7, provided at interview with Francesca Guidetti, Consorzio del Prosciutto di Parma PDO, (Ruliano, Langhirano, Parma, Emilia-Romagna, 16 September 2014).

970 Interview with Prosciutto di Parma PDO producer, Ruliano Perex Sucium Prosciutto (Ruliano, Langhirano, Parma, Emilia-Romagna, 16 September 2014) and ‘Prosciutto di Parma PDO,’ (Consorzio del Prosciutto di Parma, 2013), 10-11: I also interviewed a registered Prosciutto di Parma PDO producer, Ruliano Perex Sucium Prosciutto (Ruliano, Langhirano, Parma, Emilia-Romagna, 16 September 2014) to gain the producer’s perspective of the Consorzio del Prosciutto di Parma PDO, insofar as whether they are satisfied with the Consortium’s efforts in protecting the GI and brand, as well as to gain more insight and knowledge into the workings of the Prosciutto di Parma PDO. Ruliano Perex Sucium Prosciutto did affirm their satisfaction with the Consortium, and that it has been rewarding working with the Prosciutto di Parma PDO. A tour of their production facilities helped me to better understand the following prescribed production method for the Prosciutto di Parma PDO: An essential condition for obtaining the ‘Prosciutto di
Reggio Emilia. "Surveys show that the most frequent imitations of [Italian food] concern especially cheeses (parmigiano-reggiano, grana padano, romano, asiago, fontina, gorgonzola) and cold cuts (prosciutto di Parma, pancetta, coppa, salame Toscano, Milano, soppressata calabrese)." In the last few years there has been a boom in the sale of fake Italian food products in the United States, and many imitation products have higher sales than the authentic products.

It is for this reason that the Consorzio del Prosciutto di Parma PDO actively regulates the usage of its ‘ducal crown’ identification seal on all their products.

Parma’ PDO is that the entire process takes place in an extremely limited area that includes the area (refer to footnote no.104). All the climatic conditions that are ideal for drying, namely the natural curing that will give sweetness and flavour to the Parma Ham, occur only in this area. The air of the Parma hills is fragrant. Once it has picked up the aroma of the pine forests, the Versilia sea wind brushes against the karst mountains of the Cisa, where it loses all its salty taste, and finally rolls in the scent of the chestnut woods. It is therefore a dry air, ideal for curing “Prosciutti”. There are the following ten stages of production for the Prosciutto di Parma PDO: cutting; cooling; trimming; slating; rest; washing and drying; pre-curing; greasing; curing and branding.

The Prosciutto di Parma PDO area of production and aging is found in art 2 of the Prosciutto di Parma PDO rules and regulations Law No 26 of 13.2.90, Decree No. 253 15.2.93 as follows: 1. The typical area of production includes the territory in the province of Parma to the South of the Via Emilia at a distance of at least five kilometers from it, up to an altitude not exceeding 900 metres, bounded to the east by the course of the river Enza and to the west by the course of the stream Stirone. 2. The period of aging starts from the salting stage and shall not be inferior to ten months for hams weighing between seven and nine kilograms and twelve months for those weighing over nine kilograms. The weight is for hams with bone at the moment the mark in Article 2.1 is applied.


Ibid and interview with Andrea Righini, Director of Consorzio di Tutela Pecorino Toscano PDO, (Grosseto, Italy, 22 September 2014) who also confirmed that the USA market is one of the most problematic markets for imitation Italian food products. Righini revealed that the Consorzio del Tutela Pecorino Toscano PDO has registered certification mark Serial No. 77000683 for the words ‘Pecorino Toscano PDO’ in the USA, since 2008, and applied for certification mark Serial No. 86386969 on 5 September 2014, to “at least have some protection. We have had to send cease and desist letters to several producers in the USA.” Because of this the Consortium is carrying out international checks for use of its PDO and for imitation products. Righini told me that this is very important for the Consorzio del Tutela Pecorino “because then everyone wins – the producer because we are clearing the market of copies and allowing their products to be the sole ones and the real ones on the market; and the consumer because they are guaranteed that only the genuine, authentic product is being sold to them.” In addition to the USA trade marks, the Consortium has a pending certification trade mark application in Australia for trade mark number 1643786 for the composite mark ‘Pecorino Toscano PDO’ and logo. It has had no oppositions filed against it, but has had an adverse report issued against it. The application is ‘pursuant to examination-deferred’. [Reference: the information in this footnote regarding the Australian trade mark application was obtained from IP Australia ATMOSS Database].

Interview with Francesca Guidetti, Consorzio del Prosciutto di Parma PDO, (Ruliano, Langhirano, Parma, Emilia-Romagna, 16 September 2014) and ‘Prosciutto di Parma PDO,’
This is a seal of authenticity and endorses that the prosciutto branded with it is the real Prosciutto di Parma PDO and parma ham.\textsuperscript{975} The Consortium has spent a large amount of money in actively enforcing this seal of identification with producers as well as on educating consumers on how the seal helps to distinguish between imitation products and the authentic Prosciutto di Parma PDO. Involved in this, the Consortium provides marketing support for its producers to enhance the image of Prosciutto di Parma PDO and to increase the product’s popularity in Italy and abroad and this has been successful.\textsuperscript{976}

5.7.2.4 Concluding Comments

The Italian Interviewees revealed that being part of the EU/Italian Food GI system provides Italian food producers, particularly those involved with smaller to medium sized Consortiums, with more effective legal protection and recognition for the connection between their food products and their origin, than provided under trademark laws and other laws such as passing off and consumer protection laws, within the EU and Italy.

However, at an international level, the lack of food GI recognition and protection is causing dissatisfaction for both Italian food producers and Consortiums. For producers, in particular those tied with larger Consortiums, the common complaint is that Consortiums are not being proactive enough in regulating international usage of EU/Italian GIs. While for Consortiums, the complaint is that lack of international GI recognition means spending time and money defending EU/Italian GIs abroad,

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\textsuperscript{975} Interview with Prosciutto di Parma PDO producer, Ruliano Perex Sucium Prosciutto (Ruliano, Langhirano, Parma, Emilia-Romagna, 16 September 2014) and from ‘Prosciutto di Parma PDO,’ (Consorzio del Prosciutto di Parma, 2013) 13: the branding and identification process for each Prosciutto di Parma PDO product includes the product being stamped with the following information: the breeder who puts a special tattoo on both legs of the young pig. This shows the breeder’s identification code and a code indicating the month of the animal’s birth. It continues with the slaughterhouse where every fresh trimmed leg is checked and branded with a mark permanently identifying it. The mark has the initials PP-Prosciutto di Parma and the slaughterhouse identification. Next there is the metal seal made up of a circular crown showing the C.P.P-Consorzio Prosciutto di Parma initials and the date curing began. Finally, the five point ducal crown brand is stamped pursuant to strict control and is the final guarantee of the quality of the ham and also shows the identification of the producer.

\textsuperscript{976} Interview with Francesca Guidetti, Consorzio del Prosciutto di Parma PDO, (Ruliano, Langhirano, Parma, Emilia-Romagna, 16 September 2014).
to stop usage of their GIs and brands as well as to stop imitation products impacting on the PDO products, both in terms of quality/authenticity and sales.

However, for reasons explained in Chapter 4, it is difficult for the EU to endorse its PDO/PGI rights in food terms that are used by food producers in countries such as Australia and the USA as generic product descriptors and common food terms. While Italian food producers would like to see more international recognition and protection of their GIs as GIs, and not as a subset of trademark laws, this is an ongoing negotiation issue with countries such as the USA that until now have protected GIs under existing trademark laws. Moreover, Consortiums such as the Consorzio del Prosciutto di Parma PDO would like to see international GI recognition so as to avoid having to spend copious amounts of time and money having to defend their EU/Italian GIs and brands. For reasons already discussed in Chapter 4, if the Transatlantic Trade Investment Partnership negotiations recommence between the USA and the EU, the direction the USA takes in those negotiations (if at all) will be very important in this regard.

5.7.3. Does the EU–Italian Food GI system provide producers with more recognition and value for their food products both at a national and international level?

The fieldwork revealed that the EU/Italian Food GI system does provide food producers who work closely with small to medium sized Consortiums with more recognition and value for their food products both at a national and international level. The fieldwork revealed that small to medium sized Consortiums actively promote PDO/PGI food products and educate consumers and overseas food organisations about what the PDO or PGI registration means in terms of the quality and authenticity of the product. On the other hand, the Italian fieldwork revealed that where food producers work with larger Consortiums, the EU/Italian Food GI system does not provide those food producers with as much recognition or value for their food products either at a national or international level. I will consider examples of both these groups.

5.7.3.1 Positive experience: Tutela Pecorino Toscano PDO

An Italian Interviewee who provided an example of this was Andrea Righini, from the Consorzio di Tutela Pecorino Toscano PDO. This is a Consortium that carries

977 Rosati, above n 659, 83. Pecorino Toscano PDO cheese is a soft or semi-hard cheese, produced with whole sheep’s milk in two types: fresco (fresh) and stagionato (mature). The production method behind the cheese involves: The milk must be curdled at a temperature of between 33 and 38°C, with the addition of calf’s rennet, in order to achieve curdling within 20-25 minutes. The milk can be raw or have undergone heat treatment until pasteurized and may be inoculated with native natural or selected ferment cultures. After breaking, the curd is heated to a temperature of 40-42°C for 10-15 minutes in case the curd is used to produce Mature Pecorino Toscano PDO. The curd is then placed in moulds to purge the whey. Purging is done by manual pressing or by stufatura (a process using heat and steam). Salting takes place in brine, eight hours for the soft cheese and 12-14 hours for the semi-hard cheese, or with the direct addition of salt; semi-hard cheeses are matured for a longer period of time. Pecorino Toscano PDO may be treated externally with an anti-mold agent and must be matured in appropriate cells at a temperature of 5-
out its administration effectively across all of its producers. This is made easier for the Consortium given that the PDO area of production is well defined.\footnote{978}

In our interview, Righini pointed out that if there is governance across all ‘the links in the chain’ of a GI product (for the Pecorino Toscano PDO cheese, this means everyone from the dairy farmer to the cheese producer) then everyone in the chain benefits from the GI.\footnote{979} The PDO registration for the Pecorino Toscano PDO cheese has improved the cheese’s recognition and value at both a national and international level, particularly among EU Member States, and more slowly in international markets.\footnote{980}

\begin{center}
\textit{Our market has improved with the EU/Italian Food GI system. Our cheeses are now set apart from the French, and other EU cheeses, so it has helped to set ours apart. The Consortium markets the product—the cheese—not the producers. The Consortium cannot market each producer because that would be unfair and we are not bias towards any producers. Instead, the Consortium focuses on the cheese and promoting that. The Consortium creates an interest in the cheese and educates people about: how the cheese is made; what we are: these are the animals that we use, that we know all our producers and dairy farmers one by one and that we know who seasons the cheese and from which producer the milk/cheese comes from; that we have total governance and control, and that we pass on the benefits of those controls to the consumer; and what sets our cheese apart from other cheeses. The shops and producers then need to sell and market their own cheeses. The PDO stamp goes on the product, but each producer has their own logo and labels that they use to identify themselves.}\footnote{981}
\end{center}

Therefore, the Consorzio Tutela Pecorino Toscano PDO sees the EU/Italian Food GI system as a worthwhile system. The Consortium has committed itself to:

\begin{itemize}
\item Carry out its controls with due diligence;
\item Look after its dairy farmers and producers by ensuring consistent quality milk and cheese production across all of them;
\item Promote the cheese product on behalf of all producers on both national and international markets; and
\end{itemize}

\begin{footnote}
\footnote{978} The production area is within the territory of the Tuscany region and in some municipal areas of the Province of Viterbo and Perugia, in the regions of Lazio and Umbria.
\footnote{979} Interview with Andrea Righini, Director of Consorzio di Tutela Pecorino Toscano PDO, (Grosseto, Italy, 22 September 2014).
\footnote{980} See footnote above n 1006 for efforts made by the Consortium to afford protection on the USA and Australian markets.
\footnote{981} Interview with Andrea Righini, Director of Consorzio di Tutela Pecorino Toscano PDO, (Grosseto, Italy, 22 September 2014).
\end{footnote}

\begin{footnote}
\footnote{12}^\circ\text{C for a period of at least 20 days for the soft cheese and no less than four months for the semi-hard cheese.}
\end{footnote}
• Educate consumers about what the PDO stands for – that Pecorino Toscano PDO is the ‘real deal’ that has been made following rules and regulations, and that has been checked and verified at each stage of production – from sourcing the milk, to turning it into cheese, and maturing it for the *maturo* Pecorino Toscano PDO.

The interview with the Consorzio di Tutela Pecorino Toscano PDO therefore revealed the level of effort and focus that is required by a Consortium to properly regulate PDO/PGI products and ensure that consumers can trust a PDO/PGI label. This level of Consortium support is essential for food producers and consumers to obtain the maximum benefit out of the EU/Italian Food GI system. In return for the Consortium’s commitment, food producers happily comply with the PDO requirements and invest in producing cheese that is of a consistent quality so to maintain the value of the PDO and its reputation. “Consumers can buy what they want, but if they buy Pecorino Toscano PDO then at least they are guaranteed that it is the real Pecorino Toscano PDO cheese.”

5.7.3.2 Positive experience: Toscano Extra Virgin Olive Oil PGI

Another Italian Interviewee who endorsed that the EU/Italian Food GI system has provided producers with more recognition and value for their food products, both at a national and an international level, was President of OL.MA Massimo Felice Neri. Neri pointed out that:

> *Success of a product of quality is its GI. We have seen the development that Toscano Extra Virgin Olive Oil has had since its GI – at PGI level – was introduced. If you get a bottle of our oil, you will see that we have a system of traceability right back to where the olives were picked. This is very important in terms of a guarantee of quality for consumers. People want to know where their products come from, and this is important. The GI system has introduced this notion of traceability that is worth a lot for growers/producers and consumers.*

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982 Interview with Andrea Righini, Director of Consorzio di Tutela Pecorino Toscano PDO, (Grosseto, Italy, 22 September 2014).

983 OL.MA Collegio Toscano degli Olivocoltori’ publication provided at interview with Massimo Felice Neri, President of OL.MA, producer of Olio Extravergine di Olive Toscano PGI and member of the Consorzio per la Tutela dell’Olio Extravergine di Oliva Toscana IGP, (Montepescali Scalo, Grosseto, Italy, 23 September 2014): OL.MA was established in 1969 as an agricultural cooperative of farmers who wanted to produce high quality olive oil. The need to satisfy the increasing demand for olive oil persuaded the small producers of the area to form a consortium and gave birth to OL.MA. OL.MA currently has over 1200 olive growing members. It maintains as its strong point the attainment of quality with respect for tradition, supplemented by the most modern techniques. OL.MA’s mission is “to share this passion which binds us to our land and to its fruits, striving for the highest quality of that unique and inimitable flavour, in the conviction that this same quality and the tradition from which it stems, are the only distinguishing values which remain.”

984 Ibid and Rosati, above n 659, 142. The Toscano Extra Virgin Olive Oil PGI is obtained from the *Americano, Arancino, Cilieginino, Frantoio, Grappolo, Gremignolo, Gorssolana,*
Toscano Extra Virgin Olive Oil PGI growers bring their olives to OL.MA. OL.MA then crushes the olives into Toscano Extra Virgin Olive Oil, packages the oil into Toscano Extra Virgin Olive Oil PGI bottles and labels it with the Toscano Extra Virgin Olive Oil PGI label. OL.MA’s governance and production allows for conformity and quality control. OL.MA Members pay OL.MA 3 Euros/plant for this service, and OL.MA pays its grower members 7 Euros/bottle of oil for the olives that they provide OL.MA. The costs are not high for members given that the system of governance that OL.MA administers, provides growers with a sense of security that their olives are being produced into a high quality and sought after olive oil that is branded with the Toscano Extra Virgin Olive Oil PGI.

This was verified in my interview with one of the olive grower companies that provide olives to OL.MA for crushing into olive oil. Tenute Bruni confirmed that it only pays 3 Euros/olive plant to OL.MA and that this cost is “very little given that we get so much out of the EU/Italian Food GI system and from OL.MA.”

Cristiano Bruni, one of the directors of Tenute Bruni revealed that by being part of the EU/Italian Food GI system, and being able to take advantage of the PGI registration:

*We are able to obtain a further 2 Euros/bottle of olive oil because it is Toscano Extra Virgin Olive Oil PGI. Being able to put on your label that your product is connected with, and from, Maremma Tuscany, and that*

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*Larcianese, Lazzero, Leccino, Leccio del Corno Leccione, Madonna dell’Impruneta, Marzio, Maurino, Melaiolo, Mignolo, Moraiolo, Morchiaio, Olivastro Seggianese, Pendolino, Pesciatino, Piangente, Punteruolo, Razzia, Rossellino, Rossello, San Francesco, Santa Caterina, Scarlinese, Tondello and other similar varieties of olive, present in the orchards individually or mixed, in quantities of at least 95%. Toscano PGI can be accompanied by the following place names: Seggiano, Colline Lucchesi, Colline della Lunigiana, Colline del Aretzo, Colline Senesi, Colline di Firenze, Montalbano and Monti Pisani. The prescribed production method for the Toscano Extra Virgin Olive Oil PGI is: the olives must be harvested directly from the tree, manually or mechanically or by the stripping method. Before pressing, the olives must be washed in room temperature and must undergo no other treatment. Only traditional methods of extracting the oil are permitted in order to maintain the quality of the fruit. The production area of the Toscano Extra Virgin Olive Oil PGI is within the entire territory of the Tuscany region.*

985 Interview with Cristiano Bruni, Director of Tenute Bruni, (Poggio La Mozza, Grosseto, Tuscany, Italy, 23 September 2014). Tenute Bruni is a wine producer and olive grower. Located in Poggio La Mozza, Grosseto, in Maremma Tuscany, Tenute Bruni provides their olives to OL.MA to be crushed into Toscano Extra Virgin Olive Oil PGI, and also produces the following DOC wines in the region: Maremma Toscana DOC, Montecucco DOC and Maremma Toscana Vermentino DOC. It was interesting to interview Tenute Bruni to gather a perspective on both the Italian wine GI system and the EU/Italian Food GI System.

986 Maremma Tuscany is located in southwestern Tuscany and is home to: many Italian DOC wines such as Maremma Toscana DOC, Montecucco DOC and Maremma Toscana Vermentino DOC, all of which are produced by Tenute Bruni; and PDO/PGI products such as Toscano Extra Virgin Olive Oil PGI, Pecorino Toscano PDO, and Castagna del Monte Amiata PGI (chestnuts). Given the DOC wines and PDO/PGI foods that originate from this area, it is one of the current top agritourism destinations in Italy. [Reference: http://maremma-tuscany.com/].
the oil is authentic PGI quality, is a huge value. Even restaurants advertise that they are using Toscano Extra Virgin Olive Oil PGI. Oil is very similar to wine. As soon as wine wins a medal it makes the world of difference. It is the same wine, but it has better recognition. This is what the GI system does for food. It is important. We have around 250 GI registrations in Italy and these are important to set apart all the different varieties of cheeses and other products that are available. The PDO/PGI system helps producers and consumers know where the products are made; how they are made; from which region they originate; and what traditions are being used in making them. This is what the PDO/PGI system represents.

This system of control and traceability for the Toscano Extra Virgin Olive Oil PGI, that is required under the rules and regulations for the PGI\(^{988}\), has provided Toscano Extra Virgin Olive Oil PGI with more recognition and value. This is because for growers and consumers it represents that OL.MA is committed to ensuring that the oil produced is of a consistent quality. The system of traceability provides a guarantee of quality and authenticity that is important at both an international and national level given that OL.MA has several distributors in the USA and EU. The foreign market takes over more than 60% of the production of the Toscano Extra Virgin Olive Oil PGI. The PGI registration is “worth a lot to our distributors because they know where the product comes from and trust in the PGI.”\(^{989}\) At the time of the interview, the PGI registration for Toscano Extra Virgin Olive Oil PGI was worth 60 million Euros.

Therefore, the interviews in relation to the Toscano Extra Virgin Olive Oil PGI confirmed that where a Consortium diligently carries out the regulation of its PDO/PGI with food producers, food producers invest time and money in producing a quality food product that meets the connection criteria required for the relevant PDO/PGI. Food producers want to use a PDO/PGI for the value that it brings to their food product where they use it as part of a regulated system. By working together, Consortiums and food producers benefit from the EU/Italian Food GI system. Only food producers who comply with the PDO/PGI requirements are able to use the PDO/PGI label. Food producers are therefore assured that if they produce a PDO/PGI product in accordance with the PDO/PGI requirements, the Consortium will carry out the necessary due diligence required to mitigate against free-riders attempting to take advantage of the PDO/PGI on food products that are not connected to the PDO/PGI region. Accordingly, consumers can also trust the PDO/PGI label as a seal of authenticity, quality and regulated food product. The value in the PDO/PGI is maintained and the protection between food and origin is enforced. The food products therefore acquire a reputation at both a national and international level. Where a Consortium and food producers work together, the

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987 Interview with Cristiano Bruni, Director of Tenute Bruni, (Poggio La Mozza, Grosseto, Tuscany, Italy, 23 September 2014).


989 Interview with Massimo Felice Neri, President of OL.MA, producer of Olio Extravergine di Olive Toscano PGI and member of member of the Consorzio per la Tutela dell’Olio Extravergine di Oliva Toscana IGP, (Montepescali Scalo, Grosseto, Italy, 23 September 2014).
EU/Italian Food GI system does provide producers with more recognition and value for their food products both at a national and international level.

5.7.3.3 Comments on GI value from Qualivita

One of the Italian Interviewees was an industry-based organization Qualivita. Qualivita is the central Italian GI organization that works closely with the Italian Ministry of Agriculture gathering information on all Italian GI products and promoting the Italian GI system both nationally and internationally, as well as educating consumers and other organizations about the GI system. According to Director General of Qualivita, Mauro Rosati, overall, GIs have increased the value and recognition of Italian and EU, food products since the EU/Italian Food GI system began in the early 1990s. Sixty-nine percent of Italian consumers are willing to pay more for a certified PDO, PGI product, and seventy one percent of EU consumers want to know the geographical origin of the food they eat. GI have allowed small Italian/EU companies to enter the globalised food market and compete against multinational food companies such as Kraft, Nestle, and Unilever. “Whereas brands are produced by these large companies and are usually associated with standard food products, GIs are the marks of small-medium sized companies and they are associated with quality products connected to a specific area. A GI strengthens the connection between producer and consumer, creating a strategic leverage for negotiations between the producers and importers and distributors.”

Qualivita has carried out extensive research on the costs involved with the Italian/EU food GI system compared to the value that the System has brought to Italian GI products, in terms of recognition and sales. Qualivita explained that the results are:

> The costs that most Italian food producers pay to their respective Consortium, to be part of the Italian/EU food GI system, are minimal and worthwhile when compared to the increased value and benefits that the producers obtain as a result of operating under the System. The reputation that a GI can give producers can be so worthwhile that costs are irrelevant. Normally, a GI will add value to a product and allows products to be exported more easily because it is recognised as having a higher quality and value. However, if Consortiums and producers do not know how to value the GI, or use it properly, then it can be costly, because producers are not getting the return that they should be.

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990 Interview with Mauro Rosati, Director General Qualivita, (Siena, Italy, 19 September 2014) and from Rosati, Geographical Indications: A different way to access the global food market, above n 74.

991 Interview with Mauro Rosati, Director General Qualivita, (Siena, Italy, 19 September 2014) and from Rosati, Geographical Indications: A different way to access the global food market, above n 74.

992 Interview with Mauro Rosati, Director General Qualivita, (Siena, Tuscany, Italy, 19 September 2014).
Therefore, the interview with Qualivita endorsed that a food GI can add value to a food product and brings benefits for food producers as long as the Consortium/governing body regulating the food GI system does so diligently. Where Consortiums and food producers equally value a GI, and work together in maintaining the quality of food products that are labelled with a food GI, the benefits of being part of a GI system outweigh the costs involved in being part of a GI system. The investment is worthwhile where a food GI system is effectively regulated.

5.7.3.4 Negative experience: Fattorie Fiandino and Grana Padano PDO cheese

A producer who has experienced the downside of the EU/Italian Food GI system is Fattorie Fiandino who used to produce Grana Padano PDO cheese, but no longer does because of the negative experience of not getting a return in value for the money spent on being part of the GI system. Fattorie Fiandino used to produce Grana Padano PDO cheese until 2011/2012 on the basis that the outlay of expenses exceeded the return of lack of quality control by the Consorzio per la Tutela del Formaggio Grana Padano PDO.

We used to pay anywhere between 350,000-400,000 Euros/year to the Consortium when we were making the Grana Padano PDO cheese. That worked out to approximately 25 cents/kilogram of cheese. While 25 cents does not seem much, when you think about it as a product that we used to make on a daily basis, that’s a lot of kilograms that are being made. It would be better if the Consortium charged a fixed price, but it will not because the Consortium has to pay a lot of people, and therefore it needs to keep its fees high to cover the Consortium’s own costs. However, many people who are members/producers of the Consortium are getting tired of spending a lot of money on fees for little return.993

In Fattorie Fiandino’s experience, working with a large Consortium such as the Consorzio per la Tutela del Formaggio Grana Padano PDO, has meant that the GI system has become more about moneymaking than quality control. For Fattorie Fiandino, this has meant that the value and recognition that the Grana Padano PDO used to bring their cheese product, at the outset of the EU/Italian Food GI system, has been eroded. The interview with Fattorie Fiandino endorsed that Consortiums that do not adequately regulate the connection between their relevant PDO/PGI food products and regions impacts on the value and recognition of the relevant PDO/PGI products in Italy. In his interview, Fiandino suggested that food producers who have had a negative experience with their respective Consortiums, ask themselves where do all the fees that they pay to be part of a Consortium and the EU/Italian Food GI system go?

Consortiums create costs. For example, when I was making Grana Padano cheese, the Consortium would send out three inspectors to carry out control checks on my Grana Padano PDO production: one to check the milk; one to check the factory; and one to check the cheese itself. I asked myself:

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993 Interview with Egidio Fiandino, Director Fattorie Fiandino, (Saluzzo, Piedmont, Italy, 7 September 2014).

5.7.3.5 Concluding Comments

Therefore, for the Italian Interviewees who are dissatisfied with the Consortiums that they have worked with under the EU/Italian Food GI system, the EU/Italian Food GI system has not provided them with more recognition or value for their food products, either at a national or international level. Some of them have withdrawn from producing GI products, and being associated with Consortiums, in an effort to better spend their money on their own businesses, brands, and products, rather than on Consortium costs. They have also spent effort in promoting regional products that are made of high quality ingredients. In this respect, they have taken it on board to go back to refocus on the ideal of protecting the connection between food and origin, and promoting authentic regional food.

However, for the Italian Interviewees who have had positive experiences with Consortiums, the EU/Italian Food GI system has provided them with more recognition and value for their food products, at both a national and international level. Those food producers have committed to paying the Consortium fees because they are satisfied with the regulation that their relevant Consortium has carried out. Their investment has provided them with a return of being able to use a PDO/PGI that has value and that is recognised as a seal of authenticity and quality product

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994 Interview with Egidio Fiandino, Director Fattorie Fiandino, (Saluzzo, Piedmont, Italy, 7 September 2014).

995 Interview with Egidio Fiandino, Director Fattorie Fiandino, (Saluzzo, Piedmont, Italy, 7 September 2014).

996 Interview with Egidio Fiandino, Director Fattorie Fiandino, (Saluzzo, Piedmont, Italy, 7 September 2014).
that is connected to its origin both at a national and international level. Therefore, where a Consortium properly carries out its function under the EU/Italian Food GI system, the System works well in delivering recognition and protection of the connection between food and origin. It provides an incentive to food producers to comply with the System and consumers can trust the PDO/PGI symbols on their food products as indicators of food products that have a qualitative connection with their origin and that have been regulated.

5.8. Costs, Benefits and Risks for Producers and Consortiums that Participate in the EU–Italian Food GI system

In this Part I set out my findings on the costs, benefits and risks for producers and Consortiums involved with being part of the EU/Italian Food GI system. I will present the observations made on these points in the following order. I will provide an overall observation for each point followed by findings from Qualivita’s perspective, given that this is the primary organization in Italy that collects all information on Italian GIs. I will then provide the Consortiums’ perspective and lastly the producers’ perspective. This is done with the aim of properly identifying and recounting each of the Italian Interviewees’ perspectives on the costs, benefits and risks for producers and Consortiums involved with being part of the EU/Italian Food GI system.

5.8.1. Costs

The two main observations made in relation to the costs associated with being part of the EU/Italian Food GI system can be summarised as follows:

- The costs that producers incur in the EU/Italian GI Food System depend on the Consortium to which they are members. Specifically, influential variables include the Consortium’s membership size, the Consortium’s own administration costs that it must recover partly from its members, how active a Consortium is on behalf of its producer members in terms of marketing, promoting and protecting the GI product and certification costs and other fees that the Consortium charges to the producer; and
- The Italian Interviewees do not mind paying these costs as long as they are getting a return for their money in terms of trustworthy governance and administration of the EU/Italian Food GI system by the Consortium, some marketing and promotion of their respective GI products, international recognition and protection of the GI and consistency of product quality across all producers so that there is no negative impact on the GI and its value for producers.

5.8.1.1 From Qualivita’s perspective

As discussed, Qualivita is the central Italian GI organization that works closely with the Italian Ministry of Agriculture, gathering information on all Italian GI products and promoting the Italian GI system both nationally and internationally, as well as educating consumers and other organizations about the GI system. From Qualivita’s perspective, the costs associated with the EU/Italian Food GI system are relevant to the amount of products that are being produced within a Consortium.
The more developed the Consortium and the product, the higher the costs. The costs are also dependent on how much marketing and publication of the product that the Consortium carries out. “Consortiums should be taking these tasks on board. Costs will be more depending on how much of this is done, but Consortiums can obtain funding for this from the EU, and this would be helpful to producers. If the Consortium takes part in fairs and expos, then the costs will be much higher. There are also certification costs.” All of these costs impact on how much a producer ultimately pays in fees to the Consortium.

However Qualivita’s overall assessment is that the costs involved for food producers in being part of the EU/Italian Food GI system are outweighed by the benefits that the EU/Italian Food GI system brings to food producers.

*The reputation that a GI can give you can be so worthwhile that costs are irrelevant. Normally, a GI will add value to a product and allows a product to be exported more easily. Overall, a GI product has a higher quality and value. This outcome is worth paying for.*

However, the benefits that food producers experience will to a certain extent be dependent on the Consortium with which they work and how that Consortium values, protects and regulates the GI. The interview with Mauro Rosati of Qualivita revealed that where a Consortium does not adequately regulate the usage of a GI or administer the EU/Italian Food GI system effectively, problems begin to arise. In those circumstances, the costs of being involved with the EU/Italian Food GI system could be costly for food producers, as they do not get the return that they should be.

Therefore, where a Consortium diligently carries out its regulatory functions, food producers are more willing to pay the necessary fees to be part of the EU/Italian Food GI system. The benefits that GIs add to their food products outweigh the costs involved with operating under the EU/Italian Food GI system. However, where a Consortium does not diligently carry out its regulatory functions, then food producers do not enjoy the benefits that GI protection can provide. For example, the value that the relevant PDO/PGI has might be affected by inadequate Consortium regulation that results in inferior quality products being labelled with a PDO/PGI notwithstanding that a food producer has not complied with all the prescribed methods relevant to the PDO/PGI. It is important that diligent regulation always take place for a food GI system to be effective and for the benefits of being part of the system to outweigh the costs involved.

5.8.1.2 From a Consortium’s perspective

The fieldwork revealed that the costs that food producers pay to be members of a Consortium and to take advantage of using a PDO/PGI on their food products are

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997 Interview with Mauro Rosati, Director General Qualivita, (Siena, Tuscany, Italy, 19 September 2014).

998 Interview with Mauro Rosati, Director General Qualivita, (Siena, Tuscany, Italy, 19 September 2014).
worthwhile given the return they receive in terms of the value that the GI provides to their product and their businesses.999

For example OL.MA, the Consortium for the Toscano Extra Virgin Olive Oil PGI, only charges their olive grower members 3 Euros/plant. In return OL.MA pays them 7 Euros/bottle of olive oil pressed using their olives. Therefore, the growers make 4 Euros/bottle of olive oil. In addition, OL.MA also carries out the marketing for growers. Once OL.MA presses the olives, the rules and regulations for Toscano Extra Virgin Olive Oil PGI 1000 require that OL.MA take control of bottling, labelling and selling the Toscano Extra Virgin Olive Oil PGI final product.1001

In relation to Prosciutto di Cuneo PDO, the Consorzio di Tutela di Prosciutto di Cuneo is still in its infancy (approximately five years old at the time of the interview having started in 2009) and therefore, at the time of interviewing the Director, Luigi Allasia, the costs and returns balanced each other out. “As the Consortium grows, then more definite rules on costs will be introduced, but at the moment the focus is on incurring and paying costs that will ensure that the Prosciutto di Cuneo PDO is authentic and of high quality, and that there are no imitation products on the market.”1002

For the Consorzio Produttori Antiche Acetaie, relating to the ABTM PDO, this Consortium only charges its producer members $100/year, while it pays fees of up to $30,000/year as the Consortium bottles the ABTM PDO 1003 Therefore, this Consortium charges very little, and is a very proactive Consortium for its producer members, as already discussed in Part 4.2.3.1 above.

The Consorzio di Tutela Pecorino Toscano PDO did not provide exact cost information during our interview, but claimed that the costs it charges its members are not excessive.

Of course there are costs, because if we are guaranteeing that a product is the real deal, and authentic, then there will be Consortium costs, control costs, costs for governance, and so on. Even if the product does not absorb all the costs, that is not every single expenditure is added on to the price of the cheese that the consumer has to pay, it will cost a little more. But these are not excessive costs, because it is not as if we need a person doing these

999 Note that the Consorzio del Prosciutto di Parma PDO was the only Consortium interviewed that declined to provide me with cost information.


1001 Interview with Massimo Felice Neri, President of OL.MA, producer of Olio Extravergine di Olive Toscano PGI and member of member of the Consorzio per la Tutela dell’Olio Extravergine di Oliva Toscana IGP, (Montepescali Scalo, Grosseto, Italy, 23 September 2014).

1002 Interview with Luigi Allasia, Director of Prosciutto di Cuneo, and majority holder in the Consorzio di Tutela di Prosciutto di Cuneo for the Cuneo province, (Lagnasco, Piedmont, Italy, 10 September 2014).

1003 Interview with Andrea Galeotto, Director of Consorzio Produttori Antiche Acetaie, (Modena, Emilia-Romagna, Italy, 17 September 2014).
checks everyday. We carry out the PDO system in an ordered way that doesn’t cost too much for the producer.\textsuperscript{1004}

Therefore, from a Consortium’s perspective, the costs involved for a food producer to be part of the EU/Italian Food GI system are minimal and are outweighed by the benefits that a food producer receives as a result of being able to use a PDO/PGI on their food products.

5.8.1.3 From a producer’s perspective

As discussed in relation to Fattorie Fiandino’s experiences of being a producer of the Grana Padano PDO cheese, the costs incurred as a member of the Consorzio per la Tutela del Formaggio Grana Padano PDO were too excessive for the little return. “We used to pay anywhere between 350,000-400,000 Euros/year to the Consortium when we were making the Grana Padano PDO cheese. That worked out to approximately 25cents/kilogram of cheese.” Therefore in Fiandino’s opinion, the costs involved with being part of the EU/Italian Food GI system outweighed the benefits. In Fattorie Fiandino’s opinion, larger Consortiums hardly ever check on their producers, in particular the larger producers within their membership, because:

\textit{It requires more time to do so, and also because the bigger producer is paying the bigger money and that’s all the Consortium cares about. As long as the producers keep paying, then the Consortium is happy to take that money and not go and carry out control checks. The money has become more important than the original idea of what PDO meant: making sure that products are being made in accordance with rules and regulations and ensuring a real connection to the land/geographical location; so that only those producers who are adhering to the rules can use the PDO/GI on their products. Now that is not happening anymore. It has become more about the money. It has become more about money than quality, sadly.}\textsuperscript{1005}

Fattorie Fiandino suggested that smaller Consortiums work better under the EU/Italian Food GI system than larger Consortiums in many respects, including costs. This view is based on Fattorie Fiandino’s assessment that it takes smaller Consortiums less time and money to regulate their producers, because they have fewer members than larger Consortiums. This in turn saves their producers costs, but also provides their consumers with quality control and overall governance of the PDO system, bringing other benefits to producers, as will be further explored in part 5.4.2 below.

\textit{The problems with the GI system seem to be more with the bigger products, producers and consortiums. If you look at Fontina PDO cheese as an example, some of the producers make one cheese that is the authentic

\textsuperscript{1004} Interview with Andrea Righini, Director of Consorzio di Tutela Pecorino Toscano PDO, (Grosseto, Italy, 22 September 2014).

\textsuperscript{1005} Interview with Egidio Fiandino, Director Fattorie Fiandino, (Saluzzo, Piedmont, Italy, 7 September 2014).
Fontina PDO, but then also make 15 other varieties of it and call it something else and sell those? Why? It costs producers too much money to make all Fontina PDO cheeses. They would have to pay more money to the Consorzio Produttori e Tutela della DOP Fontina if they produced even more Fontina PDO cheese. Given that Consortiums have become so expensive, more and more producers are deciding to only make a portion of their products those that will carry the PDO brand, and then focus on their own brands for all other products. This cuts down the money that they need to pay to Consortiums.1006

In contrast to Fattorie Fiandino’s experiences with costs, Tenute Bruni revealed that the costs they pay their respective Consortiums are low compared to the benefits that they receive from operating under both systems.1007

Therefore, the interview with Tenute Bruni confirmed that where a small-medium sized Consortium regulates the EU/Italian Food GI system, the benefits that food producers receive as a result of the Consortium’s regulation outweigh the costs involved with being part of the System. Where Consortiums adequately regulate the connection between the PDO/PGI product and region, they provide an incentive to food producers to pay the relevant fees to the Consortium on the basis that the food producers are aware that the usage of their PDO/PGI is being properly regulated. The value in their PDO/PGI is therefore being maintained and protected.

5.8.2. Benefits

The Italian fieldwork revealed that the smaller the Consortium, the more time the Consortium has to be proactive about administering the EU/Italian Food GI system effectively for all its members. Proper administration filters down to ensuring consistent quality products are being made, by all growers and producers, and that products are then branded with the relevant PDO or PGI registration. The PDO/PGI

1006 Interview with Egidio Fiandino, Director Fattorie Fiandino, (Saluzzo, Piedmont, Italy, 7 September 2014). Rosati, Qualivita, above n 13, 66: Fontina PDO cheese is a semi-cooked cheese, obtained from whole cow’s milk produced by the Valdostana (Pezzata Rossa, Pezzata Nera and Castana) cattle breed. The production area of the cheese is within the territory of the autonomous region of Valle D’Aosta in northwest Italy. The prescribed production method for the cheese is: Whole or raw milk is used for production and must be processed within a few hours after milking. The milk, brought to a maximum temperature of 36°C, is curdled with calf’s rennet. The curd cheese is broken until the lumps reach the size of the corn kernels, after which it is reheated for about half an hour until it reaches a temperature of 48°C, in order to stimulate the purging of the whey. At the end of this stage, it is left to rest for 10 minutes, after which it is placed in moulds containing the casein maker showing the progressive product number; it is then pressed for around 12 hours while being constantly turned. Before the last turn, the identifying mark of the Consorzio Tutela Fontina (CTF) – Fontina Protection Consortium- is applied, which also indicates the producer’s ID code. The cheese is then salted and matured in cool, damp natural caves for at least three months.

1007 Interview with Cristiano Bruni, Director of Tenute Bruni, (Poggio La Mozza, Grosseto, Tuscany, Italy, 23 September 2014).
registration, represented by certified seals and stamps included on the products (as discussed for various products throughout this part five), stands for quality, authenticity and confirmation that controls and checks have been carried out to ensure that only authentic products carry the relevant PDO/PGI registration. To this end, there is evidence that the product has been checked to assure that there is still a degree of connection between food and origin given that there is always a prescribed area of production and production method that must be checked off by Consortiums and independent control bodies (in Italy these are either private bodies accredited by Accredia or a mix of public and private bodies authorised by Mipaaf) before a PDO/PGI registration can be used on food. Where this proper governance is being carried out and is at the forefront of the Consortium’s efforts, this brings benefits to producers/growers because the PDO/PGI increases the value of their products making it more sought after by consumers as a product that can be trusted as being authentic.

On the other hand it appears from the fieldwork that the larger the Consortium, the less time the Consortium has to be proactive about administering the EU/Italian Food GI system effectively for all its members. Lack of proper administration filters down to inconsistent quality of products being made by producers. The impact this has is that the inferior quality products affect the value and reputation of the higher quality products. Consumers buying the inferior quality product start to question the veracity of the PDO/PGI registration used on all the other same type products. This then breeds a lack of trust in the Consortiums by producers who become disgruntled with the fact that they are paying high fees to be part of the EU/Italian Food GI system, and relevant Consortium, in return for very few benefits, if any at all. It also breeds a lack of trust in the PDO/PGI seals, stamps and registrations by consumers who become dissatisfied with the quality of product that they are buying at a higher price, because of the PDO/PGI seal, when the value is not being returned in terms of quality and authenticity. To this end, the ideal of protecting the connection between food and origin is lost to a certain extent because the Consortium and independent control bodies are not systematically checking that all products are being made within a prescribed area of production or according to the prescribed production method.

In many instances, the demand for a larger food company product, such as Parmigiano-Reggiano PDO cheese, both within Italy and internationally, has meant certain aspects of regulation and control are done away with to meet trade demands. In addition, the fact that these larger company products were already well known before the EU/Italian Food GI system started, given their productivity output and brand recognition on a global scale, has made some larger Consortiums complacent in carrying out proper governance of the System because they are not as needing of the PDO/PGI recognition as much as medium sized producers for whom the System has been more beneficial. In these instances, money and trade appear to have taken over somewhat the ideal of protecting and promoting the connection between food and origin.

Therefore, overall it appears that the smaller the Consortium, and therefore the smaller the membership number which means collection of less fees, the more time, money and effort the Consortium spends on being proactive about administering the EU/Italian Food GI system effectively for all its members. This results in more
benefits for producer members. These smaller Consortiums are using, to their advantage, the connection between food and origin to set their products apart from competitors and imitation products. Whereas, the larger the Consortium, and therefore the larger the membership number which means collection of more fees, the less time, money and effort the Consortium spends on being proactive about administering the EU/Italian Food GI system effectively for all its members. Some of the larger Consortiums have also not felt the need as much to rely on the EU/Italian Food GI system, as have smaller Consortiums, because their affiliated products were already well known before the EU/Italian Food GI system started. Therefore the PDO/PGI has not been as beneficial or as valuable to them as to medium and small sized Consortiums.

Therefore, the fieldwork endorsed that the smaller-medium sized Consortiums provide more effective regulation of the EU/Italian Food GI system than larger Consortiums. Larger Consortiums tend to not be as effective in their regulation because they:

- Have too many members and are unable to adequately regulate each member’s usage of the PDO/PGI; or
- Are more concerned about their financial position rather than enforcing compliance with the EU/Italian Food GI system and regulating the quality of food products sold under their relevant PDO/PGI; or
- Are complacent about the value that a PDO/PGI can bring to food products because of the recognition and reputation that their food products already enjoy on both the domestic and international markets.

5.8.2.1 From Qualivita’s perspective

Qualivita’s viewpoint is that the EU/Italian Food GI system has brought many benefits for Italian food and the Italian agricultural industry/sector. Overall, Qualivita’s conclusion is that the System has developed and promoted Italian agricultural products and foodstuff and traditional methods and processes used to make certain foods as well as providing a catalyst for a rediscovery of regionality and traditions used in food making.1008 There has been a transformation of agricultural organisations into more international organisations, especially for medium sized producers. “Large producers such as Grana Padano PDO, Parmigiano-Reggiano PDO and Prosciutto di Parma PDO, were already well known before this system started in the 1990s and so they probably have not received as many benefits out of the system as the smaller and more medium sized producers.”1009

The manner in which most people perceive and think about farmers and producers has developed as a result of the System. “There is a much more positive thinking about producers now than there used to be. People’s perceptions have changed for the better. Artisans, and the concept of artisan work, has become more popular and

1008 Interview with Mauro Rosati, Director General Qualivita, (Siena, Tuscany, Italy, 19 September 2014).
1009 Interview with Mauro Rosati, Director General Qualivita, (Siena, Tuscany, Italy, 19 September 2014).
more people want to know about it and support it." While the EU/Italian Food GI system has brought added value to products in terms of increased recognition and sales, Mauro Rosati of Qualivita suggested that food producers need to understand how to take advantage of the value that a GI registration can provide to their food products.

"It is not enough for the product to have a PDO/PGI symbol. The symbol is only one element. Marketing of products is very important and not everyone knows how to market. Producers need to work hard to set themselves apart. The PDO/PGI symbol gives producers a stepping-stone to better promote their product. It doesn’t do it for producers, but it gives them the best instrument possible to further their product’s value and brand. It is up to the producer to use it to its best advantage. Just sticking a PDO sticker on the product is not going to do it all for them. They have to know how to use the EU/Italian Food GI system to further their product."

Mauro Rosati of Qualivita described to me that there has been an evolution in the understanding of the EU/Italian Food GI system by both producers and consumers, since its inception that has contributed to delivering this value adding benefit to producers.

"Before the EU/Italian Food GI system began, larger food companies and products, that were already distributing on international markets, such as Grana Padano, Parmigiano-Reggiano and Prosciutto di Parma, were all about promoting their brands, their products and their own IP rights. They wanted to make their products whenever, as it suited them, and still include a regional reference in its name even if there was no connection between product and region. This was not just an Italian problem because many EU countries ran in the same manner: larger companies were only interested in making money. Then, these larger companies started to realize that consumers wanted regional products that were fresh and properly made given that farmers markers were becoming more popular. People wanted to know where their food was coming from and farmers markets allowed consumers to buy direct from the farmers. Around the same time, in the early 1990s, the EU/Italian Food GI system began. At first, no one really understood what the PDO/PGI represented because the larger food companies such as Grana Padano, Parmigiano-Reggiano and Prosciutto di Parma only used them. These larger companies needed the PDO to ensure that there was a consistent standard of quality among all their producers to avoid the risk of inferior quality products being exported. Over time, education on what the EU/Italian Food GI system meant, and what the PDO/PGI symbols meant, was provided by organisations, such as Qualivita, to producers and consumers. Consumers, who were into food"

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1010 Interview with Mauro Rosati, Director General Qualivita, (Siena, Tuscany, Italy, 19 September 2014).
1011 Interview with Mauro Rosati, Director General Qualivita, (Siena, Tuscany, Italy, 19 September 2014).
and wanted to know its origin, quickly responded to PDO/PGI products. They appreciated the value of the product and understood what had gone into making it. Over the last 20 years, most producers and consumers have gained an understanding of the EU/Italian Food GI system. Importers, big shops and consumers are looking out for the PDO/PGI symbols more and buying these products. However, the problem is the governance and control of GI usage internationally...Many countries outside the EU do not recognise GIs for food; so while it’s fine within the EU, it’s outside of the EU that there are problems, which involve money and time to fix.  

Overall, Qualivita has found that the EU/Italian Food GI system has created a “movement and development for food that has been fantastic for Italy. The current generation that is into food seeks out regional products and wants to know the food’s connection with its origin. More and more restaurants include details on their menus as to where food comes from and if it is a GI product.” From Qualivita’s perspective, one of the main benefits of the EU/Italian Food GI system has been the system of control that it has brought for the Italian food and agricultural industry.

It has made people and markets feel better about Italian products, and feel reassured that the products that are labelled with GIs have been regulated and governed. There was a need to have some sort of system that would recognise, protect and promote regional products and there was also a need for people to have faith in food and its quality. The EU/Italian Food GI system has delivered all of these giving quality and governance. It has cleaned out the copies and lesser quality products.

According to Mauro Rosati of Qualivita, Consortiums have contributed to this system of governance. This is on the basis that Consortiums have introduced a standardization of rules and regulations that have provided consistency across all producers and promoted products on behalf of producers. This has worked well, especially for those producers who do not know how to effectively carry out marketing duties.

In conclusion, Mauro Rosati of Qualivita is of the view that the EU/Italian Food GI system has brought many benefits to: producers, consumers, Italian food products and the agricultural industry/sector, and that a GI registration and system represents quality products. “Quality sells and if people understand the EU/Italian Food GI

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1012 Interview with Mauro Rosati, Director General Qualivita, (Siena, Tuscany, Italy, 19 September 2014).

1013 Interview with Mauro Rosati, Director General Qualivita, (Siena, Tuscany, Italy, 19 September 2014).

1014 Interview with Mauro Rosati, Director General Qualivita, (Siena, Tuscany, Italy, 19 September 2014). As discussed, not all Italian Interviewees, depending on their respective experience with their Consortium, see this as a universal benefit of the EU/Italian Food GI System.
system, which is what Qualivita does – we try to educate people about the System – then it is worthwhile and GIs do add value to a product and brand.\textsuperscript{1015}

5.8.2.2 From a Consortium’s perspective

The main benefit that the EU/Italian Food GI system has brought for the Consortiums that I interviewed is the ability to ensure consistent product quality and authenticity across all their member producers/growers. The EU/Italian Food GI system has provided them with a legal basis to implement a system of traceability that for most of them has helped with avoiding, or in some cases identifying, imitation products and inferior quality products. In particular this has been possible through the use of seals used on products that provide for a system of traceability from grower/farmer to producer, and that are often prescribed in Consortiums’ rules and regulations.\textsuperscript{1016}

As Massimo Neri, President of OL.MA pointed out:

\begin{quote}
The success of a product of quality is its GI. We have a system of traceability right back to where our olives were picked and this is very important in terms of a guarantee of quality and authenticity for consumers and distribution at a national and international level. People want to know where their products come from. A GI is important in this regard.\textsuperscript{1017}
\end{quote}

Every bottle of Toscano Extra Virgin Olive Oil PGI has a production number included on its label that allows OL.MA to retrace the producer, the exact time of harvest of the olives used to make the oil, the exact day of pressing and the chemical and organoleptic properties of the oil.

\textsuperscript{1015} Interview with Mauro Rosati, Director General Qualivita, (Siena, Tuscany, Italy, 19 September 2014).

\textsuperscript{1016} See discussion in part 5.7.4 in relation to seals used on Prosciutto di Parma PDO and in this part 5.10.2.2 in relation to seals used on ABTM PDO and Olio Extravergine di Olive Toscano PGI.

\textsuperscript{1017} Interview with Massimo Felice Neri, President of OL.MA, producer of Olio Extravergine di Olive Toscano PGI and member of the Consorzio per la Tutela dell’Olio Extravergine di Oliva Toscana IGP, (Montepescali Scalo, Grosseto, Italy, 23 September 2014).
In terms of responsibility towards the product and...towards our consumers, we can safely assert that OL.MA is at the highest level. It has established a self-certification that is equivalent to a total guarantee. ‘Each face, one drop’ is the complete assurance which OL.MA offers to its customers." \(^{1018}\)

This seal and system of traceability, for OL.MA, has meant that it has been able to trace its oils, and assist in identifying imitation products. “Italian products are commonly copied and we refer to this as Italian Sounding – that is: products sound a lot like Italian products. Imitation is the greatest form of flattery, but the PGI sets our product apart from the imitators. Where there is no traceability for an oil product per our system, but that oil is calling itself our name, then we know that it is a fake.\(^{1019}\)

Similarly, for Prosciutto di Cuneo PDO, consistent product quality and the system of traceability that have been implemented as a result of adhering to the EU/Italian Food GI system have been the main benefits.

By quality, I mean that the entire process in making the prosciutto is correctly followed. We are very particular in our method of production and we pride ourselves on that. We are very well known for our method of deboning the pigs. We always do it in the same way and ensure strict governance on this, and other requirements. The same rules and regulations

\(^{1018}\) ‘OL.MA Collegio Toscano degli Olivocoltorti’ publication provided at interview with Massimo Felice Neri, President of OL.MA, producer of Olio Extravergine di Olive Toscano PGI and member of the Consorzio per la Tutela dell’Olio Extravergine di Oliva Toscana IGP, (Montepescali Scalo, Grosseto, Italy, 23 September 2014).

\(^{1019}\) Interview with Massimo Felice Neri, President of OL.MA, producer of Olio Extravergine di Olive Toscano PGI and member of the Consorzio per la Tutela dell’Olio Extravergine di Oliva Toscana IGP, (Montepescali Scalo, Grosseto, Italy, 23 September 2014).
apply to all producers from the beginning to end of the process of making our prosciutto. These rules and regulations have been thought of and created by the producers, breeders and butchers who understand the process behind making the prosciutto so that these rules are practical and actually work.\textsuperscript{1020}

The interview with the Consorzio di Tutela Pecorino Toscano PDO revealed that the Consortium has seen many the benefits that the EU/Italian Food GI system can provide. For the Consortium, these benefits have included increased international recognition of the Pecorino Toscano PDO cheeses, setting them apart from French cheeses. This is primarily because the Consortium has diligently safeguarded its rules and regulations so that “everyone in the production chain, from the dairy farmer to the producer, benefits from the GI.”\textsuperscript{1021}

The Consortium for the ABTM PDO is an example of a Consortium that, although it has had some positive outcomes as a consequence of the EU/Italian Food GI system, overall has not experienced many benefits as a result of the System. This is largely due to the fact that:

\textit{ABTM was already a well-known and unique product that had proper control and governance in its region of origin – Modena, before the introduction of the EU/Italian Food GI system, given that it has been a protected product since 1986, by virtue of Italian Law No.93 of 1986 which authorised the cooking of must for ABTM…This was done so that this ancient, gastronomic specialty could become renowned and appreciated worldwide. From this time as well, the ABTM bottle:}

\textsuperscript{1020} Interview with Luigi Allasia, Director of Prosciutto di Cuneo, and majority holder in the Consorzio di Tutela di Prosciutto di Cuneo for the Cuneo province, (Lagnasco, Piedmont, Italy, 10 September 2014).

\textsuperscript{1021} Interview with Andrea Righini, Director of Consorzio di Tutela Pecorino Toscano PDO, (Grosseto, Italy, 22 September 2014).
Known as Bottiglia Guigiaro (because it was specifically and exclusively designed for ABTM by Giorgetto Guigiaro) was protected as the prescribed bottle for ABTM and was promoted by chefs and important gastronomy representatives.\textsuperscript{1022} So, even without the PDO certification, that came in April 2000, by virtue of EC Rule No. 813, ABTM already had a well-established reputation and was working well.\textsuperscript{1023}

Therefore, the interview with the Consortium for the ABTM PDO revealed that the EU/Italian Food GI system has not increased the ABTM PDO’s value or sales, but has just reconfirmed its high quality and authenticity.

Therefore, overall the main benefit that the EU/Italian Food GI system has brought for small to medium sized Consortiums is the ability to ensure consistent product quality and authenticity across all their member producers/growers. This assists with maintaining the integrity and value associated with a PDO/PGI registration.

\textbf{5.8.2.3 From a producer’s perspective}

Giolitto Formaggi, cheese producer based in Bra Piedmont in northwestern Italy, revealed that the EU/Italian Food GI system is beneficial if Consortiums regulate the System in a proper and effective manner.

\textsuperscript{1022} The 100ml glass white solid bottle, spherical with a rectangular base, includes: a security seal which certifies the ABTM quality and includes a serial number for traceability; the producer’s label to reflect the producer, known as the \textit{acetaia}, that made the ABTM; a back label of the Consorzio Produttori Antiche Acetaie; and a coloured cap to identify the age of the ABTM-cream for 12 years and gold and leather for 25 years. The bottle in itself is a seal of authenticity that the ABTM PDO has been produced in accordance with the ABTM PDO rules and regulations set down in \textit{Italian Ministerial Decree no.124, 30 May 2000 and EC Regulation 813/2000, 17 April 2000}. Pursuant to Article 7 of the Ministerial Decree it is a requirement that the \textit{Bottiglia Guigiaro} be used for bottling all ABTM PDO vinegar.

\textsuperscript{1023} Interview with Andrea Galeotto, Director of Consorzio Produttori Antiche Acetaie, (Modena, Emilia-Romagna, Italy, 17 September 2014).
If the System works properly, then both the producer and consumer win. Where it works properly, then the PDO stands for the fact that there has been control taken and the product has a certain quality that consumers can trust in. Then, consumers won’t mind paying a bit more for a product. But, for this as well, there needs to be education about the System for consumers. This involves Consortiums and producers working together to provide information on what the PDO means: what is going on behind the symbols in terms of control, governance, quality, unique products, connection between product and origin? We can’t just attach a PDO/PGI symbol to a product and win from doing that. We have to work hard to make a great product and attach a PDO to it to represent quality and identify that the product has attributes that are unique to its origin.  

Assuming that there is effective regulation of the System by Consortiums, and that Consortiums are working well with their producers, then the System will bring benefits. The interviews with food producers of Grana Padano PDO cheese and Parmigiano-Reggiano PDO revealed that their experiences with large Consortiums did not provide them with many benefits. Their experiences were of larger Consortiums not providing adequate regulation that resulted in inconsistent quality of cheeses and imitation products.

On the other hand, the interview with Tenute Bruni revealed the benefits that the EU/Italian Food GI system can deliver where there has been education provided to consumers about what the PDO/PGI means.

Being based in Maremma, Tuscany, Italy, both as an oil and wine producer, we are lucky because this area is world renowned for both its oils and wines. So, we probably already have an advantage under the System, because of our geographical location and the connection between our products and our land. Our consumers do understand the regionality and the quality that goes hand-in-hand with it in our products. In terms of Tuscans, it is highly unlikely that a Tuscan would go out and buy a non-Tuscan oil. They will buy as regional as possible. Therefore, being able to put on our labels that we are based in Tuscany and that our oil and wines are Tuscan, and have PGI and DOC registrations respectively, brings benefits in terms of recognition, sought after products, and increased sales. Education across all products that operate pursuant to the EU/Italian Food GI system is necessary to bring these benefits for food GIs.

5.8.3. Risks

Some of the Italian Interviewees suggested that where larger Consortiums regulate the usage of a PDO/PGI (typically associated with Italian food products that have market dominance, such as Parmigiano-Reggiano PDO cheese, Grana Padano PDO

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1024 Interview with Fiorenzo Giolitto, Director of Giolitto Formaggi, (Bra, Piedmont, Italy, 11 September, 2014).

1025 Interview with Cristiano Bruni, Director of Tenute Bruni, (Poggio La Mozza, Grosseto, Tuscany, Italy, 23 September 2014).
cheese and Prosciutto di Parma PDO\textsuperscript{1026}, there are more politics involved in the administration of the EU/Italian Food GI system for the associated food product. Their view is that where a strong political climate exists, it brings bureaucracy and sometimes corruption in the manner in which larger Consortiums go about controlling their producers, product quality and the integrity of how their rules and regulations are implemented and practiced across all their producers. This has created a complicated System with inconsistencies of rules and regulations and in the manner in which they have been applied and monitored across producers, sometimes in a bias way.

Most of the Italian Interviewees are concerned with the lack of international regulation, recognition and protection afforded to EU/Italian Food GIs and question the worthiness of being part of the EU/Italian Food GI system if it does not afford them international GI protection. They have seen numerous imitation products and inferior quality products branded with Italian GIs as part of their product descriptions. Many Italian Interviewees believe that this has happened as a result of the politics and bureaucracy involved in the EU/Italian Food GI system that have enabled inferior quality and imitation products to be labelled with a PDO or PGI. The general consensus among the Italian Interviewees appears to be that if there isn’t the correct regulation within Italy and the EU, it is then difficult to expect Italian Consortiums to monitor and regulate international usage of EU/Italian Food GIs.

5.8.3.1 From Qualivita’s and Academia Barilla’s perspectives

Qualivita’s perception of the main risks involved in the EU/Italian Food GI system was that:

\begin{quote}
Some PDOs have not worked well because of all the politics involved and because of the lack of international recognition for most Italian PDOs. It is very hard for Consortiums to manage overseas companies using their PDO and brand. It takes time and money to enforce the GI rights on international markets where they are not recognised. The main risk and problem is the governance and control of GI usage internationally because many countries do not recognise GIs. So while overall the System works well within the EU, it’s outside of the EU that there are problems.\textsuperscript{1027}
\end{quote}

In order to overcome this problem, Qualivita suggests that producers need to better understand that:

\begin{quote}
Part of their profits need to go back into promoting and developing the region to which they are attached. This will then add more value to the GI.
\end{quote}

\textsuperscript{1026} Rosati, Mauro, \textit{Geographical Indications: A different way to access the global food market}, above n 74. All of these PDO products are currently in the Top 10 Italian GIs Exports category.

\textsuperscript{1027} Interview with Mauro Rosati, Director General Qualivita, (Siena, Tuscany, Italy, 19 September 2014).
At the moment, this does not always happen because some producers do not totally understand the EU/Italian Food GI system, in that it is a public system that has only some international recognition. They expect instant international recognition. In order to overcome this lack of international recognition, it is important to put more back into the GI and region because the more that everyone involved with the GI puts in, the more that everyone will get out of the System. Producers need to put money back into: control; governance; international watching of similar products; and marketing of the GI product; to get the most out of the GI system.\textsuperscript{1028}

While Qualivita seems to place the onus on food producers to put more back into their respective GIs and associated products, most of the food producers who I interviewed want their Consortium to be more proactive in this regard. The fieldwork revealed that many food producers and Consortiums are not on the same page when it comes to whose responsibility it is to promote the GI and products. This is not helped by the fact that many Consortiums’ rules and regulations do not include direction on this issue. One of the reasons Qualivita offered as to why Consortiums and producers are not on the same page is:

\textit{Because the people involved with a GI are from very different backgrounds: farmers vis-à-vis politicians. Instead of working together they are separated and do not share the same understanding or foresight of what the GI can bring to them and their products. The aim of the EU/Italian Food GI system should not be just to have as many GI registrations as possible. There should be thought that goes into the System and how to make it successful for everyone involved.}\textsuperscript{1029}

Gianluigi Zenti of Academia Barilla revealed a similar viewpoint. With the objective of obtaining the highest food GI registrations in the EU, many Italian Consortiums were motivated to enter the EU/Italian Food GI system by political and trade reasons and made mistakes in drafting their rules and regulations. In particular, in Zenti’s opinion, many Consortiums’ worst mistake was creating wide standards of quality among producers in order to get as many producer members in the Consortium.

\textit{This happened because in order to create a significant PDO, you need to have a large consortium and involve as many producers as you can to increase your numbers. Once you start involving many producers, you need allow for a wide standard of product quality. The alternative was to get very few people involved and keep the product standards and quality high…but Italy didn’t take this option because this would have taken too}

\textsuperscript{1028} Interview with Mauro Rosati, Director General Qualivita, (Siena, Tuscany, Italy, 19 September 2014).

\textsuperscript{1029} Interview with Mauro Rosati, Director General Qualivita, (Siena, Tuscany, Italy, 19 September 2014).
long and that doesn’t fit with our political culture. Politically, you need to have a big consortium to get a big PDO. Standard drops and the result is bad.\(^{1030}\)

Gianluigi Zenti of Academia Barilla views this political drive of many of the larger Consortia as a contributing factor to the lack of international governance of Italian GIs. “Consortiums are needed to build brands internationally, but at the moment the management is not being handled correctly because there is a political approach that is wasting money. Power is based on how many products are being made. The producer with the highest number of production will often dictate how the Consortium spends its money, and often international protection and promotion of Italian GIs is not a priority for them.”\(^{1031}\)

Gianluigi Zenti further explained that in his view Italy’s unstable political environment has spread into Consortia meaning that there are:

\[\text{Too many bodies clashing against each other. There’s no synergy here between all the Consortia. There are too many different interests and people involved here. Why have a big infrastructure, such as individual Consortia to create more positions and title that become expensive? The EU/Italian Food GI system should have been made more simple with proper experts of food products being involved to implement the System and ensure that it includes: proper standards with which producers can comply; one body/organization that controls the System; one set of rules that protects applies to all products; rather than many Consortia with varying rules and regulations that allow for wide standards. This would keep the risks that the EU/Italian Food GI system has brought at bay.}\]\(^{1032}\)

Therefore, for an effective food GI system, it is important that food producers, government, members of the food, agrifood and agricultural industries work together in implementing a food GI system. They need to understand the advantages that food GIs can bring to their food products and to them. They need to collaborate as much as possible in creating a system that will be successful for all of them and that will be adequately regulated to ensure that only quality food products that have a clear and strong connection with the GI region are labelled with a food GI.

5.8.3.2 From a Consortium’s perspective

The risks of imitation products and lack of international recognition of Prosciutto di Parma PDO have already been explained above and will not be repeated here.

\(^{1030}\) Interview with Gianluigi Zenti, Executive Director, Academia Barilla, (Parma, Emilia-Romagna, Italy, 18 September 2014).

\(^{1031}\) Interview with Gianluigi Zenti, Executive Director, Academia Barilla, (Parma, Emilia-Romagna, Italy, 18 September 2014).

\(^{1032}\) Interview with Gianluigi Zenti, Executive Director, Academia Barilla, (Parma, Emilia-Romagna, Italy, 18 September 2014).
Andrea Righini of the Consorzio di Tutela Pecorino Toscano PDO was of a similar view with respect to the risks it has been exposed pursuant to the EU/Italian Food GI system as the Consortium for Prosciutto di Parma PDO. The lack of recognition given to its GI by non-EU countries on international markets has led to imitation products and inferior quality products of Pecorino Toscano PDO cheese. In an effort to minimize this risk, the Consortium has been proactive and has been working with the University of Pisa, the University of Florence and the University of Parma to:

*Research milk to characterize the qualities of milk and flora in milk. The aim is to see if we can tell what are the exact attributes of the milk that we use for our cheese to then determine if in certain cheeses, branded Pecorino Toscano, there is a foreign substance that is being used which would conclude that the cheese that it is found in is not the real Pecorino Toscano PDO cheese. This can also be used the other way; that is to reverse engineer a cheese that is using another name. If it turns out to only have the characteristics and quality of our cheese, then we will be able to tell that our cheese has been copied.*

Andrea Righini suggested that if there were more international recognition of EU/Italian Food GIs, then Consortiums, such as the Consorzio Tutela Pecorino Toscano PDO, would not have to spend more time and money to carry out such research to be able to identify imitation products.

The interview with Andrea Galeotto of Consorzio Produttori Antiche Acetaie for ABTM PDO revealed that some of the larger Consortiums have been inconsistent in their regulation of the EU/Italian Food GI system when compared to how smaller to medium sized Consortiums regulate the System. Andrea Galeotto suggested that

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1033 Interview with Andrea Righini, Director of Consorzio di Tutela Pecorino Toscano PDO, (Grosseto, Italy, 22 September 2014). Since my interview with Andrea Righini some interim results of the research conducted by the three Universities have been provided. The most relevant results for the purpose of this thesis are as follows. Qualivita, “The GEORGOFILI-Research and innovation in the Tuscan Pecorino PDO”, <http://www.qualivita.it/news/la ricerca-e-linnovazione-nel pecorino toscano-dop/>, 1 December 2015: First, that the “microorganisms characteristics of an ecosystem-environmental production can be transferred into milk and may represent a link between the product and the production area. Therefore, the preservation and development of this biological heritage is of great importance to preserve and this aspect is pursuant to way for more than 20 years to study the project and collection of autochthonous lactic micro-flora”. Second, that “the link between the Pecorino Toscano PDO and the production area, protecting the characteristics of the product from food fraud, through studies on application of stable isotopes to determine the geographic characterization and production area of protected names, valid instrument for typification of food products for the protection of Italian food and wine heritage.” Last, “the role and prospects of the protected designation of origin: the link between the value of the product and the specific regional value added to the PDO and the sustainability of the product, but also as an element of business strategy, to open new sales channels and, in the light of the analysis, it has identified some critical factors and proposed some possible guidelines for the strengthening of PDO Pecorino Toscano.”
there must be equal governance of the System by all Consortiums to ensure that there are “high quality products behind a GI. If inferior products are allowed/added to the mix, then this will impact on the GI products and call into question the quality of the products and the authenticity of the GI system. This is why experts need to be involved to regulate that quality and to govern that the product is authentic and one to which the GI can be attached.”

At the moment, larger Consortiums have adopted rules and regulations that do not always have a practical effect.

Some rules have been made too strict and at a practical level, this causes complications for producers because it is a stress that they have to manage. Producers just want to work and get on with it and sell their product. A producer lives on making and selling their products. That’s their priority. Producers do not want to get tied up in bureaucracy and paperwork. Producers need to be free enough to do their work that only they know how to do, but feel reassured that they are being protected by being part of this System and that they are able to promote their product as a GI one. The GI should allow them to sell their products in a market that has no competitive inferior products because the Consortium should be checking on copy products and ensuring that their producers are protected against cheap dodgy products impeding their market.

Thus, the EU/Italian Food GI system has caused much work for the Consorzio Produttori Antiche Acetaie for ABTM PDO because it has taken it on board to ensure proper governance both within the EU and on international markets. But this has been a worthwhile exercise for the Consortium given the national and international recognition that the ATBM PDO has among consumers and the food industry. The Italian fieldwork therefore revealed that it is important that all governing bodies involved with a GI food System work towards regulating the system and ensuring that quality food products are being produced that will ultimately be labelled with a GI. Where regulation is inadequate, then inferior quality products will begin to emerge and will undermine the value that exists in a food GI and the value that exists in a food GI system.

5.8.3.3 From a producer’s perspective

Most of the Italian Interviewees expressed their belief that where there is a smaller Consortium involved, the Consortium better regulates and manages the administration of the EU/Italian Food GI system for the associated food product. Smaller Consortiums are better at controlling their producers, product quality and the integrity of how their rules and regulations are implemented and practiced across all their producers. I have already discussed Fattorie Fiandino’s sentiments on this above. Fattorie Fiandino’s analysis of the risks involved with the EU/Italian Food GI system, in particular for Italian PDO cheeses, such as Grana Padano, is:

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1034 Interview with Andrea Galeotto, Director of Consorzio Produttori Antiche Acetaie, (Modena, Emilia-Romagna, Italy, 17 September 2014).
1035 Interview with Andrea Galeotto, Director of Consorzio Produttori Antiche Acetaie, (Modena, Emilia-Romagna, Italy, 17 September 2014).
The fact that so many cheese producers can get away with making inferior quality products, and/or imitation products, turns off other producers from being part of the EU/Italian Food GI system. If I am doing the right thing, but another producer isn’t, then the inferior quality product is going to impact on my cheese quality. When PDOs continue to be used, even though the rules and regulations are not being adhered to, that to me means that the System is political and corrupt. There is someone at the top of the Consortium who is allowing this to happen without caring about it, and so it becomes a corrupt system…The System is helping the dodgy producer more than anyone else because they are making inferior cheeses, but are till able to call it Grana Padano and free-ride off its reputation. The more dodgy producers there are though, and that get away with it, the more this undermines the PDO value and the EU/Italian Food GI system.\footnote{1036 Interview with Egidio Fiandino, Director Fattorie Fiandino, (Saluzzo, Piedmont, Italy, 7 September 2014).}

In addition, most of the Italian Interviewees expressed their concern that politics are undermining the credibility of the EU/Italian Food GI system and have, to a certain extent, permitted the lack of international recognition, regulation and protection of EU/Italian Food GIs. Formaggi Giolitto noted:

> Italian food products have been imitated everywhere. They have been copied worldwide. To eliminate this problem, PDOs could assist with this, but how can Consortiums afford to send out representatives to carry out an audit of who is copying them? There isn’t money to do this many of the times because the money that there is isn’t being used correctly, or now, given Italy’s unstable political climate, there isn’t much money at all. Tied with this unstable political climate, is lack of intervention by the Italian Government. If you can see that Consortiums are not doing their job well, and that there are imitation products, and inferior quality products, being made, then the Italian Government should step in as the overarching body, especially the Ministry of Agriculture. But here it doesn’t. Politics and corruption are again a factor.\footnote{1037 Interview with Fiorenzo Giolitto, Director of Giolitto Formaggi, (Bra, Piedmont, Italy, 11 September, 2014).}

A producer who provided a more positive viewpoint of the risks associated with the EU/Italian Food GI system was Tenute Bruni, observing that even though their personal experience with the EU/Italian Food GI system has been a positive one overall, it does depend on the GI cost and the Consortium.

> There are some good and bad Consortiums. But is also depends on producers because if there’s a shonky producer in the mix, then this can discount the quality of the GI product and have consequences for all other producers and the Consortium. The Consortium then has to spend more money to fix the problems and to carry out more checks…but then you need a good Consortium to step in and fix the problems. If there are problems with a Consortium, then it would be good to have the power to change the
members, and clean out. Unfortunately, this does not happen in Italy because the bad people get to stay in office for way too long. Politics are a problem here. More often than not, big players are in Consortiums and the smaller producers have no voice. It is not right that the smaller producer has no say because they are producing as well, and their product has the same GI as the bigger players.\textsuperscript{1038}

Therefore, the fieldwork endorsed that for a food GI system to not present many risks for the food producers involved, it must be regulated by a diligent governing body that works with and in the best interests of the food producers. Having a diligent governing body that regulates the system effectively will provide food producers with the incentive to produce high quality products in accordance with the GI criteria. A governing body also needs to regulate and manage usage of the relevant GI on the international market. While international monitoring of GI usage is important and should be carried out by Consortiums, this task is further complicated for Italian Consortiums because food producers in countries such as the USA use some PDO/PGIs as generic product descriptors and common food terms. As discussed above and in Chapter 4, generic terms, common food terms, claw back of Old World terms are all complex international GI issues that are in constant negotiation. In some instances, some of the Italian Interviewees did not appreciate that complexity and this added to their frustration with their respective Consortium. Therefore, communication between food producers and a governing body is also required for an effective food GI system.

5.8.4. Italian interviewees’ thoughts on the EU–Italian food GI system

The following summarises the Italian Interviewee’s overall thoughts on the EU/Italian Food GI system from the perspective of: Qualivita; Academia Barilla; a Consortium and food producers.

5.8.4.1 Qualivita’s perspective

Overall Qualivita, the organization that collects and analyses information on all the Italian GIs for the Ministry of Agriculture, has a positive outlook of the EU/Italian Food GI system. “It is a System that has developed and promoted Italian agriculture and products, tourism and that has promoted a return to regionality.”\textsuperscript{1039} Contrary to some Italian Interviewees’ opinions of the EU/Italian Food GI system, Qualivita suggests that the System has brought a uniformity of rules and regulations as to food quality and safety throughout Italy. In Qualivita’s opinion, Consortiums have assisted with achieving this uniformity. Qualivita asserts that the System has brought the most benefits for medium to smaller sized producers and that education

\textsuperscript{1038} Interview with Cristiano Bruni, Director of Tenute Bruni, (Poggio La Mozza, Grosseto, Tuscany, Italy, 23 September 2014).

\textsuperscript{1039} Interview with Mauro Rosati, Director General Qualivita, (Siena, Tuscany, Italy, 19 September 2014).
about what the System means, for producers and consumers, is key in making it successful.\textsuperscript{1040}

5.8.4.2 Academia Barilla’s perspective

In the interview with Gianluigi Zenti of Academia Barilla, Zenti suggested that while the initial ideal of implementing the EU/Italian Food GI system in Italy was a good idea, that is to recognise, protect and promote the connection between food and origin, Academia Barilla has seen a decline in the integrity of the EU/Italian Food GI system. In Zenti’s opinion, “political, trade and economic issues and bureaucracy”\textsuperscript{1041} have taken over the ideal of protecting the connection between food and origin in many instances and at the moment, the EU/Italian Food GI system in Italy is providing an imbalanced system catering more for politics and trade issues than protecting the qualitative connection between food and origin. To improve the System, Zenti, recommended “Consortiums carry out proper governance of the System, and ensure that there are no imitation products being made on the EU and international markets. If Consortiums cannot do this, which many of them can’t and don’t do, then don’t have the PDO System. The PDO is costing producers a lot of money for no return. It has become a very expensive and cumbersome system that producers are sustaining for little return.”\textsuperscript{1042}

5.8.4.3 From a Consortium’s perspective

All of the Italian Interviewees that are Consortiums provided the same overall thoughts on the EU/Italian Food GI system. The smaller the Consortium, the more effective the System works and the more benefits it provides for the associated producers and products. This is because smaller Consortiums have more time to be proactive about administering the EU/Italian Food GI system effectively for all its members. Proper administration filters down to ensure consistent quality products are being made, by all growers and producers, and this instills trust in the System, and the PDO/PGI symbols, for producers and consumers alike. It also gives credibility to the System as a whole, which in turn assists with protecting the relevant GI on international markets as well.

As Luigi Allasia of Prosciutto di Cuneo PDO spelt out:

\begin{quote}
If the System is run really well, then it is worthwhile, but if shortcuts are taken, then it is not going to be as effective. In the 1980s, the most world-renowned prosciutto was Prosciutto di Parma. It was known for its excellence. But then certain errors were made because the Consortium grew too much and there are many people within it with different ideas.
\end{quote}

\textsuperscript{1040} Interview with Mauro Rosati, Director General Qualivita, (Siena, Tuscany, Italy, 19 September 2014).

\textsuperscript{1041} Interview with Gianluigi Zenti, Executive Director, Academia Barilla, (Parma, Emilia-Romagna, Italy, 18 September 2014).

\textsuperscript{1042} Interview with Gianluigi Zenti, Executive Director, Academia Barilla, (Parma, Emilia-Romagna, Italy, 18 September 2014).
Therefore, politics has intervened, and this has impacted on the quality of the prosciutto, so that some Prosciutto di Parma PDO tastes really great and others don’t. The drama created by these larger Consortiums needs to be restrained and maintained so that the original idea behind the PDO/PGI system is not lost – protecting the connection between food and origin which provides for a quality product.

On the flip side, smaller Consortiums have been able to better manage their role of governance and as a result have maintained more credibility in their associated GI. They are able to more effectively regulate and safeguard that there is a connection between food and origin.

*If a PDO system is going to work effectively, then the PDO has to be regulated. You can't have pig meat arriving from Brazil going into a Prosciutto di Parma. The meat has to be from the restricted area. Prosciutto di Cuneo PDO is very well mapped out and limited. Our pigs live on a balanced diet, and there are no ingredients, other than pig meat and salt. They are born and bred to provide the product- Prosciutto di Cuneo PDO. What you give to the animal, the animal will give back to you. If you therefore feed the pig the wrong food, the pig will deliver the wrong meat back to you and this will affect the quality of the product. Prosciutto di Cuneo PDO does not do this. We follow our guidelines seriously.*

Similarly, the Consorzio di Tutela Pecorino Toscano PDO has positive thoughts of the EU/Italian Food GI system because being a smaller Consortium it has been able to look after its producers and consumers. Its effective governance has created a “pact with consumers- the cheese that they are buying is the real deal, that has been made following rules and regulations, and that has been checked and certified. Consumers can buy what they want, but if they buy our Pecorino Toscano PDO cheese, then at least they are guaranteed that it is the real Pecorino Toscano PDO.”

The Consortium for the ABTM PDO has not experienced many benefits as a result of the System only because ABTM PDO was already a well-known and unique product prior to the introduction of the EU/Italian Food GI system. However,

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1043 Note that in the interview with Francesca Guidetti, Consorzio del Prosciutto di Parma PDO, (Ruliano, Langhirano, Parma, Emilia-Romagna, 16 September 2014), the overall thoughts on the EU/Italian Food GI System for Prosciutto di Parma PDO were positive other than the problems encountered by Prosciutto di Parma in relation to imitation products and lack of international recognition of Prosciutto di Parma PDO as discussed.

1044 Interview with Luigi Allasia, Director of Prosciutto di Cuneo, and majority holder in the Consorzio di Tutela di Prosciutto di Cuneo for the Cuneo province, (Lagnasco, Piedmont, Italy, 10 September 2014).

1045 Interview with Luigi Allasia, Director of Prosciutto di Cuneo, and majority holder in the Consorzio di Tutela di Prosciutto di Cuneo for the Cuneo province, (Lagnasco, Piedmont, Italy, 10 September 2014).

1046 Interview with Andrea Righini, Director of Consorzio di Tutela Pecorino Toscano PDO, (Grosseto, Italy, 22 September 2014).
Andrea Galeotto of the Consortium endorsed that the EU/Italian Food GI system is worthwhile if it is properly administrated and regulated by Consortiums. In particular, Andrea Galeotto suggested that international governance of EU/Italian Food GIs is necessary to secure GI recognition, protection and promotion for Italian producers to be able to gain the most out of their GIs.

Andrea Galeotto suggested that for the EU/Italian Food GI system to work more effectively across the board, there needs to be a qualitative connection between food and geographical area.

This is what the GI system should be about and this is what the initial idea was behind the EU/Italian Food GI system. Ideally: locals from a particular area; should make the GI product in a particular way; using regional core ingredients; that then results in the product having a unique flavour that is great. If you have all these elements then it makes total sense to have a food GI system because there is a unique product with a qualitative connection with its origin that can be set apart from competitive products and protected. Where there is a high quality product with a qualitative connection, then that product can be promoted worldwide, like our ABTM PDO.1047

Therefore, Andrea Galeotto confirmed that a food GI system must be about protecting the connection between food and origin. That must be its paramount consideration, aim and objective. By implementing a food GI system that provides clear ex ante guidance on how the connection between food and origin can be acquired, then a food GI system ‘makes total sense.’ The three main elements that Galeotto suggests are essential for a food GI system include: that food producers from a region; make the GI product using regional core ingredients; and make the GI product in a particular manner. By having these three main elements, Galeotto suggest that a food GI system will protect unique food products that have a clear and strong connection with their regional origin. Furthermore, where the food product is of a high quality that is ‘essentially attributable’ to its regional origin, then that food product will obtain a reputation on both a national and international level.

What Galeotto is suggesting is a sui generis food GI system that protects the connection between food and origin and that has elements/criteria that are very similar to the ones suggested in Chapter 3. These elements will be further discussed below, as well as in Chapter 7 that explains in more detail the elements proposed for an Australian sui generis food GI system taking into account the observations I made during the Italian and South Australian fieldwork

5.8.4.4 From a producer’s perspective

For the Italian Interviewees who have experienced the EU/Italian Food GI system pursuant to the regulation of larger Consortiums, the interview with Fattorie Fiandino endorsed their overall opinion of the System:

1047 Interview with Andrea Galeotto, Director of Consorzio Produttori Antiche Acetaie, (Modena, Emilia-Romagna, Italy, 17 September 2014).
The GI system started off as a good thing, with the right intentions in mind, but now in Italy, things have changed for the worse with PDO goods. For cheeses, there are not as many proper quality controls or regulations any more. Smaller consortiums are working better than larger ones...The birth of the GI system was great, but there has to be ongoing governance. The more Consortiums allow cheaper inferior products to use a GI, the more they are allowing the System to be discredited and this is wrong. They are undermining the importance and credibility of the System, and they are undermining products, their quality and the qualitative connection between food and origin.1048

However, the Italian Interviewees who have experienced some negatives with the EU/Italian Food GI system still believe that there is value in GIs and a food GI system, as long as Consortiums carry out their functions properly. Proper governance among all members is paramount. “Sometimes in Italy, we take ourselves too seriously and are concerned about titles and positions. Whereas we should all be ourselves and work on making an effective GI system for all that is governed properly...Here it’s too political and contrived.”1049

In conclusion, the food producers interviewed all agreed that the EU/Italian Food GI system is a worthwhile system as long as there is a serious Consortium made up of producers who understand the product, carrying out proper audits of the system. “We need to be more concerned about working together than about titles and power. We need to get back to basics” including refocusing on the original intentions behind the EU/Italian Food GI system which was to recognise, protect and promote the real connection between food and origin and authentic products.”1050

Therefore, one of the key recommendations that most of the food producers made to me was that in order to avoid the problems encountered in Italy pursuant to the EU/Italian Food GI system it is imperative that all interested stakeholders in a food GI system in Australia must have an equitable voice in its implementation. Food producers, food industry and trade representatives and government must all work together in establishing a food GI system. By working together it is more likely that a food GI system will take into account their respective interests while ensuring that the ideal of protecting the connection between food and origin is also achieved and maintained.

1048 Interview with Egidio Fiandino, Director Fattorie Fiandino, (Saluzzo, Piedmont, Italy, 7 September 2014).
1049 Interview with Fiorenzo Giolitto, Director of Giolitto Formaggi, (Bra, Piedmont, Italy, 11 September, 2014).
1050 Interview with Fiorenzo Giolitto, Director of Giolitto Formaggi, (Bra, Piedmont, Italy, 11 September, 2014).
5.9. Concluding Observations and Recommendations

As noted in part 5.3.2.1 of this chapter, one of the main aims and objectives of the fieldwork in Italy was to determine whether the EU/Italian Food GI system has as its core purpose the ideal to protect and promote the connection between food and origin or whether this ideal has somewhat been lost since its inception in 1992. This question is important, as the whole premise of a *sui generis* food GI system is to identify and protect the connection between food and origin. As explained in Chapters 3 and 4, a food GI system must consider how food is connected to its origin by determining if food products have been made using locally sourced ingredients and within a region and if they have a quality, reputation or other characteristic that is ‘essentially attributable’ to its regional origin. The link between food and origin is a crucial element of a food GI system and is what sets GIs apart from trademarks. It is the main basis why GIs cannot be adequately protected pursuant to a trademark system, or consumer protection or passing off laws, because none of those laws identify the connection between food and origin as a core element/criteria required to obtain protection pursuant to those laws and regulations. As explained in Chapter 4, a *sui generis* food GI system does protect the connection between food and origin and can be designed to cater for the various manners in which food can be connected to its origin. Importantly, a *sui generis* food GI system ensures that only food products that have a clear and strong connection with origin can be labelled with a food GI.

Therefore, I wanted to find out from the Italian Interviewees if the EU/Italian Food GI system has maintained the ideal of protecting the connection between food and origin in adopting the EU/Italian Food GI system. What I found was that where small to medium sized Consortiums have regulated the usage of a PDO/PGI, the Italian Interviewees endorsed that the EU/Italian Food GI system does still have as its core purpose the ideal to protect the connection between food and origin. However, where a larger Consortium has regulated the usage of a PDO/PGI, the Italian Interviewees did not share the same view regarding the EU/Italian Food GI system. They suggested that the ideal to protect the connection between food and origin had, to a certain extent, been lost or overshadowed by larger Consortiums’ focus on their respective financial position. To that end, larger Consortiums aimed to obtain as many food producer members as possible to obtain more fees and money, but in doing so compromised effective regulation of ensuring that their PDO/PGI was only used on high quality food products. They therefore suggested that the EU/Italian Food GI system has become complicated and bureaucratic, placing onerous obligations on food producers for little return. Based on their experiences, the EU/Italian Food GI system has not been properly regulated and has lost sight of the ideal to protect the connection between food and origin.

In not regulating the connection between food and origin as required by the EU/Italian Food GI system, larger Consortiums have contributed to inconsistent quality food products being labelled with PDO/PGIs. This has therefore undermined the credibility of the EU/Italian Food GI system and has created a disincentive for some Italian food producers to keep on investing in the EU/Italian Food GI system. Italian food producers have been faced with increasing costs in being part of the EU/Italian Food GI system and have not always been content with
their return. Some have withdrawn from the System and have begun promoting their own products and brands.

However, for the Italian Interviewees who have had a positive experience of the EU/Italian Food GI system, the System still has as its core focus the connection between food and origin and protecting that connection. Smaller to medium sized Consortiums are able to regulate effectively that all food products that are labelled with their respective PDO/PGI is of a consistent quality and complies with all necessary PDO/PGI criteria and thereby provide incentives to Italian food producers to keep on investing in the EU/Italian Food GI system.

A further observation made from the fieldwork is that many of the Italian Interviewees could not understand why they were still faced with ongoing issues regarding international competitors using Italian GIs on products made outside Italy notwithstanding EU/Italian GI protection. They were frustrated with their respective Consortium for not stopping international food producers from using their registered PDO/PGI on food products that were not made in the GI area or in accordance with the prescribed GI method. As explained throughout this chapter, this relates to whether a PDO/PGI is being used by a food producer in a country such as USA or Australia as a generic product descriptor or as a common food term. It also relates to the Old World versus New World dichotomy explained in Chapter 4 and the EU’s desire to claw back as many Old World terms from the New World as possible. I found that in some instances, the Italian Interviewees did not fully appreciate these complex international GI issues and were not aware of the broader international issues that were causing Consortiums to not be as ‘proactive’ as they had hoped in stopping international food producers from using a registered PDO/PGI. Some Italian Interviewees expected international recognition and protection of their PDO/PGI that was not always realistic given the broader international issues at play.

The fieldwork also revealed that Italian food producers would like to be more involved with GI protection given their product knowledge and appreciation for the connection that exists between food products and origin. They believe that they are able to offer valuable insight into the connection between food and origin and assist with regulating that the connection exists before PDO/PGIs are attached to food products. Italian food producers want to have an equitable voice in the EU/Italian Food GI system at the same level as Consortiums and the Italian government.

During the fieldwork it became evident that there has not been enough education for consumers on the EU/Italian Food GI system and what it means when a GI is attached to a food product. This is particularly true of international consumers outside the EU. Italian food producers would like to see Consortiums take a more active role in educating consumers in this regard. They want consumers to better understand what a GI means in terms of quality and characteristics of product. They want consumers to understand that a GI represents that there is a system that regulates food is connected to origin and that criteria regarding usage of an Italian food GI has been met by relevant food producers before a GI can attach to a food product.

Therefore, given my observations, I have concluded that while the initial ideal of implementing the EU/Italian Food GI system in Italy was to recognise, protect and
promote the connection between food and origin, this ideal has somewhat been lost. This is primarily because some larger Consortiums have not adequately regulated the usage of their respective PDO/PGI on food products and this has resulted in food products of inconsistent qualities being labelled with a PDO/PGI. This has undermined the value of some PDO/PGI registrations and to a certain extent has also undermined the credibility of the EU/Italian Food GI system as a regulated system that protects the connection between food and origin. Political, trade and economic issues and bureaucracy have in some instances taken over the ideal of protecting the connection between food and origin in many instances. While trade issues related to food GIs are legitimate and real issues to which regard must be had, there must be a balance between those factors and protecting the connection between food and origin. Therefore, this has provided a cautionary tale for any country looking to introduce a food GI system.

It is important for the Australian government to work with regional food producers, as well as the broader food industry, agrifood and agricultural industries to design a *sui generis* food GI system that protects the connection between food and Australian regions. By working together, these industries can also design a *sui generis* food GI system that caters for these industries’ trading needs and obligations, and that places Australia in a stronger position in relation to the identification and protection of food GIs, as explained in Chapter 4. The fieldwork revealed that it is particularly important for a successful GI system that the regulation of the connection between food and origin never be compromised. The protection between food and origin must always be enforced pursuant to a *sui generis* food GI system so that food GIs are only used on food products that have a clear and strong connection with a region and that comply with the GI criteria. This will ensure that food products that are labelled with food GIs are of a consistently high quality and will emphasize the credibility of a food GI system among food producers and consumers.

The Italian fieldwork has provided valuable insight into the elements required if a successful *sui generis* food GI system is to be introduced in Australia. These elements include the following:

- The connection between food and origin must be the core focus of a *sui generis* food GI system and this focus must be maintained.
- Food products must have a clear and strong connection with a region for a food GI to attach to them.
- The system must set out clear *ex ante* guidance and criteria that informs food producers how food products have a clear and strong connection with a region and with which they must comply to be able to use a food GI.
- The connection criteria must include that the food product be made using locally sourced ingredients and be made within a region.
- Regional food producers must be involved in designing a food GI system because of their knowledge about regional food products and how they are connected to their regional origin.
- There must be a governing body that diligently regulates that GIs are only attached to food products that meet the relevant criteria. This will assist with ensuring that food GIs are only used on food products of a consistent
quality. The governing body must apply the GI system rules fairly and equally to all food producers.

- Costs involved with using a food GI system need to be maintained at a fair standard so that all participating producers can afford to be part of the system.
- Education on what a food GI system represents and how it works is needed for food industry organisations (including, but not limited to, food manufacturers, food product retailers and restaurants), producers and consumers. Education is required early in the process of implementing a food GI system so that everyone understands what a GI represents in terms of the quality and characteristics of the product (including information about its origin and core ingredients sourced from there) and signifying that a legal framework of regulation exists to ensure that criteria has been met for the product to qualify having a GI attached to it.
- A food GI system must consider international trade issues regarding GIs and food terms in order to secure a proper balance of the ideal of protecting the qualitative connection between food and origin with trade, economic, and political issues.

These elements will be further explained in Chapter 7, after consideration has been given to the findings made during the South Australian fieldwork regarding the need for a *sui generis* food GI system to be implemented in Australia, as explained in Chapter 6. By drawing on the observations made from the Italian fieldwork as to what is required for a successful *sui generis* food GI system, and considering these elements in the context of the observations made during the South Australian fieldwork, Chapter 7 will provide a practical explanation of the key features required for a successful Australian *sui generis* food GI system. This practical explanation is intended to assist Australian government and the Australian food, agrifood and agricultural industries, and regional food producers in moving forward with a *sui generis* food GI system that is tailored for Australia’s GI and trading needs.
Chapter 6. The Value of Australia Using Food Geographical Indications on Food Labels under a Food GI System

6.1. Context for Research and Fieldwork in the South Australian Regions

Case Study: South Australian Regions - Barossa Valley And The Adelaide Hills

Australia sees trade risks, including the risk that some of the current WTO proposals for extended GI protection for products other than wine and spirits have the potential to disrupt trade in goods Australia presently supplies to third party countries pursuant to genericised geographical terms...Despite Australia’s opposition, would an extended GI scheme for agricultural products and foodstuffs be appropriate for its economy and agriculture? This is an especially relevant question in light of the vast proportions of rural and agriculturally diverse regions comprising Australia’s landscape, and the recent EU emphasis of GI registration as rural development tools.1051

6.1.1. Government of South Australia’s enquiry into food GIs

In February 2011, the then Premier of South Australia, Mike Rann, announced a new portfolio, called Food Marketing, to which he appointed John Rau MP1052 as its Minister. As part of the Food Marketing Portfolio, John Rau MP initiated a State Government enquiry, and report, called Appellation Have Your Say, enquiring into the desirability for both the South Australian public and food industry, to have a food protection scheme in South Australia.1053

In the Foreword to Appellation Have Your Say, John Rau MP noted that while:

It is unrealistic to expect that South Australia can develop overnight a food appellation scheme of the scope and depth of Italy or France...a realistic goal is for South Australia to become a national leader in this field, and develop an effective scheme to protect and promote our premium food regions and their unique products. If we do this well, South Australia will not only reap marketing benefits, we will also build on our regional economies and further enhance our international reputation for fine food.


1052 At the time, John Rau MP was also the Deputy Premier of South Australia and Minister for Tourism.

1053 PIRSA, ‘Appellation Have your Say,’ (Government of South Australia, Primary Industries and Resources SA, 2011).
The State Government does not intend to impose an appellation scheme on any region of South Australia...I want to know if the public and industry want a food protection scheme in South Australia. If we do, I need feedback from industry and the broader community to build the right scheme for our State.

Most of the core questions raised by the Appellation Have your Say initiative are questions that I have asked throughout this research and the fieldwork pursuant to taken in the South Australian Regions. They include Does South Australia have quality regional food and produce that should be identified and protected? Does a food protection scheme suit the South Australian food industry and do the producers and community want it? What would a food scheme look like? Who would administer it? How is it to be funded? What should it protect and how are those qualities defined?

The other similarity between my research and Appellation Have your Say is the fact that the Appellation Have your Say document reviewed EU’s Food GI System as an example model of regional food appellations, acknowledging that a multi-layered scheme that accommodates different types of producers and products, such as the Protected Designations of Origin and Protected Geographical Indications levels in the EU food GI system, could work well for the South Australia’s food industry. This would allow for recognition of regional produce that is 100% sourced and manufactured in a particular region of South Australia, while also allowing for “different degrees of regional food content...for example, artisan manufacturers who source some produce from other areas of the State to still be recognised pursuant to the scheme.”

However, the Appellation Have Your Say enquiry was not taken any further. The Government of South Australia did not follow through with the feedback and submissions that it received in relation to Appellation Have Your Say. My research

1054 ‘Industry’ throughout this Chapter refers to regional food, wine and tourism associations.
1055 PIRSA, above n 1099, iii.
1056 Ibid 2.
1057 Ibid 3.
1058 Ibid.
1059 During my interview with James March, CEO of Barossa Grape and Wine Association Inc, (Tanunda, Barossa Valley, South Australia, 2 April 2014), James March revealed that “industry was split on the idea of a food protection scheme intimated pursuant to Appellation Have your Say”, and that the South Australia State Government did not follow through with the feedback and submissions that it received in response to the Appellation Have your Say document: The Government requested feedback from industry and the broader community, but then closed Appellation Have your Say. It is for this reason that Barossa Valley took on the idea of food protection at a regional level instead, by establishing the Barossa Trust Mark, and has since been working with PIRSA on this initiative.
takes many of the issues explored in *Appellation Have Your Say* further. By conducting fieldwork in Italy and South Australia, many of the questions raised by *Appellation Have Your Say* have been answered by the South Australian Interviewees. Furthermore, the Italian fieldwork has revealed how the EU/Italian Food GI system works at a practical level, including the risks, benefits and costs involved with the System. By analysing the current consumer protection, passing off and trademark laws that currently regulate the usage of Australian regional names on food labels, and identifying the deficiencies of these current laws and regulations, I have explained why there is a case for implementing a *sui generis* food GI system in Australia. This is further supported by the analysis of current international trade issues that emphasise that food GIs are important trade negotiation issues in the context of FTAs. My research therefore adds to the enquiry that the Government of South Australia started with *Appellation Have Your Say* and recommends a *sui generis* food GI system be implemented in Australia. In doing so, my research provides the Australian government and Australian food industry with practical recommendations on how a *sui generis* food GI system can be implemented and the worth of using food GIs on food labels.

In 2013, the *Appellation Have your Say* enquiry was replaced with a *Premium Food and Wine from our Clean Environment (Plan Discussion Paper)* (Discussion Paper) to which the Government requested feedback from the community and industry members. The Discussion Paper was “designed to present the current thinking on how Government, industry and the community can work together to foster growth in the South Australian food and wine sector” and was prepared to illustrate the Government’s commitment to building up consumer identification of South Australia’s regions and products. The Discussion Paper explained that the focus of ‘premium, quality and clean’ credentials were in the context of South Australia’s premium quality food and wine from South Australia’s clean environment.

The Discussion Paper was not as specifically focused on a food protection scheme as *Appellation Have your Say*. However, in explaining the credential of ‘Premium’ the Discussion Paper revealed that ‘Premium’ “implies a sense of quality [and is a] concept that will be defined by the market where credence attributes (non-price factors) add value.” Provenance was one of those credence attributes. Therefore,

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1060 PIRSA, ‘Premium Food and Wine from our Clean Environment Discussion Paper,’ (State Government of South Australia, Primary Industries and Resources SA, 2013), <http://www.pir.sa.gov.au/__data/assets/pdf_file/0009/233496/PFWCE-Discussion_Paper.pdf>. This Discussion Paper was initiated in 2013 pursuant to Premier Mike Rann, pursuant to the Ministry of Agriculture, Food and Fisheries, at the time led by Gail Gago MP. In April 2014, Premier Jay Weatherill became the new South Australian Premier and the *Premium Food and Wine from our Clean Environment Plan* was then taken over by the new Minister of Agriculture, Food and Fisheries, Leon Bignell MP. At the time of writing this thesis, Leon Bignell MP was still the Minister of Agriculture, Food and Fisheries.


1062 PIRSA, ‘Premium Food and Wine from our Clean Environment Discussion Paper,’ (State Government of South Australia, Primary Industries and Resources SA, 2013),
the Discussion Paper touches on protecting and promoting the connection between food and environment pursuant to the credential of ‘Premium’.

In response to the Discussion Paper, the Government of South Australia released the *Premium Food and Wine from our Clean Environment Plan* (Action Plan) in September 2013.\(^\text{1063}\) The Action Plan is based on three themes: Build our Brand, Grow Our Capability and Secure Production.\(^\text{1064}\) In the Action Plan, the State Government recognized that food and wine are “central to South Australia’s identity and crucial to [South Australia’s] prosperity” given that “in 2013-14 the agriculture, food and wine industries contributed $17.1 billion to the economy, employed 1 in 5 workers, and accounted for more than 40% of South Australia’s merchandise exports.”\(^\text{1065}\) Food and wine is a global growth area with demand for food expected to increase by 70% by 2050, with the fastest growing markets expected to be in Asia. Given South Australia’s established relationships in the region, it is in a prime position to take advantage of this rising demand and this is why the Action Plan has become a priority for South Australia.\(^\text{1066}\)

The Action Plan further explains that ‘Premium’ products are those that have particular attributes that are valued by consumers. While the Action Plan does not specifically refer to GIs, it does refer to characteristics/elements that are typical of a food GI system. For example, pursuant to the *Build our Brand* theme of the Action Plan, one of the core focus elements is to “promote [South Australia’s] premium


\(^\text{1064}\) The ‘Build our Brand’ theme covers *promotional activities, further developing markets and building South Australia’s reputation for food and wine tourism experiences*. The ‘Grow our Capability’ theme is about *driving innovation, enhancing business capability, supporting workforce growth and ensuring a competitive business advantage*. ‘Secure Production’ theme covers *activities such as maintaining biosecurity, the sustainable use of natural resources and encouraging clean production through efficient practices*. [Reference: ‘Action Plan for Premium Food and Wine from our Clean Environment’, (Press Release by Minister Gail Gago, 9 September 2013), <http://pir.sa.gov.au/alerts_news_events/news/archives/pirsa_archive/action_plan_for_premium_food_and_wine_from_our_clean_environment>].


quality and clean credentials, and it is within this element that the idea of protecting the connection between food and origin is discussed. The ‘premium’ component of the Action Plan looks into consumer demands for ‘credence attributes’ that include provenance and traceability of food, both elements that are features of a food GI system as discussed in Chapter 4. The aim of the Action Plan is to “support the development of credence attributes that consumers are known to value. These include provenance, traceability and sustainability.”

Increasingly, markets and consumers are looking for the ‘credence attributes’ of food. These are the invisible aspects of a product, such as ‘natural’, ‘sustainable’, and ‘product of’...the aim is to support the development of credence attributes that consumers are known to value. These include provenance, traceability and sustainability.

A Feedback Summary Report on the Action Plan issued in 2014, noted that there is “wide support for regional branding and image development, and...building regional capability for individuals and businesses involved in food and wine production.” In addition, moving “product through regional and direct-to-consumer channels, such as online, cellar door, farmers markets and regional food service and independent supermarkets” has become more popular and in demand. Given this feedback, the concepts of Regional Branding (as discussed throughout this thesis) and agri-tourism are key focuses of the Action Plan moving


forward and one of the main suggested actions to meet both of these include origin labelling.

As a consequence of the Feedback Summary Report, the Action Plan was further developed to form a report on the “Premium Food and Wine from our Clean Environment Projects and Milestones” (Projects and Milestones Report) providing details on the projects and milestones being delivered as part of the Action Plan. ‘Part ‘a’ of the Project and Milestones Report focuses on the projects required to promote the ‘premium quality and clean’ credentials of the Action Plan. One of the key action areas for this promotion is to “support industry initiatives to promote credentials, including provenance, traceability and sustainability” (Action Area). The two main projects to develop this Action Area are first, supporting brands of key regions. This involves establishing a "regional branding program to expand the application of a ‘Trust Mark’ and regional marketing programs that promote the history, character and produce” of South Australia’s food and wine regions. Second, building South Australia’s Premium Food and Wine Credentials Grant Program. This involves “co-investments between business and industry to raise standards to assist with attaining third-party certification for credentials that are required to access markets or contribute to premium prices.” The main bodies involved with these projects are Primary Industries and Region’s SA (PIRSA); Brand SA; South Australian Tourism Commission; and industry.

Both the Feedback Summary Report and the Project and Milestones Report discuss origin labelling and Regional Branding. As already explained in Chapter 2, and as supported by the findings in the Feedback Summary Report, consumers have a “burgeoning interest in regional products…and want to know more about the production chain from actual producer to consumer.” Consumers value

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1075 Refers to ‘Barossa Trust Mark.’


1077 van Caenegem et al, above n 1084, 3.
geographical origin labels and research has shown that “informing consumers of the origin of food products via labelling is motivated by the recognition that geography is often correlated with a product’s overall quality, or, in the stronger case, geography may even be a determinant of a product’s ultimate realized quality.”

It is evident from both the Appellation Have your Say and Premium Food and Wine from our Clean Environment Plan initiatives that for the last six to seven years there has been a demand and need for some form of food protection scheme in South Australia. There are elements in both the Appellation Have your Say and Premium Food and Wine from our Clean Environment Plan that resonate with my research and fieldwork. The Appellation Have your Say considered whether the South Australian public and industry would be interested in a food protection scheme, such as a food GI system. The ‘food provenance and traceability’ elements of the Build our Brand theme of the Premium Food and Wine from our Clean Environment Plan Action Plan and Action Area, are both elements that are key features of a food GI system that I have researched. However, as explained above, my research and fieldwork build on these aspects and provide useful insight to Australian government and food industry on how a food GI system might compliment the Premium Food and Wine from our Clean Environment Plan and assist the Government of South Australia even further in meeting the Action Plan and delivering the objectives of the Action Area.

During my interview with James March, CEO of Barossa Grape and Wine Association Inc, (Tanunda, Barossa Valley, South Australia, 2 April 2014), he explained that “industry was split on the idea of a food protection scheme intimated pursuant to Appellation Have your Say”, and that the South Australian State Government did not follow through with the feedback and submissions that it received in response to the Appellation Have your Say document.

The Government requested feedback from industry and the broader community, but then closed Appellation Have your Say. It is for this reason that Barossa Valley took on the idea of food protection at a regional level instead, by establishing the Barossa Trust Mark, and has since been working with PIRSA on this initiative.

The Barossa Trust Mark was established in 2013 “following many years of collaboration and innovation between the Barossa’s three regional stakeholder groups: the Barossa Grape and Wine Association Inc, Tourism Barossa Inc and Barossa Food Inc.” These three groups are the founding members of Barossa Trust Mark Incorporated (Barossa Trust Mark Inc), owner of the Barossa Trust Mark. Barossa Trust Mark Inc is a not-for-profit incorporated body. The South Australian State Government contributed $40,000.00 towards the marketing of the Barossa Trust Mark and the Barossa Trust Mark website as part of the Premium

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1079 Information obtained from The Barossa Trust Mark website http://www.barossa.com/barossa-trust-mark/about-the-barossa-trust-mark.
Food and Wine from our Clean Environment Projects and Milestones Action Plan explained above.\textsuperscript{1080}

The Barossa Trust Mark is “an independently assessed mark of quality and integrity”\textsuperscript{1081} intended to provide consumers with a guarantee and an assurance of quality that the food, wine or tourism experience branded with the Trust Mark (see logo below) are of a standard of excellence:

\begin{center}
\includegraphics[width=0.5\textwidth]{barossa_trust_mark.png}
\end{center}

\textbf{Figure 6.1: Barossa Trust Mark}

Source:
\url{http://d1z63sdk26aghx.cloudflare.net/www.barossa.com/59d44b8563d84f6fd9e5024c388eeef3-uploads-barossa-trust-mark-flat-seal_cmyk-500.jpg}

Barossa Trust Mark Inc manages the use of the Barossa Trust Mark. The Barossa Trust Mark is not registered as a collective or certification trademark pursuant to the \textit{Trade Marks Act 1995} (Cth). It is a non-registered brand that is granted pursuant to licence. Licences are granted on a 12-month basis and are annually reviewed. The current licence fee is $500 per product per annum for businesses that have an annual turnover of less than $500,000.00 and the fee is $1000 per product per annum for businesses that have an annual turnover of more than $500,000.00.

The Barossa Trust Mark is awarded, pursuant to licence, to produce, products or experiences in four general areas: Barossa Food Produce and Products (Taste), Barossa Tourism Experiences (Experience), Barossa Wine (Savour) and Barossa Accommodation (Stay).\textsuperscript{1082} Barossa Trust Mark is awarded to “Barossan products

\textsuperscript{1080} Information obtained from PIRSA, “Regional Marketing Grant Funding”, \url{http://www.pir.sa.gov.au/regions/grants/supporting_brands_of_our_key_regions_grant_funding_program}.

\textsuperscript{1081} Information obtained from The Barossa Trust Mark website \url{http://www.barossa.com/barossa-trust-mark/about-the-barossa-trust-mark}.

\textsuperscript{1082} Information obtained from The Barossa Trust Mark website \url{http://www.barossa.com/barossa-trust-mark/about-the-barossa-trust-mark}. 
and experiences that demonstrate exemplary achievement and distinction across the five value pillars. To be awarded, applicants need to pursuant to a “rigorous independent judging process and demonstrate that they have met a high standard across the five pillars. The five pillars are as follows:

- **Origin** – All Barossa Trust Mark products originate in the Barossa Valley. ‘Origin’ means that the product is grown and processed in the Barossa Valley and is made from local ingredients. This pillar represents “[Barossa Trust Mark’s] sense of place in the Barossa.”

- **Quality** – All Barossa Trust Mark products meet a recognised high standard of quality. “This pillar represents [Barossa Trust Mark’s] sense of ambition and excellence.”

- **Environment** – Production processes used to make a Barossa Trust Mark product aim to protect the environment. “This pillar represents [Barossa Trust Mark’s] sense of responsibility and sustainability.”

- **Community** – The Barossa Trust Mark licence holders look out for others in the community and contribute whenever they can to make the Barossa community better. “This is a special place to live and work, and we look after each other. This pillar represents [Barossa Trust Mark’s] sense of belonging and pride in the Barossa.”

- **Integrity** – All Barossa Trust Mark licence holders operate their businesses with integrity and “are committed to encouraging and promoting the ongoing development of businesses in the region. This pillar represents [Barossa Trust Mark’s] sense of purpose and authenticity.”

The pillars of ‘origin’ and ‘quality’ are similar to the connection requirements provided pursuant to a *sui generis* food GI system in that ‘origin’ requires that Barossa Trust Mark products (including food products) be grown and processed in

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the Barossa Valley and made from local ingredients. In this regard, this is similar to what is required pursuant to the Italian PDO/PGI registrations and is similar to the first criterion that I have suggested for an Australian _sui generis_ food GI system. The ‘quality’ pillar is similar to the GI connection criterion that a food product’s quality be ‘essentially attributable’ to its regional origin. There are currently fifty Barossa Trust Mark licence holders including the following licence holders who I interviewed as part of the fieldwork in the South Australian Regions: Apex Bakery, Barossa Farmers Market, Hutton Vale Farm: Hutton Vale Farm Lamb, The Dairyman Barossa (owned by Michael Wohlstadt of ‘Barossa Heritage Pork’), Barossa Farmers Market, and Peter Lehmann Wines: Margaret Semillon. In relation to these products, most of these satisfy the ‘quality’ pillar because they have been made using traditional processes and methods brought to the Barossa Valley by Silesian and German migrants as explained in Chapter 3. An example of this is Apex Bakery’s 1924 Dough Ferment Loaf as explained below. Others satisfy the ‘quality’ pillar because food producers have invested in particular breeding methods for their animals that are used to make meat products, smallgoods or dairy products. Two examples are Hutton Vale Farm: Hutton Vale Farm Lamb for their lamb and The Dairyman Barossa for their artisan farm butter and cream.

The Barossa Trust Mark is an example of collaboration between regional food producers and regional groups creating a solution to overcome the deficiencies of current laws and regulations that inadequately regulate “the protection and promotion of…regionality”¹⁰⁹⁰ in the context of food products. As van Caenegem, Drahos and Cleary identify the Barossa Trust Mark is an example of entrepreneurial businesses coming together to “adopt/control or register a local name for branding purposes, and then to organise production through ensuring supply from a number of local producers who observe certain standards and produce locally.”¹⁰⁹¹ It has been designed to represent to consumers that Barossa Trust Mark products are of a high quality and to guarantee that all Barossa Trust Mark products have regional origin that has been regulated.

However, the Barossa Trust Mark is a “privately ordered protection.”¹⁰⁹² It has limited application in that Barossa Trust Mark Inc is only controlling the usage of the name ‘Barossa Trust Mark’ not the usage of the regional names ‘Barossa Valley’ or ‘Barossa’ on food products. Furthermore, it is also only regulating and protecting regionality in relation to the food products produced by the Barossa Trust Mark licencees. In this regard, the Barossa Trust Mark has similar limitations to CTMs as explained in Chapter 2. It only binds the licencees and does not stop other food producers from using the name ‘Barossa’ as part of their Regional Branding or from applying for a trademark that includes the name ‘Barossa’ to be used in relation to food products.

Furthermore, if Barossa Trust Mark is misused at a national level, that misuse needs to be “addressed as a breach of the Barossa Trust Mark Inc’s internal rules or, if

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¹⁰⁹⁰ Waye and Stern, above n 526, 483.

¹⁰⁹¹ van Caenegem, Drahos and Cleary, above n 15, 52.

¹⁰⁹² Waye and Stern, above n 548, 483.
consumers are mislead by the inappropriate use of the mark, by the general prohibition against misleading and deceptive conduct as set out in the Australian Consumer Law.\textsuperscript{1093} Therefore, the Barossa Trust Mark does not provide automatic rights of protection against misuse and infringement as does GI protection. A further limitation of the Barossa Trust Mark is that it “falls outside of the TRIPS Agreement and other international provisions governing GIs. As a result, there will be difficulties involved in preventing misuse of the Barossa Trust Mark in overseas jurisdictions.”\textsuperscript{1094} Moreover, “unless the renown of the Barossa Trust Mark makes it a unique signifier of the qualities of the goods and services it certifies in the relevant foreign jurisdiction, it will also be difficult to establish common law status.”\textsuperscript{1095}

Therefore, even though the Barossa Trust Mark is an example of regional groups being proactive about protecting regionality, to address the gap that exists in the absence of current laws and regulations adequately providing that protection, it provides very limited protection when compared to the protection provided pursuant to a \textit{sui generis} food GI system. However, the existence of the Barossa Trust Mark signifies that regional food producers and groups want better protection of regionality in the context of food products, wines and tourism experiences. In the context of food products, a \textit{sui generis} food GI system provides protection to regionality and a regional name as has been discussed throughout this thesis. Therefore, the Barossa Trust Mark licencees would be able to obtain broader protection pursuant to a food GI system. The licencees who I interviewed were all interested in a \textit{sui generis} food GI system as I explained below.

6.2. Aims and Objectives of this Chapter

As explained in Chapter 2, due to the deficiencies of current consumer protection, passing off and trademark laws, food producers and traders use Regional Branding on food labels that falls short of being misleading or deceptive, on involving passing off, even though the food product only has a weak connection with the named region. These laws and regulations do not adequately regulate whether there is in fact a clear connection between food and origin before a regional name can be used on a food label to make an origin claims. This is because consumer protection, passing off and trademark laws do not have as their central purpose the protection of the connection between food and origin.

As a result of the deficiencies of current laws and regulations as explained throughout Chapter 2, food producers and traders who use Regional Branding on food products that lack a clear and strong connection with the named region, take advantage of, and free-ride on, the reputation that Australian regions have for producing quality regional food and the value that accordingly exists in the relevant

\textsuperscript{1093} Ibid.

\textsuperscript{1094} Ibid.

\textsuperscript{1095} Ibid.
Australian regional names. In Chapter 2 I explained that this has led to the following four main problems:

1) First, consumers cannot rely on, or trust, food labels that include Regional Branding to obtain accurate information about the origin of food products;
2) Second, regional food producers are being deterred from making additional investment in producing Regionally Branded food products\(^{1096}\);
3) Third, the value that exists in Australian regional names as identifiers of authentic regional food products that have a clear connection with Australian regions is not being adequately protected; and
4) Fourth, Australia is risking losing the assets that it has in Australian regional names for the purposes of Regional Branding food products which has the potential to impact on Australia’s regionality and Australia’s agricultural and agrifood industries.\(^ {1097}\)

To gain direct insights into the problems that regional food producers have experienced as a result of the deficiencies of current consumer protection, passing off and trademark laws, I undertook fieldwork in the South Australian regions of the Barossa Valley and Adelaide Hills. I interviewed regional food producers who use Regional Branding, some with justification and some without. The fieldwork endorsed that current laws and regulations are not protecting against these problems resulting given that they not concerned with protecting the connection between food and origin. There is a clear difference in the protection offered to regional names used on wine labels to make an origin claim than there is to regional names used on food labels to make an origin claim pursuant to existing laws and regulations.

The main aims and objectives of this chapter is to explain what the South Australian fieldwork revealed in relation to whether Australia should implement a *sui generis* food GI system to provide adequate regulation and protection to the connection between food and origin. This is despite Australia’s current hesitation to protecting GIs for products other than wines and spirits as explained in Chapter 4. I also wanted to find out the basis of their opinion on this issue. While I have focused on the South Australian Regions in my research, as I have explained throughout this thesis, I recommend that a national *sui generis* food GI system be implemented in order to protect Australia’s regionality and the assets that Australia has in Australian regional names in the context of Regional Branding. A *sui generis* food GI system would be beneficial for Australia’s food, agrifood and agricultural industries facilitating the use of Australian regional names, in the form of food GIs, on food labels to promote Australia’s regional food that has a strong and clear connection with Australian regions. Not only is this important to overcome the deficiencies of current laws and regulations and to overcome the problems resulting from those deficiencies, but this is also important at an international level. A *sui generis* food GI system would provide Australia

\(^{1096}\) van Caenegem, above n 7, 5.

\(^{1097}\) Stern and Makris, above n 8, 43.
with trading opportunities with countries that favour protection of GIs pursuant to a GI system rather than pursuant to trademark laws or other laws. As explained in Chapter 4, this is an important consideration for the Australian government to make given the increase in FTAs that Australia’s trading partners are entering into in an effort to obtain ‘TRIPS-Plus’ protection for their food GIs. FTAs have become increasingly popular with countries, in particular WTO Members, as a mechanism to obtain this higher-level protection for food GIs rather than wait for the outcome of the: Extension Debate; Trans Pacific Partnership; and negotiations regarding the Transatlantic Trade Investment Partnership between the United States of America and the EU that are on hold.

This chapter explains the observations that I made during the South Australian fieldwork. In carrying out the fieldwork I identified that regional food producers and other representatives of the South Australian food industry believe that Australia should implement a sui generis food GI system to provide adequate regulation and protection to the connection between food and origin. They discussed with me the elements that they believe are essential for a successful system that enforces the connection between food and origin and protects Australian regional names that food producers use on food products to make origin claims. In carrying out the South Australian fieldwork, I identified a need to implement a sui generis food GI system that is collaborative and inclusive of regional food producers who invest time and money in producing Regionally Branded food products. It must take into account the ways in which Australian regional food is connected to Australian regions and protect against misuse of Australian regional names on food products that lack a clear and strong connection with Australian regions. This chapter explains these findings and others with a view to providing practical recommendations on the elements required for a successful Australian sui generis food GI system.

In Chapter 7 I draw together all of the chapters of this thesis and in particular Chapter 5 and this chapter. By considering the:

- Deficiencies of current laws and regulations as explained in Chapter 2;
- Connection between food and origin as explained in Chapter 3;
- International GI and trade issues as explained in Chapter 4;
- Observations made during the Italian fieldwork as explained in Chapter 5, in particular what is required for a successful sui generis food GI system; and
- Observations made during the South Australian fieldwork as explained in this chapter;

In Chapter 7 I provide practical recommendations for: the Australian government; regional food producers; and the broader Australian food, agrifood and agricultural industries on the elements required for a successful Australian sui generis food GI system.
6.3. Methodology

6.3.1. South Australian regions

For the South Australian fieldwork, I chose to focus on the South Australian Regions of the Barossa Valley and the Adelaide Hills (South Australian Regions) because these regions have very similar geographical features to the Italian Regions that I chose for my Italian fieldwork. As explained in Chapter 5, the Barossa Valley is similar to the Italian regions of Tuscany and Emilia-Romagna given its climate and elevation. Similar to Tuscany, the Barossa Valley has a continental climate, but due to its valleys (that have a variety of elevations from 180m to 400m) the Barossa Valley also has a wide range of mesoclimates. This results in a variation in temperatures from very warm on the valley floors to progressively cooler at higher altitudes on the hillsides and further North in the valley. The Barossa Valley also has gully winds that have a strong influence in some areas. Rainfall amounts vary from 450mm to 650mm per year and the water-holding capacity of the soil depends on its composition. The amount of sand or clay in the Barossa soil can vary significantly within the Barossa. These soil types are similar to the soil types found in Tuscany, namely albarese (clay-limestone) and sandstone.

The Adelaide Hills region is similar to the Italian region of Piedmont given its cool climate. It has a cool climate that offers a “distinct point of difference to many other regions in South Australia.” The region’s rainfall varies throughout the area, increasing at higher elevations, and receives the highest rainfall during the winter and spring months. Piedmont also receives its highest rainfall during the spring months. The soils are “predominantly grey to grey-brown loamy sands of moderate fertility,” with a high limestone content. This is very similar to Piedmont’s soil ‘calcareous marl’ which is a grey soil with high limestone content as explained in Chapter 5.

Another reason that I chose the South Australian Regions is because the food produced in these Regions are very similar to the foods produced in the Italian Regions, namely: cheese, meats and smallgoods, vinegars, olive oil, and wines.

6.4. South Australian Interviewees

6.4.1. Selection criteria of South Australian interviewees

The South Australian Interviewees were selected through existing networks of contacts or from publicly available information. The South Australian Interviewees

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1098 Girgensohn, above n 627, 20-21.
1099 Ibid.
1100 Ibid.
were emailed (email details were obtained from publicly available sources or from existing contacts) in the first instance to determine if they would be willing to meet with me and their interest in having GI usage and registrations expanded from wines and spirits to food in Australia, and making a comparison with the Italian Regions where GI registration and usage is already practiced, to determine benefits of such usage and registration.

Once the South Australian Interviewees responded and confirmed that they were interested in meeting, they were sent the following documents before the agreed meeting time:\textsuperscript{1103}:

- ‘Participant Information Sheet’ that set out information about the research project that explained that if they agreed to be interviewed, the discussion at the interview would include questions along the lines of those covered in the ‘Participant Information Sheet’ and that the interview would be recorded;\textsuperscript{1104}
- ‘Consent Form’;\textsuperscript{1105} and
- ‘Independent Contacts and Complaints Procedure Sheet.’\textsuperscript{1106}

### 6.4.1.1 Questions asked at interviews

The following questions were asked of the South Australian Interviewees:

- General background about food product and producer.
- What quality, attributes and characteristics does their food product have that is connected to their region?
- What processes do they use to produce the food products that are connected to their region?
- Their opinion on, and experience of, legal protection currently offered to the connection between their food product and origin pursuant to existing labelling and consumer protection laws, and trademark laws and other initiatives/proposals.\textsuperscript{1107} Are they satisfied with the legal protection offered pursuant to these laws?
- Their knowledge of GIs and what a GI means for them.
- Their thoughts about Australia’s current usage of GIs.
- Whether they would like to see a legal food GI system introduced in Australia, similar to the wine GI system?

\textsuperscript{1103} These documents were sent to the South Australian Interviewees in accordance with Ethics Approval No. HP-2013-075

\textsuperscript{1104} See Annex VII.

\textsuperscript{1105} See Annex VIII.

\textsuperscript{1106} See Annex IX.

\textsuperscript{1107} Such as the \textit{Premium Food and Wine from our Clean Environment Plan} and the Barossa Trust Mark.
• Their thoughts on the Extension Debate and the Multilateral Register, if any at all, and what they perceive as being the impact for them if the Extension Debate and the Multilateral Register both proceed per the EU’s proposals.

The semi-structured interviews were all recorded, taking between 1-2 hours each. Following the interviews, the interview transcripts were collated and transcribed. The South Australian Interviewees all had the right to withdraw from the research project at any point and this was stated in the ‘Consent Form’ and ‘Participant Information Sheet’, copies of which were left with the South Australian Interviewees.

The answers provided by the South Australian Interviewees to these questions have been drawn on to make the observations set out in part 6.5 of this chapter.

### 6.4.1.2 Aims and objectives of the interview questions

I asked the South Australian Interviewees these questions with the overall intention of determining whether they consider that, despite Australia’s current hesitation about protecting GIs for products other than for wines and spirits, Australia should implement a *sui generis* food GI system. In order to obtain insight into this issue from the South Australian Interviewees’ perspective, I asked the questions with a view to determining the following from the South Australian Interviewees:

• Their opinion on and experience with the current level of legal protection offered to the connection between food and origin pursuant to existing labelling and consumer protection laws, trademark laws, and other initiatives/proposals and whether they are satisfied with this protection.
• Their current level of knowledge of GIs.
• Their opinion, if any, on international GI issues such as the Extension Debate and the Multilateral Register and the impact that these could have for Australia and its usage of generic terms on food products and other trade obligations.
• Whether they see a need to implement a food protection system similar to that implemented for wines in Australia and the basis of their opinion.
• If they would like to see a legal food GI system introduced in Australia in the future what are the features that they believe such a system should include.

### 6.4.1.3 Details of South Australian Interviewees

As part of the fieldwork in the South Australian Regions, during February to May 2014 I interviewed the following food producers, food organisations and representatives from the South Australian food industry:\footnote{1108 For the South Australian Interviewees who are food producers I have included a summary of their respective products some of which will be discussed throughout this Chapter.}

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\footnote{1108 For the South Australian Interviewees who are food producers I have included a summary of their respective products some of which will be discussed throughout this Chapter.}
Table 6.1: South Australian Food Producers, Organisations and Representatives

<table>
<thead>
<tr>
<th>Region</th>
<th>Product</th>
<th>Producer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Barossa Valley</td>
<td>Hutton Vale Lamb</td>
<td>Hutton Vale Farm</td>
</tr>
<tr>
<td>Barossa Valley</td>
<td>Peter Lehmann Wines</td>
<td>Peter Lehmann Wines</td>
</tr>
<tr>
<td>Barossa Valley</td>
<td>Maggie Beer Pheasant Farm Pate</td>
<td>Maggie Beer</td>
</tr>
<tr>
<td>Barossa Valley</td>
<td>Maggie Beer Ice cream range</td>
<td></td>
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<tr>
<td>Barossa Valley</td>
<td>Maggie Beer Extra Virgin Olive Oil</td>
<td></td>
</tr>
<tr>
<td>Barossa Valley</td>
<td>Maggie Beer Aged Red Wine Vinegar</td>
<td></td>
</tr>
<tr>
<td>Barossa Valley</td>
<td>Maggie Beer Rosemary and Verjuice Biscuits</td>
<td></td>
</tr>
<tr>
<td>Barossa Valley</td>
<td>Schulz Bacon</td>
<td>Schulz Butchers Angaston</td>
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<tr>
<td>Barossa Valley</td>
<td>Schulz Bacon Pieces</td>
<td></td>
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<tr>
<td>Barossa Valley</td>
<td>Schulz Garlic Mettwurst</td>
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<tr>
<td>Barossa Valley</td>
<td>Schulz Plain Mettwurst</td>
<td></td>
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<tr>
<td>Barossa Valley</td>
<td>Barossa Feta</td>
<td>The Barossa Valley Cheese Co</td>
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<tr>
<td>Barossa Valley</td>
<td>Marinated Barossa Feta</td>
<td></td>
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<tr>
<td>Barossa Valley</td>
<td>Barossa Halloumi</td>
<td></td>
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<tr>
<td>Barossa Valley</td>
<td>Barossa Brie</td>
<td></td>
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<tr>
<td>Barossa Valley</td>
<td>Barossa Camembert</td>
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<td>Baby Bert</td>
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<tr>
<td>Barossa Valley</td>
<td>Barossa Triple Cream</td>
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<td>Barossa Valley</td>
<td>Barossa Geo</td>
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<td>Barossa Valley</td>
<td>Barossa Wanera</td>
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<tr>
<td>Barossa Valley</td>
<td>Barossa Washington</td>
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<tr>
<td>Barossa Valley</td>
<td>Barossa Washrind</td>
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<tr>
<td>Barossa Valley</td>
<td>La Petite Princesse</td>
<td></td>
</tr>
<tr>
<td>Barossa Valley</td>
<td>Blushing Princess</td>
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<tr>
<td>Barossa Valley</td>
<td>Le Petit Prince</td>
<td></td>
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<tr>
<td>Barossa Valley</td>
<td>La Dame</td>
<td></td>
</tr>
<tr>
<td>Barossa Valley</td>
<td>All Butter Puff Pastry</td>
<td>Careme Traditional Pastry</td>
</tr>
<tr>
<td>Barossa Valley</td>
<td>Sour Cream Shortcut Pastry</td>
<td></td>
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<tr>
<td>Barossa Valley</td>
<td>Dark Chocolate Shortcrust Pastry</td>
<td></td>
</tr>
<tr>
<td>Barossa Valley</td>
<td>Vanilla Bean Sweet Shortcrust Pastry</td>
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</tr>
<tr>
<td>Barossa Valley</td>
<td>1924 Dough Ferment Loaf</td>
<td>Apex Bakery</td>
</tr>
<tr>
<td>Barossa Valley</td>
<td>Barossa Heritage Pork</td>
<td>Barossa Heritage Pork</td>
</tr>
<tr>
<td>Barossa Valley</td>
<td>Free-range chicken</td>
<td>Saskia Beer’s Farm Produce</td>
</tr>
<tr>
<td>Barossa Valley</td>
<td>The Black Pig</td>
<td></td>
</tr>
<tr>
<td>Barossa Valley</td>
<td>Condiments</td>
<td></td>
</tr>
<tr>
<td>Region</td>
<td>Product</td>
<td>Producer</td>
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<td>---------------</td>
<td>----------------------------------------------</td>
<td>-------------------------------</td>
</tr>
<tr>
<td>Adelaide Hills</td>
<td>Allium Piper</td>
<td>Woodside Cheese Wrights</td>
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<td></td>
<td>Capricorn</td>
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<tr>
<td></td>
<td>Chevre</td>
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<td></td>
<td>Charleston</td>
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<td></td>
<td>Duet</td>
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<td>Edith</td>
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<td></td>
<td>Etzy Ketzy</td>
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<td></td>
<td>Figaro</td>
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<tr>
<td></td>
<td>Goat Curd</td>
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<td></td>
<td>Goat Milk Feta</td>
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<td></td>
<td>Goat on a Hot Tin Roof</td>
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<td></td>
<td>Harvest</td>
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<tr>
<td></td>
<td>Lemon Myrtle Chevre</td>
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<td></td>
<td>Mandolin</td>
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<td>Manon</td>
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<td></td>
<td>McLaren</td>
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<td>Monet</td>
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<td></td>
<td>Pumpeii</td>
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<td></td>
<td>Rubi</td>
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<tr>
<td></td>
<td>Saltbush Chevre</td>
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<td></td>
<td>Tapas</td>
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<td></td>
<td>Vesuvius</td>
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<td></td>
<td>Vigneron</td>
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<td></td>
<td>Swag</td>
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<tr>
<td>Adelaide Hills</td>
<td>Goat Curd</td>
<td>Udder Delights</td>
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<tr>
<td></td>
<td>Chevre</td>
<td></td>
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<tr>
<td></td>
<td>Marinated Chevre</td>
<td></td>
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<tr>
<td></td>
<td>Goats Camembert</td>
<td></td>
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<tr>
<td></td>
<td>Goats Brie</td>
<td></td>
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<tr>
<td></td>
<td>Udder Delights Goat Blue</td>
<td></td>
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<tr>
<td></td>
<td>Adelaide Hills Camembert</td>
<td></td>
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<tr>
<td></td>
<td>Adelaide Hills Brie</td>
<td></td>
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<tr>
<td></td>
<td>Adelaide Hills Double Cream Brie &amp; Triple</td>
<td></td>
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<tr>
<td></td>
<td>Cream Brie</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Udder Delights Heysen Blue</td>
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</tr>
</tbody>
</table>
I also interviewed the following South Australian food and wine industry based organisations and representatives:

**Table 6.2: South Australian Food and Wine Industry Organisations and Representatives**

<table>
<thead>
<tr>
<th>Region</th>
<th>Representative/Organisation</th>
<th>Industry</th>
</tr>
</thead>
<tbody>
<tr>
<td>Barossa Valley</td>
<td>Peter Wall AM/Yalumba Family Vignerons c.1849</td>
<td>Wine</td>
</tr>
<tr>
<td>Barossa Valley</td>
<td>Barossa Farmers Market</td>
<td>Food, tourism</td>
</tr>
<tr>
<td>Barossa Valley</td>
<td>Barossa Grape and Wine Authority</td>
<td>Promoting organisation of Barossa Brand, wine, food, tourism</td>
</tr>
<tr>
<td>Barossa Valley</td>
<td>Casa Carboni</td>
<td>Food, wine, cooking school, tourism</td>
</tr>
<tr>
<td>Barossa Valley</td>
<td>Dr Angela Heuzenroeder</td>
<td>Food historian and author of Barossa Food</td>
</tr>
<tr>
<td>Adelaide</td>
<td>Terry Lee</td>
<td>Wine</td>
</tr>
<tr>
<td>Adelaide</td>
<td>Paul Henry/Tasting Australia &amp; Winehero Australia</td>
<td>Wine, food, tourism, Creative Director of Tasting Australia and Director of Winehero Australia</td>
</tr>
<tr>
<td>Adelaide</td>
<td>Food South Australia Inc</td>
<td>South Australia’s peak food industry body[^1109]</td>
</tr>
<tr>
<td>Adelaide</td>
<td>DMITRE</td>
<td>Manufacturing, innovation, trade, resources and energy[^1110]</td>
</tr>
</tbody>
</table>

I refer to the producers, South Australian food and wine industry based organisations and representatives, collectively as the ‘South Australian Interviewees.’

### 6.4.2. Executive summary

As a result of the fieldwork undertaken in the South Australian Regions it is concluded that most of the South Australian Interviewees are interested in a food GI system to provide legal protection and enforcement to the connection between regional food and origin. Given that most of the South Australian Interviewees are familiar with the Australian wine GI system, they see the worth of a food GI system in that it can provide clear criteria as to when geographical location names can be used on regional food products with justification.

[^1109]: Food South Australia Inc is South Australia’s peak food industry body, established in 2010 through the merger of Food Adelaide and Flavour SA. Food SA is co-located with SARDI (South Australian Research and Development Institute) at the Waite Campus of the University of Adelaide.

[^1110]: DMITRE was the South Australian Government Department for Manufacturing, Innovation, Trade, Resources and Energy, but since 1 July 2014 is known as the Department of State Development. The Department of State Development is committed to helping “industry, business and communities identify and capitalize opportunities for job creation and economic growth.” The focus of my interview was in the food industry and business and investment and trade arms of the Department. [Reference: <http://www.statedevelopment.sa.gov.au/>].
Many of the South Australian Interviewees would welcome a similar food GI system as the Australian wine GI system on the basis that the Australian wine GI system provides a system of traceability of wine’s origin from the grapes to the bottle of wine. Most of the South Australian Interviewees see the worth of having a similar system for food. By using food GIs on food labels, a food GI system would protect and enforce the connection between regional food and origin and provide transparency for consumers about the origin of regional food from paddock to plate. It would also bring the protection of the connection between regional food and origin to a more consistent level with that currently provided to the connection between Australian wines and regions.

Most of the South Australian Interviewees, in particular food producers, are dissatisfied with the current level of legal protection offered to the connection between food and origin pursuant to current consumer protection, passing off and trademark laws. They would welcome clearer laws requiring a connection between food and origin before food provenance claims can be made on food products.

All of the South Australian Interviewees had some knowledge of what is a GI, albeit to various degrees. Most of the South Australian Interviewees’ knowledge of GIs was based on their wine background, some as wine producers or because of their associations with the wine industry and exposure to the Australian wine GI system. The South Australian Interviewees’ responses revealed an uncertainty about GIs and whether they would be able to use GIs in relation to their respective products. The basis of this attitude was dependant on the South Australian Interviewees’ respective position in the South Australian food industry and their sentiments on whether they would be able to meet ‘criteria’ prescribed by a food GI system. Therefore, while all the South Australian Interviews agreed that a GI should represent a connection between food and origin, and protect and promote that connection, there was a variety of opinions about the degree of connection required to qualify to use a GI relevant to their position in the South Australian food industry.

While most of the South Australian Interviewees did not have specific and/or extensive knowledge about the Extension Debate or the Multilateral Register, they all discussed with me issues such as: generic terms; clawing back of terms; and the concept of using regional provenance claims on foods. Most of the South Australian Interviewees identified the following three factors as their priorities in using Regional Branding on food products:

- Being able to use Regional Branding on their food products supported by a regulated system that ensures that all producers who use Regional Branding can in fact demonstrate that their food is connected to the region;
- Marketing their products using labels that are personal to their regions, products and production style, rather than using EU/Old World terms; and

Protecting and respecting EU food GIs as long as the protection is justified on the basis that there is a qualitative connection between food and origin, the EU GI is not used as a generic common descriptor name or common food term by Australian food producers, and that reciprocal protection is achieved for Australian food terms similar to what has occurred with the Australian wine GI system.
Many of the South Australian Interviewees, in particular those with an association with the wine industry, and exposure to the Australian wine GI system, told me that they would welcome a similar legal framework for food protection, where all producers who meet relevant criteria, would be able to use a public right mark to identify and protect the connection between food and origin.

Most of the South Australian Interviewees expressed to me their frustration at the lack of clarity provided in current consumer protection, passing off and trademark laws regarding the connection required between food and origin before Regional Branding is used on products. The overwhelming response from the South Australian Interviewees was that Australian should implement a new regulated food system that protects and promotes the connection between food and origin. Most of the South Australian Interviewees are no longer willing to accept Australian government putting this in a ‘too hard’ basket and believe that now is an ideal time to consider the implementation of a food GI system given producers’ and consumers’ interest in food origin and regionality.

6.5. Findings from fieldwork

As set out in part 6.4.1.2 of this chapter, my overall intention in interviewing the South Australian interviewees was to determine whether they consider that Australia should implement a sui generis food GI system to provide adequate regulation and protection to the connection between food and origin. This is despite Australia’s current hesitation to protecting GIs for products other than wines and spirits. I also wanted to find out the basis of their opinion on this issue. To obtain the South Australian Interviewees’ views on the implementation of a sui generis food GI system, I focused on the following main issues:

6.5.1. The South Australian Interviewees’ opinion on and experience with the current level of legal protection offered to the connection between food and origin pursuant to existing labelling and consumer protection laws, trademark laws and other initiatives/proposals and whether they are satisfied with this protection

Most of the South Australian Interviewees explained that they are dissatisfied with the current level of protection provided to the connection between food and origin, in particular with that offered pursuant to existing consumer protection, passing off and trademark laws. The dissatisfaction falls into the following two main categories, both of which allude to issues discussed in Chapter 2:

1) First, that origin claims made on food products about the connection between food and origin causes confusion; and

2) Second, that there is a real need to defend trademarks because rights for trademark owners are not as automatic as led to believe.

6.5.1.1 Origin claims made on food products cause confusion

Most of the South Australian Interviewees told me that their main concern with trade mark laws are the ‘grey areas’ that exist at a practical level when it comes to the inconsistencies in what is accepted to be registered as a trademark and/or a label by the Trade Marks Office, the veracity behind representations made in trademarks
or labels that include a geographical location and the confusion these issues cause for producers and consumers regarding food provenance.\textsuperscript{1111}

As explained in Chapter 2, at the moment in Australia, a geographical location name such as ‘Barossa’ can be legally used as part of a trademark without first requiring any real connection between product and origin. This is in keeping with Australia’s emphasis on brand names to create distinction between goods. Current consumer protection, passing off and trademark laws, including the PoOL framework, are primarily focused on the proprietary legal rights associated with a brand name for the registered owner of the brand name in order to increase sales of products and build consumer trust and confidence in a brand.

In the absence of a clear legal requirement on connection between food and origin, many of the South Australian Interviewees confirmed that, in their experience:

\textit{Trying to protect the use of the word ‘Barossa’ is very difficult…\textit{[because]} there are many businesses using the word ‘Barossa’ in their name even though it is not reflective of the fact that the product comes from the region. Use of the word ‘Barossa’ doesn’t always authenticate that the product is truly from the Barossa or that it has a certain quality connected to the Barossa.}\textsuperscript{1112}

In trying to pinpoint a reason as to why this has been able to happen, some of the South Australian Interviewees view the lack of a legal framework dedicated to food protection as one of the main causes. They acknowledge that it is the lack of legal requirement, that a real connection exist between food and geographical location when using a geographical location name as part of a product’s marketing, that is the main cause of this problem.\textsuperscript{1113} They also see this lack of legal requirement as the impetus behind permitted varying degrees of connection between products and origin and inconsistencies in product quality. In their opinion these have in turn impacted on the credibility of provenance claims, quality and authenticity of food products, sales of food products, the identity and credibility of the named region as well as the producers located within a region.

Their further assessment is that one of the main underlying reasons why there is no such legal requirement is a lack of pursuant understanding from the food

\textsuperscript{1111} For example, interview with Jess Greatwich, Manager, Barossa Farmers Market, (Angaston, Barossa Valley, South Australia, 25 February 2014): \textit{The reason why trademarks are so confusing is because some have trademarked ‘Barossa Getaways’, or ‘Barossa…’ whatever. In some respects ‘Barossa’ can be trademarked and in others it can’t, and in some respects there is a connection with the region, and in others there isn’t.}

\textsuperscript{1112} Interview with Stephan Knoll MP, Co-Proprietor, Schulz Butchers Angaston and Barossa Fine Foods, (Angaston, Barossa Valley, South Australia, 25 February 2014).

\textsuperscript{1113} Interview with Jan Angas, Proprietor and Producer, Hutton Vale Lamb, Margaret Lehmann, Director, Peter Lehmann Wines, Peter Wall AM, Non Executive Director, LogiCamms and Ex-Director, Yalumba Family Vignerons c.1849 (Tanunda, Barossa Valley, South Australia, 17 February 2014).
industry'] about food that has a real connection with its origin as opposed to manufactured food. On this point Jan Angas, proprietor and producer of Hutton Vale Lamb, feels “one of the main things [against regional food producers and products] is industry itself. Industry itself is really confused and does not understand the difference between food manufacturing and food that’s regional food: of our ground and our earth.” In Jan Angas’ opinion, this confusion and lack of understanding by industry caters for origin claims to be made on food products that lack a clear connection with a region and in her opinion this occurs on frequently.

Therefore, the South Australian fieldwork revealed that in order to preclude misleading origin claims on food products, the following issues need to be worked through. First, clearer laws requiring that a connection between food and origin exists before origin claims can be made on food products need to be carefully contemplated and introduced in Australian law. Such laws would need to form part of a broader specific food protection system that clearly stipulates the criteria that food producers need to meet before a regional name can be used on food products so as to ensure a qualitative representation of origin and provenance.

Having one legal framework dedicated to food provenance and protection issues, such as there exists with the Australian wine GI system, would help to alleviate current confusion about what names food producers can attach to their food products and when it is legally acceptable to use Regional Branding on food. This would provide better legal protection and enforcement of the connection between regional food and origin than is currently provided pursuant to consumer protection, passing off, trademark and PoOL laws that often deal with origin claims after they have already been used to market food products (after they have already been accepted as labels and trademarks). “There are a lot of things happening in food, and there have been many reinventions of ‘Barossa Valley’ systems. Producers are getting tired of these and skeptical, and would like just one system that actually works and that is easy to follow and is inclusive.” Using GIs on food labels instead of Place of Origin labelling would be worthwhile given that the central notion of GIs is to provide protection in a legal framework and enforce the connection between regional food and origin. In this regard, GIs are more relevant to protecting the connection between regional food and origin than existing laws that do not focus on this core element.

Second, such a legal framework would require administration from an appropriate legally constituted body to ensure that a connection between food and origin exists before an origin claim could be made on food. It is envisaged that such a governing

114 ‘Industry’ in this context means food manufacturers, food representatives, government bodies and legal departments, as discussed in interview with Proprietor and Producer, Hutton Vale Lamb, Margaret Lehmann, Director, Peter Lehmann Wines, Peter Wall AM, Non Executive Director, LogiCamms and Ex-Director, Yalumba Family Vignerons c.1849 (Tanunda, Barossa Valley, South Australia, 17 February 2014).

115 Interview with Jan Angas, Proprietor and Producer, Hutton Vale Lamb, (Tanunda, Barossa Valley, South Australia, 17 February 2014). (emphasis in original).

116 Interview with Saskia Beer, Proprietor and Producer of Saskia Beer’s Farm Produce, (Nuriootpa, Barossa Valley, South Australia, 7 May 2014).
body would have a very similar role to Wine Australia’s role in the Australian wine GI system. Introducing these changes in Australian law would result in a very similar legal framework for food and origin claims to that currently in place for Australian wines. This similarity will be addressed further below and in Chapter 7.

With the introduction of a *sui generis* food GI system must come change to current laws to avoid food producers being able to continue to use Regional Branding on food that has no connection with the named region. Failure to change existing Australian law will allow food producers to imply a connection with a region at the expense of the reputation of regional food producers who work diligently at ensuring a connection between food and origin exists, and labelling their products to reflect this connection. Failure to change Australian law will also impact on the reputation of regions that are known for producing premium regional food.

Some South Australian Interviewees from the Barossa Valley explained to me that this has already occurred in the Barossa where businesses have tried to take advantage of the Barossa’s reputation by coming “into the Barossa because it is *the Barossa* and then they call themselves a German heritage name and there’s no tie between their product, Barossa or German heritage.”

Several of the South Australian Interviewees revealed that, to a certain extent, the Barossa community has felt a need to take personal responsibility for the protection of the Barossa brand and image because of the lack of policing of usage of the region’s names on products that have no connection with the region. An example of this is the Barossa Trust Mark as explained in this chapter. James March, CEO of the Barossa Grape and Wine Authority (BGWA), the body responsible for promoting the brand *Barossa*, discussed with me the BGWA’s commitment to protecting the reputation of the Barossa, brand Barossa and ensuring some degree of connection between food and the region. This has been to fill in the gaps that exist because of a lack of clarity on this issue pursuant to current consumer protection, passing off and trade mark laws and regulations.

James March, CEO of BGWA, told me that most Barossa based food producers have wanted the Government of South Australia to take on this governance role, but failure to do so has meant producers and bodies such as the BGWA have had to be proactive about regulating usage of the Barossa brand.

> Generally speaking, people are very proud of the Barossa. We are little community on the big world stage. Industry does not have the resources to build the brand and integrity and police it – we need someone on board to police it and it should be government that does this, but when I have raised this, I am told that it is not government’s job to do this.\(^{1118}\)

In March’s opinion, the collaboration between the Barossa Valley community and regional based initiatives, such as the Barossa Trust Mark, have assisted with

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\(^{1117}\) Interview with Corey Fechner, Co-Proprietor APEX Bakery, (Tanunda, Barossa Valley, South Australia, 2 April 2014).

\(^{1118}\) Interview with James March, CEO, Barossa Grape and Wine Authority, (Tanunda, Barossa Valley, South Australia, 2 April 2014).
putting the “region at the forefront.” It has assisted with regional community monitoring of ensuring that a connection between food and origin exists before ‘Barossa’ is used on food products.

In keeping with this initiative, while many of the South Australian Interviewees acknowledged that not all ingredients in food products could be sourced from one region, for reasons such as availability of ingredients and food safety, their attitude is that if there was a clear legal requirement that the core ingredient, or some ingredients, be required to be sourced from the region before Regional Branding could occur, this would better protect the connection between food and origin than what is currently offered pursuant to existing laws. It would also help reduce the amount of origin claims that are currently being made as to food provenance. Most of the South Australian Interviewees revealed that they would be able to meet this requirement because they source as many products as they can from the South Australian Regions. Where they need other ingredients that cannot be regionally sourced they look next to other South Australian regions, then interstate, and lastly at international sources. For example, Victoria McClurg, proprietor and artisan cheese maker of Barossa Valley Cheese Co explained that:

By using ‘Barossa’ in our name—we are about the integrity of our brand and being as Barossa as we can possibly be. The cows' milk is 100% from the

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1119 Interview with James March, CEO, Barossa Grape and Wine Authority, (Tanunda, Barossa Valley, South Australia, 2 April 2014).

1120 Interview with James March, CEO, Barossa Grape and Wine Authority, (Tanunda, Barossa Valley, South Australia, 2 April 2014).

1121 Interview with Victoria McClurg, Proprietor, Barossa Valley Cheese Co, (Angaston, Barossa Valley, South Australia, 25 February 2014) and from <http://barossacheese.com.au/>: The Barossa Valley Cheese Co is located in Angaston, Barossa Valley, and has been operating since 2003. The artisan cheese range includes 25 styles of cow and goat milk cheeses, and is made using traditional methods. The ‘Barossa Washrind’ cheese has received a number of prestigious awards in artisan cheese competitions. ‘The Barossa Valley Cheese Co’ (word and image) is a registered Australian composite trademark no. 954175, in class 29 for cheese, and has been registered since May 2003:

Barossa and the goats’ milk is from as close as it can possibly be to this region. I look at getting products from South Australia first, and if I can’t get it from South Australia then I will look outside. That’s what it’s about for me. We will always be an artisan producer, sourcing milk from regional dairies and creating cheese imbued with the character of the region and passion of the maker.¹¹²²

The same approach exists in the Adelaide Hills Region. Kris Lloyd, proprietor and artisan cheese maker of Woodside Cheese Wrights, explained to me that all the milk she uses to make her cheeses “is regional, and the traditional method that I use to make the cheeses is regional. But I am not legally allowed to grow my own starter culture because I might grow bugs and infect people, and so I have no choice but to get it from France. It’s a food safety issue.”¹¹²³

In conclusion, most of the South Australian Interviewees agreed that there is a need for a framework for food protection that requires that the core ingredients, or some ingredients, be sourced from the region before Regional Branding can occur. Such a framework would require proof of this local sourcing of ingredients and be monitored to ensure compliance. Having such a requirement would better protect the connection between food and origin than what is currently offered pursuant to existing laws and regulations. Having a framework for food protection would assist food producers to be clearer about what names that they can attach to their foods and to provide transparency about the true origin of regional food for consumers. From a producer’s perspective Jan Angas of Hutton Vale Lamb and Margaret Lehmann of Peter Lehmann Wines expressed the view shared by most of the South Australian Interviewees that “marketing and origin go hand in hand and are not on competing sides of the fence. Regional loyalty is tribal.”¹¹²⁴ This view was also shared by other food industry representatives such as Peter Wall AM, ex-Director of Yalumba Family Vignerons c.1849, and Paul Henry, one of the creative


Woodside Cheese Wrights has been producing award winning cow and goat milk cheeses since 1994, with production of around 50 Tonne and distribution throughout Australia. All cheeses are made by directly sourcing regional milk from small regional dairies, allowing Woodside Cheese Wright the ability to maintain excellent governance over milk quality used in their cheeses. Woodside Cheeses are truly artisan in that they are all created by hand and some are seasonal, only made when the milk is perfect for each cheese style. Kris Lloyd established the South Australian Cheese Association ‘CheeseSA’ in 2004 to promote specialty cheese and introduce industry driven education and training programs in South Australia. Kris Lloyd is currently the Chair of the Association, as well as Director of CheeseFest, Australian Alfresco Cheese Festival, a Board member of the South Australian Tourism Commission and Chair of the Artisan Cheese Making Academy-Australia.

¹¹²⁴ Interview with Proprietor and Producer, Hutton Vale Lamb, Margaret Lehmann, Director, Peter Lehmann Wines, Peter Wall AM, Non Executive Director, LogiCamms and Ex-Director, Yalumba Family Vignerons c.1849 (Tanunda, Barossa Valley, South Australia, 17 February 2014).
Directors of Tasting Australia, who described that “in an ideal world, the best marketing should be about the truth and the reality of the area” and the law needs to change to ensure that there is better governance of claims being made as to food provenance.\(^{1125}\)

### 6.5.1.2 The need to defend trademarks

Many of the South Australian Interviewees further expressed their concerns about trademark protection and what it truly offers to them at a practical level. Many are disappointed that the rights that a trademark owner should obtain as a result of having a registered trademark are not as automatic or protective as they were led to believe based on previous legal advice.

Many of them noted with me that they had come to realize over the years that, notwithstanding they have registered trademarks which should provide them with automatic rights and protection, they still need to spend a large amount of money and time to defend their trademarks where instances of misrepresentations and/or misuse arise. Jan Angas expressed her sentiment that:

*The worst part of a trademark is that you always have to defend it; it's not a pro-active thing. It's a counteractive thing, and that would be my biggest chip on the shoulder about trademarks. If you are a small business, you don't have the resources: time, money or other; to defend what is yours. So for me, it's a little back to front, because a trademark does not protect you; it allows you to protect yourself, if you have the resources to do so.*\(^{1126}\)

In a similar vein, Saskia Beer of Saskia Beer’s Farm Produce spoke to me about her experiences with trademark laws, applications and registrations that have sometimes been unsuccessful because of the confusion that exists for food producers as to the names that they can attach to food products.

*What you can and can’t call a product because it is such a grey area. There are many people passing off with region names. There is accidental misleading and confusion and then there are a lot of people that are doing it deliberately to the extent that their labels are wrong...For example, we are moving away from using 'Barossa' because not all my products are made here or come from here\(^{1127}\). Also I don’t use ‘free range’ for my chooks anymore...I believe that my chooks are free range: they are in a paddock*
running free, but someone will come along and say that they aren’t and will fine me. So it’s easier not to use that term anymore.\textsuperscript{1128}

Shortly after my interview with Saskia Beer, in June 2014, Beer provided the ACCC with a court enforceable undertaking on behalf of her company, called Barossa Farm Produce Pty Ltd at the time (it is now called ‘Saskia Beer’s Farm Produce’ because Beer stopped using the word ‘Barossa’ as she explained in her interview with me because not all her products come from or are made in the Barossa Valley) as discussed in Chapter 2.

At the time of writing this thesis, Saskia Beer had stopped using the word ‘Barossa’ in her brand name and food product labels and replaced it with ‘Saskia Beer’s Farm Produce’. Saskia Beer disclosed to me that this was because she:

\textit{Could not farm poultry on the Barossa Valley floor. We can farm poultry in Eden Valley…so everything that is contributing to my industry is on the outside of the Barossa Valley. So I have been consciously moving away from ‘Barossa’ because I find it is too confusing. When we started off very small scale, ‘Barossa Chooks’ that was fine, but as we have grown, we have had to employ farmers from Freeling (northeastern neighbour to Barossa Valley region, 25 kilometres away from the Barossa Valley) and Cambrai (eastern side of the Mount Lofty Ranges, along the River Marne, 50 kilometres from the Barossa Valley), which are just outside the Barossa boundary. Probably ten percent of our farmers fall within the Barossa Valley boundary, and all of our manufacturing has to fall outside the Barossa because there’s no one with a skill base or the facility. So, we have very well travelled goods. It comes from the farm, comes in here, goes to the processor, becomes a product, and comes back here for aging and packing. It’s a pain in the bum, but you know that’s what has to be done in order to have a business. But then, I feel that what we do is very much Barossa culture and heritage based and the IP is in the Barossa Valley and the whole preserving culture is in the Barossa Valley.}\textsuperscript{1129}

Stephan Knoll MP spoke to me about the expense and time delays that trademark and labelling laws can cause for food producers at a practical level because of the inconsistent application of them resulting in a variation of trademarks, brands and labels that do not always have a connection with the geographical location included in the label. Involved with his family’s business ‘Barossa Fine Foods’,\textsuperscript{1130} Knoll

\begin{flushright}
\textsuperscript{1128} Interview with Saskia Beer, Proprietor and Producer of Saskia Beer’s Farm Produce, (Nuriootpa, Barossa Valley, South Australia, 7 May 2014).

\textsuperscript{1129} Interview with Saskia Beer, Proprietor and Producer of Saskia Beer’s Farm Produce, (Nuriootpa, Barossa Valley, South Australia, 7 May 2014).

\textsuperscript{1130} Interview with Stephan Knoll MP, Co-Proprietor, Schulz Butchers Angaston and Barossa Fine Foods, (Angaston, Barossa Valley, South Australia, 25 February 2014) and from BFF website <https://www.barossafinefoods.com.au/history>: Barossa Fine Foods’ history dates back to 1924 when Andreas Knoll (Stephan Knoll’s great, great uncle) learnt to make smallgoods in Germany. His nephew Hans Knoll (Stephan Knoll’s grandfather) learnt the tradition in 1946 in Germany before migrating to Australia in 1957 and settling at
\end{flushright}
candidly revealed that Barossa Fine Foods has in some instances been the cause of the inconsistency.

If you look at Barossa Fine Foods (BFF), which we use as a trademark, we are the best and worst of proper and improper use of the word ‘Barossa’. Some of our products can be tied back to the Barossa and others aren’t, but we can still use the trademark on them. BFF has eight shops in Adelaide and manufactures out of Elizabeth, but we use a lot of Barossa regional produce. We did start producing on my grandparents’ farm, which is outside of the Barossa, but would still be part of the Barossa as a broader geographical area. We trade marked BFF, and we thought that it was going to be a lot harder than what it was.\textsuperscript{131}

Knoll Consultants & Investments Pty Ltd have been the registered trade mark owners of composite Trade mark No. 1438647 ‘Barossa Fine Foods’ and image since 2011, in class 29 for chilled meats; class 35 for retail sale of prepared meat and meat products (butcher’s hop); and class 40 for butchery (meat preparation), smoking of meat\textsuperscript{132}:

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{finefoodwholesalers.com.au/images/listings/5c0be713.jpg}
\caption{Barossa Fine Foods Trade Mark}
\end{figure}

Source: https://finefoodwholesalers.com.au/images/listings/5c0be713.jpg

Having used the trade mark ‘Barossa Fine Foods’ on products that are not connected to the Barossa, Stephan Knoll acknowledged the frustration that this has

Rapid Bay. In 1961 Hans Schulz found work as a smallgoods maker and opened his own shop in May 1961 called ‘Bavaria smallgoods’. Hans’ son Franz (Stephan Knoll’s father) began to work at ‘Bavaria smallgoods’ at the age of 15 and learnt to make the very same smallgoods that Andreas Knoll had made. Eventually, in 1991, Franz started his own smallgoods business and bought a shop in the Central Market called ‘Barossa Fine Foods’ producing small quantities of product on Hans Knoll’s farm located below the Barossa reservoir. In 2001, the fourth generation of the Knoll family smallgoods makers began to work in the smallgoods business. BFF currently has eight retail outlets and a factory facility (in Elizabeth, South Australia) that supplies product Australia wide. “While our production has increased significantly, we pride ourselves on staying true to our traditional hand processing methods and to never compromise on the quality of our smallgoods made to traditional recipes.”

\textsuperscript{131} Interview with Stephan Knoll MP, Co-Proprietor, Schulz Butchers Angaston and Barossa Fine Foods, (Angaston, Barossa Valley, South Australia, 25 February 2014).

caused among Barossa Valley food producers whose products have a real connection with the Barossa, and whose reputation has at times been tarnished because of other’s misappropriation of the word ‘Barossa’, such as that of Barossa Fine Foods; as well as some confusion that it has caused for consumers. “Barossa Fine Foods has been given a lot of flack for using the trade mark on products that aren’t actually made in the Barossa…and is now becoming more authentic to justify the name. We are looking at making a production port in the Barossa Valley because we think that there is market share to be had for authenticated product.”

The Barossa Valley food producers who have been frustrated by Barossa Fine Food’s trade mark can apply to the Trade Marks Office to have the Trade Marks Register rectified pursuant to section 88(2)(c) of the Trade Marks Act 1995. Section 88(2)(c) provides that an application can be made pursuant to section 88(1) of the Trade Marks Act, to have a prescribed court order that the Trade Marks Register be rectified by cancelling or removing a trade mark, or by entering any condition or limitation affecting the registration of a trade mark, “because of the circumstances applying at the time when the application for rectification is filed, the use of the trade mark is likely to deceive or cause confusion.” Section 88(2)(c) is tested on the grounds of whether there is a ‘real, tangible danger of consumers entertaining a reasonable doubt’ or being ‘caused to wonder’ about the existence of a particular state of affairs, as a result of the use of the trademark. There are no limitations prescribed in section 88(2)(c) as to the reasons why the usage of a trademark is likely to deceive or cause confusion. Burrell and Handler suggest that one reason for a section 88(2)(c) application might be that while the trade mark did not at the date of filing the trade mark application contain a deceptive or confusing connotation, for a variety of reasons since that date the trade mark is deceptive or confusing at the time of a section 88(2)(c) application.

On this basis, Barossa Valley food producers might apply to have the Trade Marks Register rectified in relation to the Barossa Fine Foods trademark. An ‘aggrieved person’ can apply to have the Register rectified where there is an “overarching public interest in allowing rectification [of the Trade Marks Register] to ensure the integrity of the Register.”


1134 Trade Marks Act 1995 (Cth) s 190 identifies a ‘prescribed court’ for the purposes of the Trade Marks Act as each of the following: the Federal Court, the Federal Circuit Court; the Supreme Court of a State; the Supreme Court of the Australian Capital Territory; the Supreme Court of the Northern Territory; and the Supreme Court of Norfolk Island.

1135 Trade Marks Act 1995 (Cth) s 88(2)(c).

1136 Burrell and Handler, above n 124, 272.

1137 Ibid.

1138 Ibid 256.
producer might apply to have the Trade Marks Register rectified on the ground that Barossa Fine Foods’ usage of the trade mark is likely to deceive or cause confusion about the actual origin of the food products that are labelled with the Barossa Fine Foods’ trade mark. However, pursuant to section 89 of the *Trade Marks Act*, the court may decide not to grant an application for rectification made pursuant to section 88(2)(c) where the registered owner of the trade mark satisfies the court that the ground relied on by the applicant has not arisen through any act or fault of the registered owner.\(^{1139}\) While the interview with Stephan Knoll revealed that Barossa Fine Foods has used the trademark on food products that do not have any connection with the Barossa Valley, he also revealed that Barossa Fine Foods’ is taking measures to make usage of the trademark more authentic. Knolls suggested that the trademark can now be trusted more by consumers, that it does in fact represent a connection between food and origin, given that some production of Barossa Fine Foods products is located in the Barossa Valley and Barossa Fine Foods uses more Barossa Valley sourced ingredients.\(^{1140}\) Therefore, this change might allow Barossa Fine Foods to rely on section 89 of the *Trade Marks Act*, but would be dependant on the evidence that Barossa Fine Foods could provide to support its argument. While there has not been a section 88(2)(c) application made against Barossa Fine Foods, section 88(2)(c) of the *Trade Marks Act* provides a potential avenue for regional food producers to have the Trade Marks Register rectified on the basis that a trademark that includes a regional name used on food products to make an origin claim is likely to deceive or cause confusion. However, as discussed in Chapter 2, this does not provide as much of an automatic right against misuse of a regional name on food products as does a registered GI. A GI that is used on food products that do not have a connection with the GI area is *ipso facto* an infringement of the GI.

### 6.5.1.3 Conclusion

The South Australian fieldwork endorsed that most of the South Australian Interviewees, in particular food producers, are dissatisfied with the current level of protection offered in a legal framework to the connection between food and origin. They are especially dissatisfied with the protection offered pursuant to existing trademark laws and labelling laws. They would welcome clearer laws requiring a connection between food and origin before food provenance claims can be made on food products as will be discussed further below.

### 6.5.2. South Australian interviewees’ knowledge of GIs

All of the South Australian Interviewees had some knowledge about what a GI is, albeit to various degrees. Their knowledge was based on their food background - some as producers, some as chefs and some as both. It was also based on their experience of international food and wine scenes particularly in France and Italy where many have worked as chefs, sommeliers or in food and wine production.

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\(^{1139}\) *Trade Marks Act 1995* (Cth) s 89.

\(^{1140}\) Interview with Stephan Knoll MP, Co-Proprietor, Schulz Butchers Angaston and Barossa Fine Foods, (Angaston, Barossa Valley, South Australia, 25 February 2014).
Some have even studied food and wine courses in these countries. However most of the South Australian Interviewees’ knowledge of GIs was based on their wine background - some as wine producers and others because of their associations with the wine industry and exposure to the Australian wine GI system.

The main discussion point pursuant to this question was the South Australian Interviewees’ knowledge about the fact that GIs are meant to represent a connection between food and origin similar to how wine GIs represent the connection between wines and origin. While all of the South Australian Interviewees agreed that the protection and promotion of this connection was at the forefront of what GIs are meant to represent, their views on how the connection criteria can/should be met varied depending on the South Australian Interviewees’ subjective circumstances in the South Australian food industry. This made them uncertain about whether a food GI system could apply to them. The following opinions were offered.

### 6.5.2.1 GIs should represent a connection between food and origin

The majority of the South Australian Interviewees told me that in their opinion a GI should represent a connection between food and origin. Specifically this means that the food products must have a characteristic that is attributable to its regional origin. This could be based on the geographical factors of a region and in some instances even the human factors. However the South Australian Interviewees had a variety of opinions on the degree of connection required to qualify for using a GI on food products and their opinion was based on their respective food production position, requirements and needs.

Most of the South Australian Interviewees are unable to source every single ingredient for their particular product from their region. Reasons for this include that the ingredients are not locally grown or available and/or are seasonal. Ingredients might also need to be sourced from other areas in order to meet food safety standards. Most of the South Australian Interviewees treat this reality as a major difference from how GIs apply to wine believing that the wine GI system is easier because it only relates to one core ingredient - the grapes used to make the wine need to be sourced from the GI region.

Some South Australian Interviewees need to produce/manufacture various food products outside of their regions. This is primarily because some of them need to meet market and consumer demands for their products. This means that they are no longer able to produce the volume of products required within their particular region due to legal requirements such as council and planning regulations that prohibit larger scale production and/or facilities within their regions.

The fieldwork therefore revealed that some of the South Australian Interviewees were concerned about not being able to use ‘Barossa Valley’ or ‘Adelaide Hills’ as a GI on their food products because of a lack of connection between their food products and regions. However, the interviews with the South Australian Interviewees who could locally source the core ingredients for their food products and who could carry out each stage of food production within a region, endorsed that a qualitative connection between food and origin could be met. We will consider examples of these different perspectives.
6.5.2.2 Example of strong connection between food and origin: Barossa Valley perspective

Jan Angas and Margaret Lehmann expressed their view that:

*If someone said ‘Barossa Mettwurst’, we would want that product to be a mettwurst from the Barossa, made using Barossa regionally sourced ingredients and also traditionally cured and smoked in the Barossa tradition. If someone in Hong Kong made a Barossa Mettwurst, it’s not about them fermenting it in the same way as Graham Linke[^1141] or packaging it in the same way, it’s also about the fact that it comes from the Barossa as well.*[^1142]

They used Hong Kong merely as an example. Their point was to illustrate that, in their opinion, a mettwurst made in Hong Kong, and then branded ‘Barossa Mettwurst’ would taste different to a mettwurst made in the Barossa that is made using regionally sourced meats and cured and smoked in the traditional way in a smokehouse. Therefore, Jan Angas and Margaret Lehmann suggested that the Hong Kong producer should not be able to call the product ‘Barossa Mettwurst’ as this is misleading and deceptive as to the true origin of the mettwurst. While current consumer protection laws and regulations are able to prevent the marketing of a product such as ‘Barossa mettwurst’ made in Hong Kong, the deficiencies of those laws as explained in Chapter 2 means that in many instances unless a complaint is made to the ACCC about a potentially misleading claim, food producers are able to use regional names on food products to make an origin claim notwithstanding that the food product lacks a clear connection with the named region. As explained in Chapter 2, as well as in Chapters 3 and 4, GI protection would provide more extensive protection to the connection between the mettwurst and the Barossa, in this instance, than provided for at the moment pursuant to current laws and regulations.

A mettwurst made in Hong Kong would be different to a mettwurst made in the Barossa Valley. Even if the meat used by the Hong Kong producer was imported from the Barossa Valley this would not be enough to validate use of the word

[^1141]: Meet the Producer: Linke’s Butcher’, <http://www.barossa.com/food/meet-the-producer/meet-the-producer-linke-s-butcher>: Graham Linke (Linke) is proprietor of ‘Linke’s Meat Store’ in Nuriootpa, Barossa Valley, South Australia. Linke’s ancestors left Silesia in 1838 and arrived in South Australia the same year. In 1928, George and Edgar Linke established ‘Linke’s Central Meat Store’ which has remained in the Linke family ever since. In 1938, Edgar and Alma Linke were the proprietors before Graham and his wife Lola took over in 1978. They have been the proprietors since that time. Linke uses family recipes to cure and smoke traditional Barossa smallgoods in a wood fired smokehouse behind the store. Linke’s ham, bacon, mettwurst, laschinken and other wursts are made from traditional family recipes dating back to the nineteenth century, and they are well known for these traditional products.

[^1142]: Interview with Proprietor and Producer, Hutton Vale Lamb, Margaret Lehmann, Director, Peter Lehmann Wines, Peter Wall AM, Non Executive Director, LogiCamms and Ex-Director, Yalumba Family Vignerons c.1849 (Tanunda, Barossa Valley, South Australia, 17 February 2014).
‘Barossa’ on the product because it is not made in the Barossa in the traditional way. Nor would curing the smallgoods in Hong Kong produce the same mettwurst as that made in the Barossa. This is because the air used to cure the smallgoods in Hong Kong would have different geographical factors at play that would cause a different type of curing to the air and geographical factors found in the Barossa. The interview with Stephan Knoll confirmed that the curing method used in the Barossa has been adapted for the Barossa environment because the natural process of curing is affected by the air and temperature in the Barossa Valley. This provides a different curing and flavour effect to mettwursts made in Germany or elsewhere. “The mettwurst in Germany is actually soft, whereas with [Barossa’s] regional climate, in summer it would dry out, and become hard and spicy, so it shows that taking knowledge from Germany and bringing it over here gives us something unique because of the climatic change.”

Furthermore, smoking mettwurst in a smokehouse in Hong Kong would not produce the same mettwurst as a mettwurst that is produced in the Barossa because more than likely the wood used to smoke the smallgoods in Hong Kong would be regional to Hong Kong, and impart a smoke and flavour of its own on the smallgoods, unique to Hong Kong, and very different to that of the Barossa. This difference would result in a different flavour of the smallgoods. Dr Angela Heuzenroeder discussed this issue with me in comparing Barossa mettwursts to those made in Germany, given that it was with the Silesian migration to the Barossa Valley that small-good recipes, and curing and smoking traditions, were brought to the Barossa, but then adapted for regional ingredients and geographical factors such as air, temperature, and woods used for smoking. Through her research on Barossa food, Dr Heuzenroeder concluded that while smallgoods “were smoked in Northern Europe with hickory and almond shells, and things like that, the saw dust that went and still go into smoke houses [in the Barossa] - red gum, gives a very different flavour, and so the mettwursts that you taste in Germany just don’ taste like the Barossa ones.”

The smoking method used in the Barossa to make smallgoods is therefore specific to the region and is a traditional method used in the Barossa to make smallgoods. “If Germans say that we don’t know how to make mettwursts, we do, but this is our product; our regionality; our origin; and this is where through microorganisms; the different indigenous ingredients; that that point of difference - our terroir, makes for a different product” to mettwurst made in Germany or elsewhere.

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1143 Interview with Stephan Knoll MP, Co-Proprietor, Schulz Butchers Angaston and Barossa Fine Foods, (Angaston, Barossa Valley, South Australia, 25 February 2014). This is very similar to issues discussed with Italian smallgoods producers Prosciutto di Cuneo PDO and Prosciutto di Parma PDO, as discussed in Chapter 5 in relation to how the geographical factors unique to the production regions of the products influences the curing process of the prosciutto. The air and temperature of a region is very important in the curing/drying process of the prosciutto as it is for the smallgoods made in the Barossa Valley.

1144 Interview with Dr Angela Heuzenroeder, Food historian and author of ‘Barossa Foods’, (Tanunda, Barossa Valley, South Australia, 7 May 2014).

1145 Interview with Dr Angela Heuzenroeder, Food historian and author of ‘Barossa Foods’, (Tanunda, Barossa Valley, South Australia, 7 May 2014).
It would also be unlikely that the Hong Kong producer would return the smallgoods to the Barossa to be cured and smoked due to legal food safety requirements. For all these reasons, a mettwurst made in Hong Kong, should not be able to use the names ‘Barossa Valley’ or ‘Barossa’ in its branding because there is no connection between the food and the Barossa.

At the interview with Margaret Lehmann, Jan Angas and Peter Wall AM, also pointed out that there are two elements at play here - ‘Barossa’ and ‘mettwurst’. In Wall’s opinion, the ‘mettwurst’ would be a generic term (as will be further discussed in Part V C below) and the GI would be ‘Barossa Valley’. He agreed with Angas’ and Lehmann’s views that in order to use ‘Barossa Valley/Barossa’ on a mettwurst, the mettwurst should be made in the Barossa, using regionally sourced ingredients and cured and smoked using the Barossa traditional method. ‘Barossa Valley’ should be used as a food GI to represent that it is the Barossa’s geographical (ingredients, air, temperature, wood) and human factors (traditional recipe, curing and smoking) that have influenced the mettwurst in such a way and to such a degree that it is a product distinct to that area that can not be replicated in another region or taste the same as a mettwurst from another region.\textsuperscript{1146} To that end, Wall’s assessment is that GIs should not apply to generic terms or traditions and methods that are not qualitatively linked with a region. In this regard, a GI should not apply to human factors that can be duplicated outside the region to produce a similar tasting and flavoured end product. This is on the basis that human factors that can be duplicated in another region to produce a similar end result would most likely not include traditions that have a real influence over food flavour and production in an area. In Wall’s opinion, such traditional methods should therefore not be protected as a GI.\textsuperscript{1147}

6.5.2.3 Example of strong connection between food and origin: Adelaide Hills perspective

Comparable to this viewpoint was Kris Lloyd’s assessment as to what a GI should represent for food. Kris Lloyd concluded that GIs should represent that attributes of a geographical area have influenced the food’s \textit{flavour}, rather than the food’s \textit{quality}.

\begin{quote}
\textit{I think that GIs have more to do with attributes than quality because it’s the limestone that we have in the Adelaide Hills that imparts the flavour. It’s not a quality thing. It’s something that imparts the flavour and it’s more of an attribute/characteristic that is indigenous to a particular area. So I would be saying very much that GIs are about identifying the: fauna; flora; the geographical elements; the rainfall; and the climatic conditions that will}
\end{quote}

\textsuperscript{1146} Interview with Proprietor and Producer, Hutton Vale Lamb, Margaret Lehmann, Director, Peter Lehmann Wines, Peter Wall AM, Non Executive Director, LogiCamms and Ex-Director, Yalumba Family Vignerons c.1849 (Tanunda, Barossa Valley, South Australia, 17 February 2014).

\textsuperscript{1147} Interview with Proprietor and Producer, Hutton Vale Lamb, Margaret Lehmann, Director, Peter Lehmann Wines, Peter Wall AM, Non Executive Director, LogiCamms and Ex-Director, Yalumba Family Vignerons c.1849 (Tanunda, Barossa Valley, South Australia, 17 February 2014).
play a part in the characteristic of a particular food product. So, what are
my cows grazing on in the Adelaide Hills that they are not grazing on in
McLaren Vale, and how does that difference impart on the flavour of the
food I am producing? To me that is the perfect thing that GIs should
represent."^{1148}

With a focus on the geographical elements of a region that influence foods’
flavours, Kris Lloyd considered that one of the first steps in establishing a food GI
system should be the identification of Australia’s regions and those regions’
attributes that influence foods’ flavours.

Let’s identify the regions we have and that the regions have certain
attributes that influence the flavour of the foods produced in those
regions… I think that a lot of the climatic conditions and geology that
applies to Australian wine GIs would apply to Australian food and that we
could apply something similar to Australian food GIs rather than
reinventing the wheel."^{1149}

Similar to the Australian wine GI system, Kris Lloyd sees the opportunity “for
regions to use a GI they must ensure that a certain percentage of their product
comes from that region and has those attributes influencing their foods.”^{1150}

6.5.2.4 Example of weaker connection between food and origin: Cheese
producers unable to source cultures/rennet regionally

The cheese producers I interviewed were among those most concerned about the
fact that they might be excluded from being able to use a GI on their products
because they are unable to source all of their ingredients from the Adelaide Hills or
Barossa Valley. For the cheese producers this is mainly due to availability of
regional milk from time to time and food safety regulations that require them to
obtain their cultures from elsewhere, sometimes from international sources. This
latter reason is the focus of this discussion.

Victoria McClurg from Barossa Valley Cheese Co expressed her sentiments about
GIs as a concept that:

Would be lovely if we could be authentic about what comes out of our
region and be attuned to that, but realistically it is virtually impossible from
my way. Yes, I can source all of my milk from here and make it here, but I
have to get my cultures from somewhere else…So we’ve got loads of South
Australian products, but they are made from a blend of ingredients…there

^{1148} Interview with Kris Lloyd, Manager and Head cheese-maker, Woodside Cheese
Wrights, (Woodside, Adelaide Hills, South Australia, 24 February 2014).

^{1149} Interview with Kris Lloyd, Manager and Head cheese-maker, Woodside Cheese
Wrights, (Woodside, Adelaide Hills, South Australia, 24 February 2014).

^{1150} Interview with Kris Lloyd, Manager and Head cheese-maker, Woodside Cheese
Wrights, (Woodside, Adelaide Hills, South Australia, 24 February 2014).
are not many people who can say that it's 100% Barossa product. We are probably the closest that can say this."\textsuperscript{1151}

Kris Lloyd of Woodside Cheese Wrights must obtain her starter cultures from France for food safety reasons. She is worried that this could affect her ability to use ‘Adelaide Hills’ as a GI on her cheeses and told me that she “would be most appalled if I had an impediment on my rating for a GI because I need to source part of my product from somewhere outside the GI region which I can not do anything about.”\textsuperscript{1152}

Sheree Sullivan from Udder Delights in the Adelaide Hills shared similar views given that, even though the cow and goat milk used in her cheeses is regionally sourced, some rennet needs to be obtained outside the region. She would not want to see this requirement as an impediment on using ‘Adelaide Hills’ on her products.\textsuperscript{1153}

6.5.2.5 Cheese culture trial project

The usage of internationally sourced cultures to make Australian cheeses might become less common following the results from the ‘Culture Trial Project.’\textsuperscript{1154} In November 2015, the Australian Specialist Cheesemakers’ Association published results from its ‘Culture Trial Project’ (Project).\textsuperscript{1155} The Project, the first of its kind in Australia, and only one of a few similar projects that have been carried out internationally, involved cheesemakers collaborating with scientists to develop cultures made exclusively from the milk of individual farms located in Victoria owned by various cheesemakers.\textsuperscript{1156} The questions that the Australian Specialist Cheesemakers’ Association wanted answered as a result of the Project included:

- Does terroir have a taste?
- Can raw milk cultures be used to enhance pasteurized milk cheeses?
- Is artisan cheesemaking in Australia about to change?\textsuperscript{1157}

\textsuperscript{1151} Interview with Victoria McClurg, Proprietor, Barossa Valley Cheese Co, (Angaston, Barossa Valley, South Australia, 25 February 2014).

\textsuperscript{1152} Interview with Kris Lloyd, Manager and Head cheese-maker, Woodside Cheese Wrights, (Woodside, Adelaide Hills, South Australia, 24 February 2014).

\textsuperscript{1153} Interview with Sheree Sullivan, Proprietor and Head cheese-maker, Udder Delights, (Hahndorf, Adelaide Hills, South Australia, 7 April 2014).

\textsuperscript{1154} Australian Specialist Cheesemakers’ Association, ‘The results from our culture trial project are in!’ (2 November, 2015), <http://www.australiancheese.org/news/?id=155>.

\textsuperscript{1155} Ibid.

\textsuperscript{1156} Three cheesemakers from Victoria: Holy Goat, l’Artisan Cheese and Prom Country Cheese, provided fresh raw milk in October 2014. Their Spring milk was selected for the Project because they source their respective milk from their own (or a neighbouring single) herd, from goats, cows and sheep. Spring milk was provided as it is microbiologically richer than milk produced in other seasons.

\textsuperscript{1157} Australian Specialist Cheesemakers’ Association, above n 1187.
The results were that cultures found in raw milk, indigenous to the geographical location where the sheep, cows and goats are herded and graze, most likely have an influence on the flavour of the respective animals’ milk and can enhance the flavour of the resulting cheeses made from the cultures.

Each of the cheesemakers who provided the milk for the Project identified a partner cheesemaker in another state, who also produced cheese made from the same milk type (Cheesemakers). The Cheesemakers were all involved in the cheesemaking stage of the project. The scientists involved in the Project, the ‘Cheese & Culture Products’ team at Dairy Innovation Australia Ltd (DIAL), examined the microbes present in the raw milk provided for the Project, and identified which species were present. They selected individual species that were considered to be safe and that were likely to produce complexity in the resulting cheeses. “The chosen microbes were isolated and grown in the lab, then re-assembled into culture blends from each milk source, resulting in prototype cultures that could be used by the Cheesemakers” (Adjunct Cultures).

The Cheesemakers experimented with the Adjunct Cultures by producing multiple batches of the same cheese, made with different cultures.

Each Cheesemaker was required to produce a ‘control’ batch of cheese made using their normal starter cultures and according to their normal recipe (Control Batch). They then made experimental batches using either the ‘indigenous’ cultures from their own milk type (Indigenous Culture), or the ‘superblend’ of cultures from all three milk types, utilized as ‘adjunct cultures’ (Superblend). Adjunct Cultures are used in addition to normal acidifying starter cultures, to enhance the flavours, textures and other characteristics of cheeses.

On 28 October 2015, a team of experts conducted a blind tasting of around 36 cheeses. The tasting panel worked in pairs “to systematically evaluate different batches of each cheese, to determine the differences, if any, between them. All of the cheeses were coded and presented as if for judging in a cheese show…so the panel members didn’t know which Adjunct Cultures had been used, or if they were just the normal cheeses.” For each cheese, multiple batches were presented. One made using the Control Batch, one made with Indigenous Cultures from that milk type (sheep, cow or goat) and one made with the Superblend of cultures from all three milk types. The three cheeses that were chosen as the best examples from each of the Cheesemakers had distinct differences depending on the cultures used.


1159 Australian Specialist Cheesemakers’ Association, above n 1187.

1160 Ibid.

1161 Ibid.

1162 The three cheeses chosen were: ‘Holy Goat Nectar Tomme’, ‘L’Artisan Mountain Man’, and ‘Prom Country Venus Blue’.
Out of the three cheeses, the result was that for two of the cheeses, the batches made with the Indigenous Cultures had “the most flavour complexity and best representation of the style” and “had amplified flavours that masked some of the subtleties present in the regular batch of cheese.” For one cheese, the batch made with the Superblend of cultures was a “stand-out cheese…[as it was] the strongest, most complex and well-balanced.

Following the Project, the results from the blind tasting will be analysed in more detail “to determine whether the various cultures resulted in overall improved cheese flavour, and whether location-specific flavours were identified…Once this is known, [the Australian Specialist Cheesemakers’ Association] can decide whether it is worth considering routine production of location-specific cultures for use by our artisan cheesemakers.” If location-specific cultures are found to improve cheese flavour, then the Project, and the follow-up research, will most likely confirm that the geographical factors of a location do influence the microbes found in raw milk (cultures) that go on to influence the flavour of the milk and the resulting cheeses made using the milk/cultures. The follow-up research therefore might confirm that terroir does have a taste and that raw milk cultures can be used to enhance pasteurized milk cheeses. If this is the finding, then it is likely that artisan cheesemaking in Australia will change and perhaps more artisan cheesemakers, such as those interviewed in the South Australian Regions, will use Indigenous Cultures to make their cheeses, rather than rely on internationally sourced cultures. Cheese making will then become truly local and the link between cheese and regional origin will be stronger.

6.5.2.6 Other South Australian interviewees unable to source each ingredient regionally

Moving away from cheese producers, other South Australian Interviewees were concerned about not being able to use a GI because they cannot source each ingredient that they use in their food product from their region. For example, Corey Fechner of Apex Bakery located in Tanunda, Barossa Valley discussed how Apex Bakery would “struggle with getting all the ingredients from [the Barossa] because our flour is not from the Barossa Valley,” but is hopeful that given the Bakery’s ‘ferment’ process, traditionally used by the Fechner family since 1924 in making their breads and pretzels, would provide them with the ability to use a GI. Corey Fechner explained that the ‘ferment’ process that they use is not German per se, but more Barossa.

1163 The ‘Holy Goat Nectar Tomme’ and ‘Prom Country Venus Blue’.
1164 The ‘L’Artisan Mountain Man’.
1165 Australian Specialist Cheesemakers’ Association, above n 1187.
1166 Apex Bakery obtains their flour from Sedan, a small farming community 110km north east of Adelaide, situated in the Murray flats between the Barossa ranges and the River Murray.
1167 Interview with Corey Fechner, Co-Proprietor APEX Bakery, (Tanunda, Barossa Valley, South Australia, 2 April 2014).
The ‘ferment’ process is what is used in all the products, and then we have the ‘1924 Dough Ferment Loaf’. It has become very popular with a lot of the restaurants around the region. When restaurants put our bread on the menu they write that it’s our bread and they write the story behind it. The ferment process takes nine hours. We don’t know anyone else in Australia making bread like this.

Since opening in 1924, Apex Bakery has continued to use its wood fired Scotch Oven, to make its breads, cakes, pretzels and pasties. The Fechner family uses Malee wood from Sedan, and Corey Fechner concludes that it is the combination of using the traditional recipe, ‘ferment’ process, original Scotch Oven and Malee wood that makes a “difference to the flavour of our breads. The wood used gives less or more smoke and a different taste to the breads.”

Corey also concludes that given the adaptation of recipes brought over by his ancestors from Silesia, Apex Bakery products are ‘Barossa’ products.

When my family settled [in the Barossa], there were a lot of ingredients that they could not get here and therefore they used part English, part Italian, part German ingredients and adapted them in a lot of ways. Grandma had to adapt to the environment to get the same sort of bread as back in the homeland. So we don’t call ourselves a German bakery. We call ourselves a Barossa bakery. We are all Silesian – my grandfather was 11 years old when the Bakery opened in 1924. He worked here since he was 12 and when he was about 33 he bought the place. He is 100 years old now. From there, we haven’t changed much at all. The method that we use to make our bread (ferment) is pretty much the same as it was. The only difference is that Grandpa used to make his own yeast from fermented potato skins, but now we use fresh yeast. Apart from that the recipe is the same.

Therefore, while the flour to make the sourdough bread is sourced from outside the Barossa region, a strong argument could be made that because the bread is made using a traditional recipe, the ‘ferment’ process, original Scotch Oven and Malee wood locally sourced from the Barossa, the ‘1924 Dough Ferment Loaf’ has a clear and strong connection with the Barossa.

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1168 Interview with Corey Fechner, Co-Proprietor APEX Bakery, (Tanunda, Barossa Valley, South Australia, 2 April 2014) and <http://www.barossa.com/trust-mark/licensees/apex-bakery-1924-dough-ferment-loaf/apex-bakery-1924-dough-ferment-loaf>: Apex Bakery is a ‘Barossa Trust Mark’ license for the ‘1924 Dough Ferment Loaf’. The recipe used to make the ‘1924 Dough Ferment Loaf’ dates back to 1924 when the Apex Bakery was founded. It is an old English recipe that was adopted by the German settlers in the Barossa Valley and the tradition of using this recipe has continued from 1924 to present.

1169 Interview with Corey Fechner, Co-Proprietor APEX Bakery, (Tanunda, Barossa Valley, South Australia, 2 April 2014).

1170 Ibid.

1171 Ibid.
6.5.2.7 Other South Australian interviewees unable to source each ingredient regionally and/or unable to produce food within their region

The last category of South Australian Interviewees who are concerned about being classified as having a weak connection between food and origin because they are unable to source each ingredient regionally and/or are unable to produce food within their region.

Example: Maggie Beer Products

For reasons already explained Chapters 2 and 3, Maggie Beer Products are unable to source each ingredient of their extensive product range from the Barossa Valley mainly because the ingredients are either unavailable regionally or are seasonal. Maggie Beer Products therefore use South Australian ingredients wherever possible, or interstate products if South Australian ingredients are unavailable. Moreover, Maggie Beer Products have moved some stages of food production outside of the Barossa Valley to meet consumer demand. The Tanunda Export Kitchen is not big enough to produce some of the products from the Maggie Beer Product range to meet consumer demand.

Because of these factors, in the interview with Maggie Beer, she suggested that a GI should be broader than just a region for food. Maggie Beer suggested that a GI should perhaps be the state of ‘South Australia’ rather than the region ‘Barossa Valley.’ The interview with Maggie Beer revealed that she does not want a GI system to “miss out on the fact that I am using other regional products as well, albeit outside the Barossa. For example, I source citrus fruit from the Riverland…I would like to see a GI system that celebrates regionality and traditions, and that is as ‘South Australian’ as possible.”

Maggie Beer also revealed that even though her ice-cream range is made in Victoria, she is hopeful that she would still be able to use a ‘Barossa Valley’ GI on her ice-creams. She explained that she thought that she would be able to because she follows each stage of production closely, and because the ice-creams are made using recipes started by Maggie Beer at her Pheasant Farm Kitchen in Nuriootpa. However, a ‘Barossa Valley’ food GI, or even a broader ‘South Australia GI’, could not attach to her ice-cream range because they are made in Victoria and using non Barossa and non South Australian core ingredients. In addition because her ice-creams are made outside of the Barossa region, there is no clear connection with the Barossa Valley.

Example: Barossa Fine Foods

Reasons why Barossa Fine Foods (BFF) to date has not been able to produce all of its products within the Barossa Valley include planning and development issues and economies of scale – meeting consumer demand and production costs. For these

1172 Interview with Maggie Beer, Proprietor ‘Maggie Beer’s Farm Shop’ and ‘Maggie Beer Products’, (Pheasant Farm, Nuriootpa, Barossa Valley, 25 February 2014).

1173 Interview with Maggie Beer, Proprietor ‘Maggie Beer’s Farm Shop’ and ‘Maggie Beer Products’, (Pheasant Farm, Nuriootpa, Barossa Valley, 25 February 2014).
reasons, BFF’s production plant is located in Elizabeth, South Australia. “It is difficult to obtain planning approval to move industry to the Barossa Valley. I have asked and can’t do it…BFF doesn’t want to be excluded because we are not based in the Barossa Valley because we can’t be.”

If a food GI system would require production to be within the Barossa Valley, then Stephan Knoll opined that BFF “would have to give lots of thought around planning regulations and changing laws, because otherwise we would have nothing to be protected pursuant to a GI. We looked at whether BFF would be allowed to build an abattoir [in the Barossa Valley] and we wouldn’t be allowed. So, if there’s no pig-farm or abattoir allowed, it is very hard for BFF to be ‘regional.’” Knoll also suggested that an entity such as BFF is in a no-win situation. He explained that this is because if BFF contemplated moving food production of some food products to within the Barossa Valley, on the basis that there was demand for a food GI system in the future and changes in laws to support that, Knoll believes that some people would be against BFF being able to use ‘Barossa Valley’ as a GI on BFF products as they are ‘too manufactured.’ “Some see a GI as being about quality in that a product has to be handmade and small scale to attract a GI, as opposed to having end product quality specifications. I don’t care if a sausage is filled by hand or machine, as long as the end quality is the same.”

The other issue for BFF is the ability to source all the pork it requires for its smallgoods from the Barossa. “Because piggeries are not that easy to establish in the Barossa Valley, because of planning and regulations, we try to source Barossa pork and it’s not that easy.” Therefore, if laws and regulations remain the same, it would be difficult for BFF to prove a strong connection between its food products and the Barossa Valley. Similar to Maggie Beer’s situation with her ice-cream range, BFF would find it hard to show that it sources its core ingredients from the Barossa Valley or makes its products in the Barossa Valley. Notwithstanding that some of the recipes used by BFF might have been initially based on regional recipes and traditions used by the Knoll family in making smallgoods, if there was no connection to human factors in the Barossa Valley any longer, this too would downplay BFF’s connection between its products and the Barossa Valley.

As discussed above, BFF is trying to make some changes to become more ‘authentic’ to justify using the name ‘Barossa’ on its foods, by re-establishing a connection between the products and the Barossa. BFF appreciates consumer


1175 Interview with Stephan Knoll MP, Co-Proprietor, Schulz Butchers Angaston and Barossa Fine Foods, (Angaston, Barossa Valley, South Australia, 25 February 2014).

1176 Interview with Stephan Knoll MP, Co-Proprietor, Schulz Butchers Angaston and Barossa Fine Foods, (Angaston, Barossa Valley, South Australia, 25 February 2014).


demand for ‘local’ and ‘authentic’ regional food products. BFF also appreciates that some of its competitors who are based in the Barossa Valley making authentic regional smallgoods and meat products do not appreciate BFF taking advantage of the Barossa brand as part of BFF’s trademark and Regional Branding. Therefore, for these two main reasons, BFF has commenced making some changes to establish a connection between BFF food products and the Barossa Valley.

6.5.2.8 Industry perspective on GIs and what they represent

Moving away from food producers, another perspective offered about what a GI represents/means was from South Australia’s peak food industry body, Food South Australia Inc (Food SA). Food SA was established in 2010 through the merger of Food Adelaide and Flavour SA. Food SA “aims to grow value and opportunities for members and industry through key service programs” with a focus on “connecting businesses in the food industry with the services and expert advice they need to develop their businesses, grow their bottom line and connect with new markets.”

Food SA is industry led and membership based industry comprised of ‘manufacturers’ that range from smaller South Australian food production companies (such as Alexandrina Cheese Company located in the Fleurieu Peninsula, South Australia) to some of the largest food manufacturing companies in South Australia (such as Bickford’s Australia and San Remo) (Manufacturers). The following South Australian Interviewees are included on the current Food SA ‘Manufacturers Membership Directory’: Barossa Fine Foods, Barossa Valley Cheese Co, Careme Pastry, Maggie Beer Products, Udder Delights and Woodside Cheese Wrights.

Focusing on consumer trends and perspectives in the food industry, Food SA shared with me findings made in the Competitive Foods Initiative Food SA Industry Intelligence Report, January 2014 (Food SA Report). Food SA discussed with me the relevance of GIs in context of the ‘Top 10 Trends’ for consumers in 2014 as found in the Food SA Report with a focus on the question of whether GIs are responding to a trend in consumers needs or desires. Out of the top ten consumer trends, trend two - ‘You can trust us’ and trend four - ‘Look out for the small guy’, are the two trends that in Food SA’s opinion were the most closely affiliated with GIs.

1179 Interview with Silvia Estrada-Flores, Project Manager-Competitive Foods, Food South Australia Inc, (Adelaide, South Australia, 12 March 2014), and from ‘Food SA’ website <http://foodsouthaustralia.com.au/about/>. Depending on the level of membership, Food SA members can access the following services: “international in market representation in Japan and China; national market support through in-bound buyers, tradeshows, promotions and product feedback; financial grants and awards; food technologist advice; business development advice; exposure through Food SA communications; individual profile in the online Food SA Directory; and discounted rate for Food SA events.” [Reference: http://foodsouthaustralia.com.au/membership/].

1180 Food South Australia Inc, above n 12.

1181 Ibid 47.

1182 Ibid 49.
The ‘You can trust us’ trend is about transparency of origin claims used on food products. Food SA found that consumers want food labels that they can trust. In response, Food SA proposed that labels used on food products be transparent about origin of ingredients. Specifically, this means: “ingredient origin claims will move to the front of packaging and be more prominent; and the use of tracking codes or QR codes on packaging to view where ingredients are sourced from will be more readily applied.”

The ‘Look out for the small guy’ trend is about “big companies…increasingly looking to smaller companies for product innovation ideas”, with “flavour authenticity” being one of the strong drivers for new product development. This consumer trend has been supported in South Australia through the ‘Eat Regional SA’ initiative of the Regional Food Industry Association, Food SA and PIRSA. Food SA explained that ‘Eat Regional SA’ is related to this consumer trend number four in that it is about:

Supporting the small guy and supporting the community. Eat Regional SA helps you locate venues that serve and sell the very best South Australian food on their menus and shelves across the state. In our food service venues (restaurant, café, pub, stay, catering and cellar door) you should expect to find one main dish where the main or naming ingredient is sourced regionally and detailed on your menu...At food retail venues (cellar door, farm gate, retail and experience) you should expect a display of at least 10 different South Australian products or various preparations of a specialty product.

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1183 Ibid 47.
1184 Ibid 49.
1185 Interview with Silvia Estrada-Flores, Project Manager-Competitive Foods, Food South Australia Inc, (Adelaide, South Australia, 12 March 2014), and from ‘Eat Regional SA’ website <https://eatregionalsa.com.au/about/>.
In this regard, ‘Eat Regional SA’ supports South Australian food producers and the food industry by giving consumers information on venues that “actively choose to include regional producer on their menu.” Information is provided by the use of the following ‘Eat Regional SA’ sign used throughout South Australian regions:


**Figure 6.3: Eat Local South Australia**


As well as on the ‘Eat Regional SA’ website and the ‘Eat Regional SA’ app. The website and app includes details of over 235 ‘Eat Regional SA’ venues located across South Australian regions, including the Barossa Valley and Adelaide Hills.

The interview with Food SA revealed that Food SA’s current impression of what GIs are and how food GIs could apply to South Australian food in the future was based on Food SA’s view that there needs to be ‘value proposition’ in South Australian GIs before GIs can be worthwhile for the South Australian food industry. “The ‘value proposition’ has to be developed for manufacturers and for consumers, but for consumers in particular…and one of the ways that industry can do this is through product innovation and quality.” In order to evaluate the value proposition of GIs for Manufacturers, Food SA suggested that a key enquiry for Food SA would be to look into what value regional labelling could bring to manufacturers. The types of questions Food SA raised during our interview included: “will adding a Barossa GI on cheese make a difference, or is it better to support the industry to grow and perhaps GIs are one factor that can help it grow?

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1186 Interview with Silvia Estrada-Flores, Project Manager-Competitive Foods, Food South Australia Inc, (Adelaide, South Australia, 12 March 2014), and from ‘Eat Regional SA’ website <https://eatregionalsa.com.au/about/>.

1187 Interview with Silvia Estrada-Flores, Project Manager-Competitive Foods, Food South Australia Inc, (Adelaide, South Australia, 12 March 2014), and from ‘Eat Regional SA’ website <https://eatregionalsa.com.au/about/>.

1188 Interview with Silvia Estrada-Flores, Project Manager-Competitive Foods, Food South Australia Inc, (Adelaide, South Australia, 12 March 2014).
Or do we support Manufacturers’ bigger issues that they have which are all about costs and economies of scale?"1189

The interview with Food SA revealed that Food SA was concerned about the value proposition of GIs for consumers. This was most likely due to Food SA’s position that the “people who buy the products are the focus. What do we have of value in the products in the Barossa? Addressing this issue is important. We need to create a product or characteristics around a product that are truly, truly a value proposition for consumers.”1190 Food SA clarified that this requires looking at food products that come from, for example, the South Australian Regions, and asking the questions “why would I buy cheese from the Barossa Valley instead of cheese from another region or place? What makes the cheese so unique? Why is the cheese made in the Barossa Valley any different to a cheese made somewhere else?”1191 In Food SA’s opinion, asking and analysing these types of questions will assist in determining the value that a GI can have for food products, if any at all. As explained in Chapters 3 and 5, it is the geographical factors of a region, and sometimes even the human factors of a region, that make food products unique. In relation to cheese, what cows are grazing on in the Adelaide Hills and the manner in which they are bred in the Adelaide Hills, might be different to what the cows are grazing on in the Barossa Valley and the manner in which they are bred. As Kris Lloyd confirmed these factors do influence the flavour of the resulting milk and end-products used making the milk. Therefore, a food GI system does have value proposition as it identifies products that have a clear and strong connection with a GI region for consumers. Education about a GI system is essential for consumers to understand what GIs represent and to appreciate the regulation that a GI system provides to the connection between food and origin.

Food SA’s notion is that while this value proposition exists already for wine, it does not yet for food. However Food SA’s sentiment is that if this value proposition is determined, (based on findings that a region can influence food’s quality and characteristics) and the value proposition “is supported and developed, it could work.

Notwithstanding Food SA’s acknowledgment that GIs’ value proposition could be developed in the South Australian Regions, Food SA flagged its concerns about food GIs causing inequality among South Australian food Manufacturers and producers. In particular, Food SA noted that GIs could advantage certain producers within a region over other producers located in that same region, one South

1189 Interview with Silvia Estrada-Flores, Project Manager-Competitive Foods, Food South Australia Inc, (Adelaode, South Australia, 12 March 2014).

1190 Interview with Silvia Estrada-Flores, Project Manager-Competitive Foods, Food South Australia Inc, (Adelaode, South Australia, 12 March 2014).

1191 Interview with Silvia Estrada-Flores, Project Manager-Competitive Foods, Food South Australia Inc, (Adelaode, South Australia, 12 March 2014).
Australian region over another South Australian region and South Australian regions over brand ‘South Australia’ and/or ‘Australian Made’.¹¹⁹²

Looking at whether GIs could advantage certain producers within a region over other producers located in that same region, this is an issue that might arise because of the demarcation of a GI boundary, certain producers are not producing food that is qualitatively connected with the region and/or because producers have been using a region’s name in their branding notwithstanding a lack of any connection with the region. These sorts of issues are not foreign to the commencement of any GI system anywhere in the world, as already discussed in Chapter 5 in relation to the EU/Italian Food GI system, and as arose in relation to the Australian wine GI system in its early stages in 1993/1994. Such issues would need to be addressed pursuant to transitional provisions of any new GI system, as they were when the Australian wine GI system commenced in 1993/1994, with extensive amendments being made to the then Australian Wine and Brandy Corporation Act 1980. Transitional issues will be discussed further in Chapter 7.

As to whether GIs could advantage one South Australian region over another South Australian region, Food SA is concerned that certain regions will receive more benefit than others where regions have a stronger connection between food and origin, such as the South Australian Regions. From a State perspective, Food SA considers that this may not only impact on regions, but also on South Australia as a whole. “What’s in it for manufacturers? Looking at GIs from the view that you advantage cheese from one region in South Australia over cheese from another region in South Australia...how good will this be for the producers, regions and for the State? Will it be an equal advantage?”¹¹⁹³

Food SA also suggested that tied with this issue is the fact that from a Federal and State government perspective marketing of food manufacturing and food industry on international markets is campaigned using ‘Australian Made’ firstly, and then from a brand ‘South Australia’ perspective before any regional marketing is carried out, if at all. In governments’ perspective:

When you promote regions, you dilute efforts to promote Australian manufacturers. Regional promotion dilutes the fact that it is an Australian product...the promotion of ‘Made in Australia/Australian Made’ or brand ‘South Australia’¹¹⁹⁵ over region by region branding also happens because

¹¹⁹² Interview with Silvia Estrada-Flores, Project Manager-Competitive Foods, Food South Australia Inc, (Adelaide, South Australia, 12 March 2014).

¹¹⁹³ Interview with Silvia Estrada-Flores, Project Manager-Competitive Foods, Food South Australia Inc, (Adelaide, South Australia, 12 March 2014).

¹¹⁹⁴ As discussed in Chapter 2.

¹¹⁹⁵ ‘Brand SA’ is a not-for-profit, member based organization that “uniquely connects with the South Australian government, media and businesses, to promote confidence and pride in South Australia’s creativity, innovation and industriousness...Brand SA plays an important role, regionally, nationally and internationally in promoting South Australia.”
it is determined in that way by government funding. The funding that is going to promote the ‘Australian Made’ brand is limited. If you go into some brands for different regions you are going to dilute the funding that is going to promote the ‘Australian Made’ brand. For both Federal and State governments, funding is limited, and if you set it in a regional context, you are going to dilute those efforts as well. We need to ask: what actually makes South Australia better for food manufacturers? Is it a regional approach or is it a State approach? I don’t have the answer.\textsuperscript{196}

Overall, Food SA raised both positive and negative facts about GIs reflecting its role as South Australia’s peak food industry body and its work with Manufacturers. However having noted the success that the wine GI system has had for South Australian regions and wine producers, Food SA concluded that it would contemplate supporting a food GI system “if there was a genuine value proposition for consumers. A food GI system would need to be handled carefully, so that as a State, South Australia is balancing these propositions carefully for different regions to ensure that there is equal distribution of funds or grants that come. A balance of all these factors would need to be considered.”\textsuperscript{197}

\textbf{6.5.2.9 Concluding remarks}

While most of the South Australian Interviewees see the worth of using GIs on food labels to protect and enforce the connection between regional food and origin, some of them are uncertain about whether they would satisfy the qualitative connection required to be able to use GIs in relation to their respective products. This attitude reflected the concern that the South Australian Interviewees had in the South Australian food industry and their sentiments on whether they would be able to meet ‘criteria’ set down by a food GI system. Therefore, while all the South Australian Interviews agree that a GI should represent a connection between food

[Reference: <http://www.brandsouthaustralia.com.au/about-us>]. Brand SA is the custodian of the State Brand:


\textsuperscript{196} Interview with Silvia Estrada-Flores, Project Manager-Competitive Foods, Food South Australia Inc, (Adelaide, South Australia, 12 March 2014).

\textsuperscript{197} Interview with Silvia Estrada-Flores, Project Manager-Competitive Foods, Food South Australia Inc, (Adelaide, South Australia, 12 March 2014).
and origin, and protect and promote that connection, the proposed degree of connection required to qualify to use a GI varied relevant to their position in the South Australian food industry. Proposed criteria on how a qualitative connection could be met by South Australian regional food producers is discussed further below and in Chapter 7.

6.5.3. South Australian interviewees’ opinion on international GI issues and their potential effect for Australia

While most of the South Australian Interviewees did not have specific and/or extensive knowledge about the Extension Debate or the Multilateral Register, they all coincidentally discussed with me issues relating to the Extension Debate and the Multilateral Register. Such issues included:

- Generic terms vis-à-vis genuine GI terms;
- Clawing back of EU GIs that are currently used in Australia should the EU succeed in its efforts to obtain extended protection for such GIs; and
- The concept of using regional provenance claims on foods to identify the adaptation of various food products made in the South Australian Regions that are based on recipes and traditions brought from the Old World (EU) to the New World (South Australian Regions), rather than continuing to promote EU GIs and Old World terms.

In some instances, these issues were also discussed in the context of Australia’s current trade obligations. Each of these issues were considered by most of the South Australian Interviewees as relevant and applicable topics given that some of the South Australian Interviewees who were cheese and smallgoods producers, in particular, used EU food GIs as generic product descriptors to identify a type or style of food product for consumers by using terms that consumers can readily recognize and identify. That is, the origin is European and therefore there are identifiable links because of migration to the South Australian Regions from European countries.

As discussed in Chapter 4, two of the main arguments put forward by Australia, as one of the Opposing WTO Members, to the Extension Debate are that producers would incur costs if forced to give up the use of commercially significant terms and terms that they have traditionally used. The higher level of GI protection for other goods might mean that they would be forced to re-name, re-label and find new ways of marketing goods that use such terms, both in domestic and overseas markets. Consumer costs would be incurred as a result of consumer confusion caused by the disappearance of terms customarily used to identify goods. As analysed in Chapter 4, generic terms and claw back of Old World terms are very topical matters for countries such as Australia given that as a ‘New World’ country Australia has been using ‘Old World’ (EU) food terms to describe food on the basis that the Old World terms are well known to consumers and were brought to Australia with immigrants. Australia does not want EU to ‘claw back’ these Old World terms for reasons discussed in Chapter 4. The South Australian Interviewees were very keen to share their viewpoints, as set out below, on what terms they consider are generic and where the GI should attach should the EU request claw back of terms.
6.5.3.1 Generic terms: cheese producers’ opinions

All of the cheese producers interviewed confirmed for me that they have made a commitment and commercial decision to name most of their respective cheeses with their own created names, rather than using European cheese names (in particular French and Italian cheese names) on their products. Other than using generic names such as camembert and brie\(^{1198}\), to identify a type or style of cheese that consumers will recognize and to which they will respond, all of the cheese producers prefer to name and label their cheeses with names that are personal to their businesses, regions and artisan cheesemaking. They see this practice as giving them an edge in the market place, setting their respective products apart from competitors’ cheeses, and as marketing their regions rather than a EU region by using and relying on the reputation of some EU cheese names.

Kris Lloyd from Woodside Cheese Wrights was adamant that she does not “want to copy anyone and [by using my own names] it sets my goods apart…I do think that we should be going down the path of naming our cheeses because we are a young emerging country that has its own terroir and its own originality.”\(^{1199}\) Lloyd proudly discussed her decision to not use EU cheese names saying:

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\text{I don’t want to use them…and that’s why my cheeses have names}\^{200}\text{ and I have tended to use styles so that what I might say is: this cheese is called Charleston (because the next town on where we get the milk from is Charleston). However, it is a camembert or brie style cheese. In this way, I}\]

\(^{1198}\) European Commission, ‘List of Geographical Indications and Designations of Origin and Generic Names’, (European Commission Press Release Database, 22 October 2015), <http://europa.eu/rapid/press-release_IP-96-153_en.htm>. In this European Commission Press Release updated as at 22 October 2015, the EC notes that the EC had adopted a proposal for an EC Council regulation on the registration of 318 agricultural and food products (including meats, cheeses, olive oils and fruit) contained in a list of GIs and PDOs (Annex I). The list contains ‘camembert’ and ‘brie’: Use of the names of the registered products is to be confined to producers in a defined area who comply with closely defined rules of production. At the same time, the Commission has adopted a short but open-ended list of products considered to be generic (Annex II). The names of these products – all of them cheeses - may be used by any producer in a region of the Community. Identification of a name as generic has major implications. Designations that have become generic can no longer be protected. The Commission has drawn up a list of names that can be considered generic on the basis of the lists transmitted by the Member States, taking into account both the relevant law and the views of both the Member States where these products originated and other Member States. The list is not long. It contains some cheeses, such as 	extit{camembert}, 	extit{brie}, gouda and cheddar. However, the list is only indicative and not exhaustive. (emphasis added). Annex I lists Camembert de Normandie, Brie de Meaux and Brie de Melun as registered PDOs. Annex II lists Brie and Camembert as generic names and notes that protection of either name is not sought.

\(^{1199}\) Interview with Kris Lloyd, Manager and Head cheese-maker, Woodside Cheese Wrights, (Woodside, Adelaide Hills, South Australia, 24 February 2014).

\(^{200}\) See the table of South Australian Interviewees, and their respective products, in part 6.1 of this Chapter for a complete list of Woodside Cheese Wright’s cheese names.
am not actually calling it camembert or a brie, but I am referring to it as a Brie style.”

This usage of camembert and brie is legally acceptable given that both terms are generic, but Kris Lloyd explained that she only uses these terms for an interim period for consumers to identify the type of cheese and more as an education tool “for consumers to understand that ‘Charleston’ is a brie and on the back there is a description which I hope will be enough to illustrate what the cheese is about.”

Sheree Sullivan from Udder Delights and Victoria McClurg from Barossa Valley Cheese Co also use camembert and brie on some of their cheeses given that both are generic terms. Udder Delights has “made a point of not calling a cheese something that is already protected. We have already thought about that and therefore don’t use any traditional cheese names such as ‘Taleggio’ because we know it’s a protected cheese name in the EU/Italy.” Victoria McClurg explained that she uses camembert and brie purely because consumers recognize them and identify with the type of cheese they describe. “The French have marketed those terms very well and so consumers recognize that and the reality is that simplicity works and they will buy it – so camembert and brie will always be like that.” Barossa Valley Cheese Co likes to keep names and label “simple and we just try to keep educating our consumers…my consumers want the cheese to taste good and be the right price point, and it’s a bonus if it’s 100 percent Barossa.”

While it uses ‘feta’ on some of its cheeses, Barossa Valley Cheese Co is aware that ‘feta’ might become a protected term outside of the EU if the EU is successful in its efforts to obtain this protection as explained in Chapter 4. “Feta might be a term that might be at risk, but we can change it in some way and get around it. My consumers are not going to particularly care if I need to change the name”, as long

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1201 Interview with Kris Lloyd, Manager and Head cheese-maker, Woodside Cheese Wrights, (Woodside, Adelaide Hills, South Australia, 24 February 2014) (emphasis in original).

1202 Interview with Kris Lloyd, Manager and Head cheese-maker, Woodside Cheese Wrights, (Woodside, Adelaide Hills, South Australia, 24 February 2014) (emphasis in original).

1203 Interview with Sheree Sullivan, Proprietor and Head cheese-maker, Udder Delights, (Hahndorf, Adelaide Hills, South Australia, 7 April 2014). Refer to the Table of South Australian Interviewees, and their respective products, in part 6.1 above for a complete list of Udder Delights’ cheese names.


1205 Interview with Victoria McClurg, Proprietor, Barossa Valley Cheese Co, (Angaston, Barossa Valley, South Australia, 25 February 2014). Refer to the Table of South Australian Interviewees, and their respective products, in part 6.1 above for a complete list of Barossa Valley Cheese Co’s cheese names.
as Barossa Valley Cheese Co maintains its best practice of educating its consumers, which it is committed to doing so.1206

While these South Australian Interviewees were not overly concerned about having to stop using EU cheese GIs as generic product descriptors, a larger Australian cheese manufacturer or major dairy producer and exporter would have different feeling about not being able to use EU cheese GIs as generic product descriptors. As explained in Chapter 4, for Australian food producers who do use EU cheese GIs as generic product descriptors, having to stop use them would require them to re-label their cheeses and educate consumers about the usage of a new name on their cheeses. They would need to incur both costs and time in order to do so and would lose market opportunities. For the South Australian Interviewees above, this was not a concern because they already use regional names and other creative and distinctive names to promote their cheeses.

6.5.3.2 Generic terms: smallgoods producers’ opinions

Saskia Beer raised her concerns over the prospect of not being able to use terms such as ‘prosciutto’ or ‘la schinken’ to describe her products if the Extension Debate succeeds in the EU’s favour. While ‘prosciutto’ and ‘la schinken’ are currently used on smallgoods made in Australia, but not exported to the EU, Saskia Beer explained that “not being able to use such terms would be very hard because how else would you describe the product? Salted ham does not quite sound the same as ‘prosciutto.’”1207 The reason Saskia Beer uses these terms is in a similar vein to the cheese producers’ usage of camembert and brie because consumers are aware of these terms and can identify with the type and style of product to which they pertain. Other terms that Beer uses include pancetta and confit.

In relation to ‘confit’, this term refers to a cooking method typically used for cooking duck and is a generic cooking term. Saskia Beer explained that “every chef has training to use these terms from an early stage, but otherwise we don’t use

1206 European Commission, ‘List of Geographical Indications and Designations of Origin and Generic Names”, (European Commission Press Release Database, 22 October 2015), <http://europa.eu/rapid/press-release_IP-96-153_en.htm>. In relation to ‘feta’, the European Commission’s ‘List of Geographical Indications and Designations of Origin and Generic Names” notes that: Production of a product (even a significant one) outside its area of origin does not automatically mean that the name has become generic. The case of feta cheese is a good illustration of this possible confusion. ‘Feta’ is a traditional designation that has been submitted for registration by the Greek authorities, supported by documentation showing that it meets the requirements of the Regulation for a designation of origin. In the minds of the public, as demonstrated in particular by an opinion survey carried out among Community consumers in May 1994, the name ‘feta’ has not become the common name for a product but continues to be associated with a Greek provenance by most people. On the basis of this data, feta has not become a generic name. ‘Feta’ is listed in Annex I as registered EU/Greek PDO.

1207 Interview with Saskia Beer, Proprietor and Producer of Saskia Beer’s Farm Produce, (Nuriootpa, Barossa Valley, South Australia, 7 May 2014).
terms that are indicative of a region; it’s more about a process, a method, a product descriptor.”

In relation to the other terms, ‘Prosciutto di Parma’, ‘Prosciutto di San Daniele’, ‘Prosciutto di Modena’ and ‘Prosciutto di Cuneo’ are all registered EU/Italian PDOs, as is ‘Pancetta di Calabria’. ‘La Schinken’ is a Black Forest dry-cured smoked ham produced in the Black Forest region of Germany. The term ‘Black Forest ham’ is a EU/German PDO. None of these PDO terms are recognized in non-EU countries, such as Australia, resulting in various commercially produced smallgoods of varying degrees of quality being marketed and sold within Australia (and in some instances exported to non-EU countries) as ‘la schinken’, ‘prosciutto’, ‘pancetta’, but typically labelled with ‘Product of Australia’ close-by. This is with the aim of notifying consumers that the product is a type/style of ‘la schinken’, ‘prosciutto’, ‘pancetta’ product, but not from the EU PDO regions.

One of the main reasons why these types of EU GI/terms are used in the South Australian Regions is because migrants brought recipes and processes to make these products with them to the South Australian Regions, and continued to make them while adapting recipes and processes to cater for regional geographical factors. For example, Schulz Butchers and Barossa Fine Foods use mainly generic names on their smallgoods, but in relation to their respective usage of the term mettwurst Stephan Knoll justifies Schulz Butchers’ and Barossa Fine Foods’ respective use of this term on the basis that their mettwurst products are unique to their namesake product in Germany, as explained in above.

6.5.3.3 Generic terms: other South Australian interviewees’ opinion

Maggie Beer acknowledged that some of the terms that she currently uses in her product range, such as ‘freekah’, ‘arborio’, ‘verjuice’ and ‘vincotto’, are terms that could be at risk of being protected pursuant to the Extension Debate. However, she believes that by the time “an international extension happens for food GIs, if at all, many of these terms will have become generic.”

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1208 Interview with Saskia Beer, Proprietor and Producer of Saskia Beer’s Farm Produce, (Nuriootpa, Barossa Valley, South Australia, 7 May 2014).
1210 Interview with Stephan Knoll MP, Co-Proprietor, Schulz Butchers Angaston and Barossa Fine Foods, (Angaston, Barossa Valley, South Australia, 25 February 2014).
1211 Encyclopedia of Meat Sciences (Academic Press, 2014), 531. The term ‘mettwurst’ is not a protected EU GI pursuant to the EU Food GI System, but is a principal classification of “finely or coarsely minced and cured sausages (spreadable)” of ethnic German meat products.
1212 Interview with Maggie Beer, Proprietor ‘Maggie Beer’s Farm Shop’ and ‘Maggie Beer Products’, (Pheasant Farm, Nuriootpa, Barossa Valley, 25 February 2014).
6.5.3.4 Claw back of terms

Most of the South Australian Interviewees consider that there needs to be a “clear differentiation between terms that are generic and those that aren’t. If something strays over the line into generic use, then it weakens the IP claim for that term and product.” In this respect, South Australian Interviewees would like to see a conclusive analysis on what terms are in fact generic and what are not, and in this regard raised similar issues as the United States of America has raised in the Transatlantic Trade Investment Partnership negotiations about what are ‘common food names’ and what are in fact ‘legitimate GIs’, as explained in Chapter 4. In the South Australian Interviewees’ opinions, terms that have been used over several years to refer to a type/style of food have in most instances become common food names/generic terms, and therefore should remain unprotected outside the EU and not be clawed back by the EU.

Most of the South Australian Interviewees also acknowledged that they would be prepared to recognize more EU food GIs, should the Extension Debate succeed and/or the EU succeed on this issue in the TTIP negotiations with the USA, so long as the extended protection was justified on the basis that there was a qualitative connection between food and origin, the term was in fact not generic and that reciprocal acknowledgement was achieved for Australian food terms where relevant.

Drawing comparisons with what happened in the Australian wine industry in the 1980s with negotiations between the EU and Australia, as discussed in Chapter 2, that culminated in agreements about what wine terms were generic and ones that required protection, most of the South Australian Interviewees noted that:

> Australia needs to start the ball rolling for food, and we cannot see a problem with not using someone else’s food GI because we do not want to market a competitor’s product. We should not promote names of competitors, because we will then be secondary to one’s promoting. By promoting competitors’ GIs/products, we are setting them up as a benchmark—that they are the highest quality—and we will then always be secondary to the ones that we are promoting.

This perspective is in keeping with the opinion of most of the South Australian Interviewees that marketing and origin go hand in hand. Therefore, as long as there is a qualitative connection between food and origin, then most of the South

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1213 Interview with Peter Wall AM, Non Executive Director, LogiCamms and Ex-Director, Yalumba Family Vignerons c.1849 (Tanunda, Barossa Valley, South Australia, 17 February 2014).

1214 Interview with Jan Angas, Proprietor and Producer, Hutton Vale Lamb, Margaret Lehmann, Director, Peter Lehmann Wines, Peter Wall AM, Non Executive Director, LogiCamms and Ex-Director, Yalumba Family Vignerons c.1849 (Tanunda, Barossa Valley, South Australia, 17 February 2014).
Australian Interviewees endorse the principle that origin should be respected and only used on products that are connected to it.

For most of the South Australian Interviewees, claw back of terms does not overly concern them because most of them have already made a commercial decision to use names and terms on their products that are personal and relevant to their regions, products and production styles, rather than use EU terms. There has been a shift by most of the South Australian Interviewees towards using regional provenance claims on their foods, rather than relying on EU/Old World names and marketing products pursuant to EU/Old World terms. For example, as explained in part 5.3.1 above, Kris Lloyd from Woodside CheeseWrights uses names such as ‘Charleston’ and ‘Monet’ on her cheeses and Victoria McClurg from Barossa Valley Cheese Co uses names such as ‘Barossa Wanera’ and ‘Barossa Geo’ on her cheeses.

However most of the South Australian Interviewees concluded that what is missing is a legal framework that regulates the degree of connection required between food and origin before Regional Branding is used in order to ensure that all producers are on the same playing field when it comes to representing a connection between their product and region. Therefore, they identified a need for structured protection of the usage of regional names on food products and the usage of food GIs appealed to them to provide protection in a legal framework.

6.5.3.5 The shift towards using Regional Branding on foods

The South Australian fieldwork endorsed that most of the South Australian Interviewees have already shifted their focus to what is being produced in their region and using Regional Branding on their foods in order to reflect the connection between food and their respective region. They prefer this approach rather than relying on Old World terms, which promotes EU competitors, to sell and brand South Australian regional products. They see this shift as reflecting, and identifying, the fact that most of the South Australian Interviewees are producing food that is distinct and unique to Old World food products (on which they might have been initially based) and connected with the South Australian Regions not the Old World country from which it might have emanated.

Dr Heuzenroeder’s assessment is that the shift in attitude is largely due to the development of regionality in the Barossa Valley. As explained in Chapter 3, with regionality has come the fading out of many Old World terms being used on food products that are made using locally sourced ingredients and that are made within the Barossa. Due to the regional adaptation that has taken place over the many years, since original recipes and traditions were brought to the Barossa with migration, regionality has had the effect of:

People [bringing] their recipes to their new homeland, but in a different part of the world, in a different latitude, [and] they have found that they have different ingredients and therefore use those in old recipes to make a completely new recipe...Even where a recipe or method has been brought across, that has even been changed due to geographical factors, or technology that might improve it or modify it. Therefore, we have ended up
with our own products...This is our product. Our regionality. Our origin.\textsuperscript{1215}

The same can also be said of the Adelaide Hills, where migrants from Germany settled and brought recipes and knowledge with them, but that was adapted over time to take into account their new geographical environment and influential factors. Given that many recipes, traditions and processes that were originally brought to the South Australian Regions by migrants, have been adapted over the years to take into account the regional geographical factors, and in some instances human factors, many food products being made in the South Australian Regions are “physically, generationally, and/or philosophically so distant from their point of [Old World] origin that they actually have become something else or something new and/or different.”\textsuperscript{1216} With this in mind, many of the South Australian Interviewees are now focused on their own products and region, rather than the Old World, and market their products accordingly to reflect this connection to the South Australian Regions. Paul Henry agrees with this shift in attitude.

For me, as a non-Australian, now resident in Australia, impassioned in what I see, particularly in South Australia...there is an opportunity to recognize your inheritance, but leave a very different legacy. For example, Ferment Asian\textsuperscript{1217}, when [the owner] started here she would import the fresh ingredients from Vietnam, and then when she saw the market gardens in South Australia, and the processes used here, which were largely old Eastern EU processes, there was an opportunity to take those influences, but to grow them as South Australian produce...and so now there are sixth generation Silesians growing Vietnamese produce in the Barossa Valley, which is such a cross-polonisation of cultures. So when you so profoundly change the context, not just location, but also how you integrate with a new and different culture, then the origin becomes original and it’s something new again.\textsuperscript{1218}

Given this change in context, it explains the cheese producers’ commitment to using names on their cheeses that are personal to their region and artisan cheese making, rather than using EU cheese names and marketing their competitors and/or competitor products. Similarly, Corey Fechner from Apex Bakery, correctly concludes that the recipe and fermenting process Apex Bakery uses for the ‘1924

\textsuperscript{1215} Interview with Dr Angela Heuzenroeder, Food historian and author of ‘Barossa Foods’, (Tanunda, Barossa Valley, South Australia, 7 May 2014) (emphasis added). See Chapter 3 for a detailed discussion of regionality.

\textsuperscript{1216} Interview with Paul Henry, Creative Director, Tasting Australia, and Director, Winehero Australia, (Adelaide, 3 March 2014).

\textsuperscript{1217} ‘Ferment Asian’ is a restaurant located in Tanunda, Barossa Valley, South Australia, using regional producer and supporting regional producers. “Since my parents arrived in the Barossa Valley [in 2010] they have transformed our home gardens into miraculous vegetable growing all manner of vegetables and herbs that are intrinsic to our cuisine.” [Reference: <http://www.fermentasian.com.au/menu/menu.php>].

\textsuperscript{1218} Interview with Paul Henry, Creative Director, Tasting Australia, and Director, Winehero Australia, (Adelaide, 3 March 2014).
Dough Ferment Loaf’, as already discussed, results in a unique sour dough bread so much so that it is a Barossa Valley bread, not one that can be tied back to Germany or England.\footnote{1219 Interview with Corey Fechner, Co-Proprietor APEX Bakery, (Tanunda, Barossa Valley, South Australia, 2 April 2014).}

Stephan Knoll explained that the mettwurst products that both Schulz Butchers and Barossa Fine Foods make are different to the original recipes and processes used by their ancestors to make mettwurst.

_The mettwurst made in Germany is actually soft, whereas with our regional climate, in summer it would dry out and become hard and spicy. This shows that taking that knowledge from Germany and bringing it over here, gives us something unique because of that climatic change...Mettwurst [has] probably..been adapted enough that we could say [it’s] regional and unique to the product made in Germany._\footnote{1220 Interview with Stephan Knoll MP, Co-Proprietor, Schulz Butchers Angaston and Barossa Fine Foods, (Angaston, Barossa Valley, South Australia, 25 February 2014).}

In Knoll’s opinion this differentiation would justify continuing to use the term mettwurst if it were ever to become a protected EU GI, although this is unlikely given its generic nature up until now. However given the uniqueness of the regional mettwurst, Knoll also acknowledged that there is scope to change the name completely to reflect its regional origin. Knoll made this acknowledgment given that he has seen the shift with other smallgoods producers making more of an effort to stop using EU food GI terms on regionally made smallgoods. Knoll pointed out that there are a few reasons for this change in attitude. Producers are aware that consumers want to know where food comes from and are seeking out regional products where possible with the hope that they are more authentic and healthy. Where there are EU food GIs that have product specific heritage and integrity, there is a risk that the Extension Debate and/or TTIP developments could see such EU food GIs become protected outside the EU, impacting on producers’ continued use of those terms, unless they are concluded to be generic. Knoll sees this break by regional producers in no longer using EU food GIs on products that are made regionally as “a great idea because it helps to deliver integrity and make people understand that there is place attached to food.”\footnote{1221 Interview with Stephan Knoll MP, Co-Proprietor, Schulz Butchers Angaston and Barossa Fine Foods, (Angaston, Barossa Valley, South Australia, 25 February 2014).}

Maggie Beer also supports the concept of regional branding on food that has a connection with a region, over using EU GIs/terms. “Australia is a young country with its own terroir and adaptations o processes from those brought here. Therefore, we should use our own GIs.”\footnote{1222 Interview with Maggie Beer, Proprietor ‘Maggie Beer’s Farm Shop’ and ‘Maggie Beer Products’, (Pheasant Farm, Nuriootpa, Barossa Valley, 25 February 2014).}

Having lived and worked in Parma, Emilia-Romagna, Italy, (one of the Italian Regions focused on in my Italian fieldwork), Matteo Carboni now lives in...
Angaston, Barossa Valley, where he owns Casa Carboni, Italian cooking school and Enoteca, with his wife Fiona Carboni. Matteo and Fiona shared the same view that:

For one reason or another, we doubt that Barossa foods are identical [to the homeland foods on which they might have been originally based] because it’s difficult to produce the same products here…The climate and soil here is different. You wouldn’t want people to think that it’s the same as what people are buying in the EU because it isn’t.

Very familiar with food made in the Barossa Valley, Jess Greatwich from the Barossa Farmers Market explained that traditions, recipes and knowledge that were brought to the Barossa Valley by migrants, have been adapted for various reasons. “Most of the time, when you compare the resulting product made here to the one made back in the homeland, they are completely different so there wouldn’t be any worth in promoting the Old World GI anyway.”

BGWA also promotes the fact that the Barossa Valley gives the food from the region a particular flavour and that this point of difference should be promoted via brand Barossa rather than Old World terms. BGWA encourages Barossa Valley based producers to focus on their regional ingredients and processes, and market these rather than promoting a competitor.

6.5.3.6 Concluding observations

Most of the South Australian Interviewees identified the following three factors as their priorities in using Regional Branding on their foods:

• They want to use Regional Branding on their labelling but would like to see the introduction of a clear legal framework that ensures that all producers who do so can in fact demonstrate that their food is connected to the region.
• They prefer to market their products using labels that are personal to their regions, products and production style, rather than using EU/Old World names.
• They are willing to protect and respect EU GIs as long as the extended protection, if any in the future, is justified on the basis that there is a qualitative connection between food and origin, the term is in fact not generic and that reciprocal acknowledgement is achieved for Australian

1223 Matteo Carboni also worked at Academia Barilla in Parma, Emilia-Romagna, Italy (one of the Italian Interviewees discussed in Chapter 5) for five years as a teacher, conducting cooking classes, demonstrations and building courses for clients from around the world.
1224 Interview with Matteo and Fiona Carboni, Owners of Casa Carboni, Italian Cooking School & Enoteca, (Angaston, Barossa Valley, South Australia, 7 May 2014).
1225 Interview with Jess Greatwich, Manager, Barossa Farmers Market, (Angaston, Barossa Valley, South Australia, 25 February 2014).
1226 Interview with James March, CEO of Barossa Grape and Wine Association Inc, (Tanunda, Barossa Valley, South Australia, 2 April 2014).
food terms, where relevant, similar to what has occurred with the Australian wine GI system.

The South Australian fieldwork has therefore provided the insight that serves as a foundation for the recommendation that Australia implement a sui generis food GI system. I consider each of these priorities further below and in Chapter 7 where I recommend the elements that a successful food GI system should include.

6.5.4. Most South Australian interviewees believe that there is a need to implement a legal food protection system similar to that implemented for wines in Australia

It is clear therefore that many of the South Australian Interviewees, in particular those with an association with the wine industry, and exposure to the Australian wine GI system, want a similar legal framework for food protection where all producers who meet relevant criteria would be able to use a public right mark to identify and protect the connection between food and origin.

Having seen firsthand the positive effects of the Australian wine GI system for the wine industry, many of the South Australian Interviewees appreciate the public right aspect that a GI can bring to their product, brand and image and respective region in terms of promotion and tourism. They would like to have access to a legal framework that provides a community based approach to protecting the connection between food and origin rather than relying on current trademark, passing off, PoOL and consumer protection laws to gain this protection given that, in their opinion, these laws are all inadequate in providing that protection as explained above.

Most of the South Australian Interviewees see the worth of using GIs on food labels given that GIs would indicate that the South Australian Regions have “a reputation for certain qualities or character associated with [the] particular regional origin;...[and] a product with particular characteristics that the consumer has come to recognise because of their consistent association with the placename over time.”1227 This is particularly relevant to the South Australian Regions given that they are already recognised for their wines, food and tourism. Given that GIs are focused on protecting and enforcing the connection between goods and origin, they are more relevant to enforcing the connection than are existing laws that are focused more on branding to distinguish between goods and legal proprietary rights in the brand names.

Most of the South Australian Interviewees shared their frustration at the lack of clarity in current legal frameworks regarding the degree of connection required between food and origin before regional branding is used on products. They view governments and legislators as being “way behind on how industry thinks on this topic.”1228 In their opinion, governments have become very focused on ensuring that

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1227 van Caenegem at al, above n 1084,10.
1228 Interview with Jan Angas, Proprietor and Producer, Hutton Vale Lamb, Margaret Lehmann, Director, Peter Lehmann Wines, Peter Wall AM, Non Executive Director, LogiCamms and Ex-Director, Yalumba Family Vignerons c.1849 (Tanunda, Barossa Valley, South Australia, 17 February 2014).
bigger food manufacturers are complying with systems, such as food standards and Occupational Health and Safety (OHS) measures used in their facilities. While the South Australian Interviewees do not deny that these are important issues for larger food manufacturers, they feel that the smaller regional food producers are not as focused on and that this is a reason why a clear legal framework dealing with food and origin does not yet exist.

 Governments have helped and forced food industry to become all about food manufacturing that involves production line food and generic products. But, what we want to promote is real regional food and create incentives for locals to produce it...Instead, governments have homogenized flavour and taken away the traditional way of making food to ensure that only bigger entities that can abide by OHS systems are making food.\textsuperscript{1229}

While most of them acknowledged that determining the criterion of connection between food and origin is more complex for food than wine, because of the multiple ingredients in food and the value-adding that takes place with food production, this challenge can not be a barrier to a clear legal framework any longer. The abandonment of the Appellation Have Your Say initiative is looked upon unfavourably by many of the South Australian Interviewees.\textsuperscript{1230} “Anything like this challenges the bigger food companies and the government because we are challenging their methods that are in place and that are easy, and they are fearful of moving from them. But, it is not necessarily correct to stop evolving.”\textsuperscript{1231} Many of the South Australian Interviewees would like to see this challenge taken up in terms of a new food GI system.\textsuperscript{1232} “We should not put things in the too hard basket because the things that are often too hard, are the ones that pay off in the end.”\textsuperscript{1233} It is clear therefore that current opposition that exists in Australia in relation to GIs, other than for wines and spirits, needs to be revisited. There is a real need and a real

\textsuperscript{1229} Interview with Jan Angas, Proprietor and Producer, Hutton Vale Lamb, Margaret Lehmann, Director, Peter Lehmann Wines, Peter Wall AM, Non Executive Director, LogiCamms and Ex-Director, Yalumba Family Vignerons c.1849 (Tanunda, Barossa Valley, South Australia, 17 February 2014).

\textsuperscript{1230} It is for this reason that the Barossa Trust Mark was initiated, but some of the South Australian Interviewees based in the Barossa Valley do not view the Barossa Trust Mark as the answer to the flaws in the current legal framework. Some see the Barossa Trust Mark as catering to a niche segment of the producers based in the Barossa Valley, rather than driving the needs of the greater community. They would still like to see a food protection legal framework introduced that is inclusive of as many producers as possible and that provides more of a public right protecting the connection between food and origin, rather than a private licensed right to use a trust mark.

\textsuperscript{1231} Interview with Jan Angas, Proprietor and Producer, Hutton Vale Lamb, Margaret Lehmann, Director, Peter Lehmann Wines, Peter Wall AM, Non Executive Director, LogiCamms and Ex-Director, Yalumba Family Vignerons c.1849 (Tanunda, Barossa Valley, South Australia, 17 February 2014).

\textsuperscript{1232} Interview with James March, CEO of Barossa Grape and Wine Association Inc, (Tanunda, Barossa Valley, South Australia, 2 April 2014).

\textsuperscript{1233} Interview with Victoria McClurg, Proprietor, Barossa Valley Cheese Co, (Angaston, Barossa Valley, South Australia, 25 February 2014).
interest in a food GI system that enforces and protects the connection between regional food and origin and that has clear criteria as to when Regional Branding can be used. It would be a worthwhile investment for the Australian food industry and generally to provide greater certainty and clarity regarding applicable laws. This real need and interest was confirmed by the majority of the South Australian Interviewees.

Shortly after my interview with Kris Lloyd from Woodside Cheese Wrights, Lloyd wrote an article in the Adelaide Review about whether South Australian regions should “clearly define food in the same way that they define wine.” Lloyd in her article, and at our interview, acknowledged that the South Australian wine industry:

Has been largely responsible for the establishment and marketing of our regions, Barossa Valley, McLaren Vale and the Adelaide Hills...[that] are all regarded as regions with quite specific and diverse wine styles. These clearly defined areas possess what is referred to as ‘terroir’ – all the funky doo-dads and characteristics that make up the region. Anything from the indigenous weeds, terrain, tradition, rainfall, altitude, slope, fauna and flora all lay a part in what will ultimately shape that drop in your glass.

Different characteristics from the regions are present in the various wine specialties from each region, and have been used as marketing tools and “key driver[s] for consumers when choosing a dry or perhaps herbaceous style to go with dinner.”

Therefore, in her article, Kris Lloyd asked the following questions:

Will we see this concept adapted across to food products? Will we be able to say, for example, that a Camembert made in the Adelaide Hills has a richer texture than Camembert made in the Limestone Coast? Could it be that a cheese produced in the Adelaide Hills using milk specifically from that region will have characteristics we can claim as unique to that source?

After briefly considering the EU food GI system as an example of a food protection system that defines food in terms of origin, characteristics and quality, Lloyd answered these questions in her article. She concluded that given the current interest in origin of food and a growing consumer understanding of local produce, “the fundamental thinking behind protection of regionalism, promotion of sustainability within regions and producers obtaining a fair price for their authentic products, should be seriously considered.” To that end, Lloyd suggested to her readers that “surely knowing where your food heralds from is just as important as

1234 Kris Lloyd, 'Cheese Matters' (1 April, 2014), Adelaide Review 1, 2. Kris Lloyd and I discussed the contents of this article at our interview.
1235 Ibid 1.
1236 Ibid.
1237 Ibid 1-2
1238 Ibid 2.
the source of what you drink.”

Given all these factors, Lloyd feels that the concept of buying a wine “based on the characteristic that the region influences in that product” should also be promoted in the food industry and that food should be defined in the same way as wine.

In discussing the Australian wine GI system, and the negotiations between Australian and the EU leading up to the 1994 and 2008 Australia/EC Wine Agreements, as reviewed in Chapter 2, Peter Wall AM explained that before the Agreements were reached the wine industry also experienced a similar divide as the food industry is currently experiencing. There was a divide between larger wine corporations and smaller wine producers, and the manner in which they were respectively treated by government. At the time of negotiations between the EU and Australia:

People were apprehensive about GIs and the EU Wine Agreements. But, we adopted the restraints on Australia’s use of EU wine GIs in order to get a less onerous certification and the removal of trade barriers in the EU and UK, and then it got us meshed into all of the other issues. But, this was all a good thing because we now have GI protection and no abuse of wine GIs anymore.

Jan Angas added to this that the wine industry is an interesting example “because you have small and big businesses alongside each other now as a result of the wine trade agreements. We hope that the food industry can be like this one day.”

In following the wine example, many of the South Australian Interviewees would like to see the introduction of a food GI system devoted to the identification, protection and promotion of the connection between food and origin and that is a ‘one-stop-shop’ system for all issues dealing with this topic. Looking at the Australian wine GI system as an example, most of the South Australian Interviewees would welcome a legal framework for food that clearly spells out the percentage of core ingredients that need to come from a region before a region can be used on food labels. “A new food system needs to serve that purpose. It will help to put all producers on the same level playing ground and it will help consumers understand what is a real regional product,” with proper education of the system.

1239 Ibid.

1240 Ibid.

1241 Interview with Peter Wall AM, Non Executive Director, LogiCamms and Ex-Director, Yalumba Family Vignerons c.1849 (Tanunda, Barossa Valley, South Australia, 17 February 2014).

1242 Interview with Jan Angas, Proprietor and Producer, Hutton Vale Lamb, Margaret Lehmann, Director, Peter Lehmann Wines, Peter Wall AM, Non Executive Director, LogiCamms and Ex-Director, Yalumba Family Vignerons c.1849 (Tanunda, Barossa Valley, South Australia, 17 February 2014).

1243 Interview with Matteo and Fiona Carboni, Owners of Casa Carboni, Italian Cooking School & Enoteca, (Angaston, Barossa Valley, South Australia, 7 May 2014).
While all of these elements will be addressed in further detail below as well as in Chapter 7, the conclusion to this issue is that the Australian government at both state and federal levels needs to give imminent consideration to the recommendation that a food GI system be implemented in Australia. Implementing a *sui generis* food GI system would overcome the deficiencies of current consumer protection, passing off and trademark laws and would provide adequate protection to the connection between Australian regional food and origin. It would protect the assets that Australia has in its regional names and the reputation of Australian regions that produce quality food products. Moreover, it would provide trade incentives and advantages as explained in Chapter 4.

### 6.5.5. Demarcation of GI boundaries

One specific factor that most of the South Australian Interviewees raised about the Australian wine GI system was demarcation of GI boundaries. As noted in Chapter 2, the GI Committee (GIC), a statutory committee of the Australian Grape and Wine Authority (AGWA), determines areas and regions that are to be legally recognised GIs and that are to be entered into the *Register of Protected GIs and Other Terms*. This Register is maintained by the AGWA. Currently, there are 114 registered Australian GIs in the *Register of Protected GIs and Other Terms* and ‘Barossa Valley’ and ‘Adelaide Hills’ are on the Register.\(^{1244}\)

Annexed to this thesis are three maps that illustrate the wine regions of Australia as prescribed by the GIC. Annex I includes the GI boundaries for thewine zones‘Barossa’ and ‘Mount Lofty Ranges’. Annex II and Annex III both show the GI boundaries for thewine regions‘Barossa Valley’, Eden Valley’ and ‘Adelaide Hills’\.\(^{1245}\) Even though not shown on the maps, the GIC Register lists ‘High Eden’ as a subregionof ‘Eden Valley’ and ‘Lenswood’ and ‘Piccadilly Valley’ as subregions of the ‘Adelaide Hills’.\(^{1246}\)

As explained in part Chapter 3, given that food includes multiple ingredients, not just one as is the case for wines with grapes being the key ingredient, most of the South Australian Interviewees’ perspective is that determining GI boundaries for food will be a more difficult task than it was for wine. As there will likely be more than one origin for the ingredients, the focus would need to be on the key/core ingredients and ensuring that those core ingredients are connected to the region in issue.

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\(^{1244}\) All the maps in the annexure have been sourced from Australian Grape and Wine Association, *Register of Protected GIs and Other Terms* available at [https://www.wineaustralia.com/au/labelling/register-of-protected-gis-and-other-terms](https://www.wineaustralia.com/au/labelling/register-of-protected-gis-and-other-terms).

\(^{1245}\) All the maps in the annexure have been sourced from Australian Grape and Wine Association, *Register of Protected GIs and Other Terms* available at [https://www.wineaustralia.com/au/labelling/register-of-protected-gis-and-other-terms](https://www.wineaustralia.com/au/labelling/register-of-protected-gis-and-other-terms).

\(^{1246}\) All the maps in the annexure have been sourced from Australian Grape and Wine Association, *Register of Protected GIs and Other Terms* available at [https://www.wineaustralia.com/au/labelling/register-of-protected-gis-and-other-terms](https://www.wineaustralia.com/au/labelling/register-of-protected-gis-and-other-terms).
The South Australian Interviewees’ views on using wine GI boundaries for food purposes were divided. While some of the South Australian Interviewees regard the current ‘Barossa Valley’ and ‘Adelaide Hills’ GI region boundaries for wine as a good starting point for food GIIs, they noted that they would most likely need to be broadened for food purposes; while others would want the same wine GI region boundaries maintained for food. Even in one interview the views differed with Margaret Lehmann considering it ideal to start off with assessing the wine GI boundaries and extending them if need be for food purposes, so as to be as inclusive as possible of Barossa food producers. We should not be constrained by wine boundaries where there is good reason to include producers. We want to be as inclusive a possible, as long as there is a link and a tie back to the region.”

On the other hand Jan Angas held the view that there “can’t be different wine lines to food lines. They should be the same.”

While a ‘middle road’ might be the possibility of using the GI boundary for the zone ‘Barossa’ for food, so that it is more inclusive of producers located throughout the Barossa (given that it includes both the regions of ‘Eden Valley’ and ‘Barossa Valley’), it was noted by many South Australian Interviewees that even using the zone GI might still leave some food producers out of the ‘Barossa’ zone. Michael Wohlstadt, owner of Barossa Heritage Pork and the Dairyman Barossa, as well as Chairman of Barossa Food Inc, has a background in planning and explained in his interview that for food GI boundaries:

The first thing that you would try and do is try to have the same GI boundaries as for wine, and see if it works for food. The problem with food is that the range is much wider for foods than wine. Some food is ‘made’ products and some of it is ‘produced products’. In Saskia Beer’s case, the ‘made’ products would better fit the ‘Barossa Valley’ region GI, while ‘produced products’ probably wouldn’t.

This is because Saskia Beer sources some of her chickens from Riverton, between Clare and the Barossa, and this falls outside the ‘Barossa’ zone and the ‘Barossa Valley’ region GIIs. Therefore, for someone like Saskia Beer, “the boundaries would have to be extended depending on what is permissible with the different zoning laws. The wine GI boundary demarcation did upset a lot of people when it

1247 Interview with Jan Angas, Proprietor and Producer, Hutton Vale Lamb, Margaret Lehmann, Director, Peter Lehmann Wines, Peter Wall AM, Non Executive Director, LogiCamms and Ex-Director, Yalumba Family Vignerons c.1849 (Tanunda, Barossa Valley, South Australia, 17 February 2014).

1248 Interview with Jan Angas, Proprietor and Producer, Hutton Vale Lamb, Margaret Lehmann, Director, Peter Lehmann Wines, Peter Wall AM, Non Executive Director, LogiCamms and Ex-Director, Yalumba Family Vignerons c.1849 (Tanunda, Barossa Valley, South Australia, 17 February 2014).

1249 Interview with Michael Wohlstadt, Barossa Heritage Pork and Chairman of Barossa Food Inc, (Barossa Valley, 2 April 2014).
was introduced, but it was a little bit easier for wine because you can see where the vines are.”

Paul Henry agreed that if a new system for food were created, then “the framework should probably be reworked because a GI system from the GIC’s point of view was not about food.” Similarly, James March from BGWA would want as many Barossa producers to be included in a GI boundary for food purposes and to that end favours creating new GI boundaries for food that are broader than the current wine GIs. Dr Heuzenroeder’s suggestion was that given that “grapes and wine have had an influence on the food [in the Barossa] that tends to suggest that the wine GI boundaries are compatible...at least a good starting point...but given the cultural sprawl of people across the Barossa and the food that they make...the wine GI boundaries might not be broad enough.”

In relation to the Adelaide Hills, Kris Lloyd’s vision is that the wine GI demarcation should be followed.

> Why reinvent the wheel? A lot of the climatic conditions and geology that applies to wine would apply to food. The amount of geology that winemakers do is extraordinary. A lot of the areas have been mapped out and a lot of the information is available which is very important and can be used for food purposes...I would be very interested to know how the wine industry has done this and apply the same to food...Wine GI system has been successful. It’s noted. People have an understanding of it. Apply something similar for food.

Therefore, there was no common view on demarcation of GI boundaries for food, but taking into account that food products are made from multiple ingredients, the ‘cultural sprawl’ of producers producing regional food throughout one region and the South Australian Interviewees’ respective production positions and their desire that a new legal food system be as inclusive of producers as possible, I suggest that the issue of demarcation of boundary for food GIs will most likely require a new evaluation of appropriate food GI boundaries. Given these issues and:

> The diversity of Australia’s regional economies there is merit in approaching the issues of GI protection afresh rather than simply extending the wine model...Proper processes for geographical delineation are, of course, a core aspect of GI law, since the inclusion or exclusion from a GI

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1250 Interview with Saskia Beer, Proprietor and Producer of Saskia Beer’s Farm Produce, (Nuriootpa, Barossa Valley, South Australia, 7 May 2014).

1251 Interview with Paul Henry, Creative Director, Tasting Australia, and Director, Winehero Australia, (Adelaide, 3 March 2014).

1252 Interview with James March, CEO of Barossa Grape and Wine Association Inc, (Tanunda, Barossa Valley, South Australia, 2 April 2014).

1253 Interview with Dr Angela Heuzenroeder, Food historian and author of ‘Barossa Foods’, (Tanunda, Barossa Valley, South Australia, 7 May 2014).

1254 Interview with Kris Lloyd, Manager and Head cheese-maker, Woodside Cheese Wrights, (Woodside, Adelaide Hills, South Australia, 24 February 2014).
region can have severe consequences for local producers, and is significant for the integrity of the scheme. Those who fall outside a delineated area will often not enjoy the benefits of GI use, such as higher land values and buying into a famous name.\textsuperscript{1255}

In conclusion, the overwhelming response from the South Australian Interviewees is that there needs to be a food GI system that protects and promotes the connection between food and origin in a more comprehensive and effective manner than currently offered pursuant to existing trademark, PoOL, passing off and consumer protection laws. Most of the South Australian Interviewees are no longer willing to accept government putting this in a ‘too hard’ basket and believe that now is an ideal time to focus on this topic given producers’ and consumers’ interest in origin and regionality. This will be addressed further below.

6.5.6. Features South Australian interviewees believe a legal food GI system should include

Given that the majority of the South Australian Interviewees would like to see a new legal framework introduced that provides protection and promotion of the connection between food and origin, in a similar vein to the Australian wine GI system, I discussed with them aspects of both the Australian wine GI system and the EU/Italian Food GI system in order to obtain their views on what features they believed a food GI system should include. These Systems were discussed given that most of the South Australian Interviewees are familiar with the Australian wine GI system because of their exposure and/or involvement in the wine industry in the South Australian Regions and due to the similarities between the geographical factors of the Italian Regions and South Australian Regions and the products being made in those Regions.

Overall, most of the South Australian Interviewees agreed that the following key features should be included in a food GI system. It is worth noting that most of the features that the South Australian Interviewees reviewed with me resemble the main elements that I recommend are required for an effective and credible legal food GI system, following my fieldwork in Italy, as set out in Chapter 5.

6.5.6.1 Australia needs a food GI system tailored to its needs

All of the South Australian Interviewees agreed that while the EU/Italian GI system could be looked at as a case study of a legal food GI system, there were differences between Australia and EU/Italy that needed to be taken into account in contemplating a legal food GI system for Australia. Most of them agreed that the EU/Italy GI system could be looked at to determine what aspects, if any, could apply to an Australian extended GI system and to learn from in terms of risks, benefits and costs. However, factors of different cultural and political climates and Australia’s various trade obligations would most likely see a different legal food GI system emerge in Australia.

\textsuperscript{1255} van Caenegem et al, above n 1084, 17.
Kris Lloyd candidly revealed that that while she is prepared to:

> Have a look and see what the Europeans are doing, I don’t want to copy that. I don’t want a DOC or AOC\footnote{DOC refers to the Italian Wine Classification Denominazione di Origine Controllata and AOC refers to the French GI certification Appellation d’Origine Controle.} I don’t want any of that because I find that too rigid and I just don’t think that we need to go down that path. However, I think that we can probably take bits of it that will allow us the opportunity to make the most of that as a marketing and selling point without putting shackles on us and to be inclusive of what locals are doing. I would hate to see us say that we are going to do DOC, because that works over there and they have been doing it for years, but they have a very different structure and culture, that they all just understand it…We are not like them and therefore we must not behave like them. We should really understand what they have done and take on board the things that are relevant for us here as a young emerging food industry.\footnote{Interview with Kris Lloyd, Manager and Head cheese-maker, Woodside Cheese Wrights, (Woodside, Adelaide Hills, South Australia, 24 February 2014).}

Victoria McClurg of Barossa Valley Cheese Co, who having spent time in France firstly making wine in Bordeaux and then learning the art of cheese-making, noted:

> In Italy and France, consumers accept the PDO system shared a comparable view. They know what it is, how it works, they are older, and they have different economies of scale…Australia is all about freeform, and not so many rules and red tape. So I like the idea of a PDO system, but I don’t think that it fits our culture of what we do overall. We need to work out what system works for [Australia] and our consumers, and come up with a tailor made system for us. What can we learn from overseas?\footnote{Interview with Victoria McClurg, Proprietor, Barossa Valley Cheese Co, (Angaston, Barossa Valley, South Australia, 25 February 2014).}

Matteo Carboni from Casa Carboni believes that a food GI system should be contemplated in Australia, but tailored to fit its different cultural and political environment to that of the EU and Italy.

> I couldn’t believe when I moved here how fresh the food is, and the flavour. I was really impressed. Cooking Italian is based on primary flavours, and here are the best flavours. Here I am dealing with fresh produce, so I don’t know how this can’t be PDO? I am using 80-85% of local produce. I am here to show it off. I even use oils from here as much as I can…anything that I can find here, I use. When I do cooking classes, I show how the recipes can be changed to reflect the season and what’s available.\footnote{Interview with Matteo and Fiona Carboni, Owners of Casa Carboni, Italian Cooking School & Enoteca, (Angaston, Barossa Valley, South Australia, 7 May 2014).}
Having reviewed with the South Australian Interviewees the three levels of protection for agricultural products and foodstuffs (Protected Designations of Origin (PDO), Protected Geographical Indications (PGI) and Traditional Specialties Guaranteed (TSG)) that the EU/Italian Food GI system provides, I found that some of the South Australian Interviewees liked the different levels of protection offered as they saw the levels as different means for more producers to be able to be part of the System and therefore saw these levels as promoting inclusiveness. However other South Australian Interviewees saw the three levels as complicated and as classifying producers into three different tiers, which in their opinion provided a non-collaborative approach and an aspect that could cause tension among producers and provide a perception of elitism among producers and to consumers. This division in views of the EU/Italian Food GI system’s three different levels led to the identification of the next key features that that a new legal food system should include. It needs to be inclusive and collaborative.

6.5.6.2 The system needs to be inclusive

All of the South Australian Interviewees endorsed that a food GI system needs to be as inclusive as possible of all producers within the South Australian Regions as long as they can demonstrate some connection between their food and the respective region. There must be some connection, link, tie back to the region for producers to be able to use regional provenance claims, in the form of a GI, on their food product. Most of the South Australian Interviewees concluded that such a connection could be achieved in the following ways:

6.5.6.3 Core ingredients must be sourced from the region

As most of the South Australian Interviewees are unable to source each ingredient from the respective South Australian Regions, they all agreed that at least the core ingredient(s) should be sourced from the region. This is analogous to the issues already explained in Chapters 3 and 5.

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1260 Interview with Jan Angas Proprietor and Producer, Hutton Vale Lamb, Margaret Lehmann, Director, Peter Lehmann Wines, Peter Wall AM, Non Executive Director, LogiCamms and Ex-Director, Yalumba Family Vignerons c.1849 (Tanunda, Barossa Valley, South Australia, 17 February 2014): For example, Jan Angas and Margaret Lehmann regarded the three levels as accommodating various producers, especially those who could not source all their ingredients from a region and for others who use traditional recipes and processes to make a food product. They favoured a GI system that allowed for as many producers to be included in the system as possible and saw the three levels as increasing this opportunity.

1261 Interview with Paul Henry, Creative Director, Tasting Australia, and Director, Winehero Australia, (Adelaide, 3 March 2014): For example, Paul Henry, Kris Lloyd, Victoria McClurg, Jess Greatwich, and Saskia Beer, who saw the three levels as causing tension among producers and segregating producers rather than achieving collaboration. They favour a more simple and inclusive system that encourages collaboration so that as many producers as possible can be part of the system. The general consensus was that a food GI system should not be overcomplicated from the beginning “because it will turn people off. Start with a simple system and then as things evolve, it can become more elaborate.”
Similar to the Australian wine GI system that prescribes the percentage of grapes that must be sourced from a region to be able to use the relevant GI on the wine, a percentage of ingredients, to reflect the core ingredient(s) component of the relevant food product, would need to be sourced from the region. At a practical level this means that as a cheese producer the milk should at least be locally sourced. As a smallgoods producer the meat used to make the product should at least be locally sourced. For olive oil producers the olives should be sourced from olive trees grown in the region. Overall, most of the South Australian Interviewees told me that they

Want the system to be inclusive of producers who perhaps do not totally source the product from the region...we don’t want to cut people out who are promoting the region, and are using some Barossa-sourced ingredients, but mixing it with other ingredients that might come from overseas or other areas. And many Barossa Valley producers do fall into this category. But, there needs to be that linkage with the region to have a connection.  

The emphasis here is on the geographical factors of a region that influence food’s flavour and characteristics. By focusing on “what is characteristic about the region and what effect it has on raw materials...we can then easily say that it’s the limestone in the Adelaide Hills that imparts the flavour...it’s about identifying the geographical conditions of a region that will play a part in the characteristic of any particular food product” that will provide a connection between food and region.  

6.5.6.4 Production and processing of food in the region

Most of the South Australian Interviewees agreed that, where laws and council regulations permit, it would be favourable that all stages of food production be carried out within the region to reinforce the connection between food and origin. As explained in Chapter 3, local production reinforces the connection between regional food and origin and is important in mitigating the risk of food producers and traders free-riding on the reputation that the GI region has for producing authentic regional food and the value that accordingly exists in the GI. It will also mean that consumers will be able to trust food labels that include food GIs to provide regulated transparency of origin of food from paddock to plate.

The South Australian fieldwork endorsed that in some instances, as discussed in the context of Maggie Beer and Saskia Beer, and smallgoods producers such as Barossa Fine Foods, some stages of food production might need to be carried outside a region. In such a situation, most of the South Australian Interviewees were of the opinion that as long as the core ingredients were sourced from the place of origin, and the processing was not too far removed from the place of origin, ideally as close to the region as possible and definitely within the same State, then

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1262 Interview with Jan Angas, Proprietor and Producer, Hutton Vale Lamb, Margaret Lehmann, Director, Peter Lehmann Wines, Peter Wall AM, Non Executive Director, LogiCamms and Ex-Director, Yalumba Family Vignerons c.1849 (Tanunda, Barossa Valley, South Australia, 17 February 2014).

1263 Interview with Kris Lloyd, Manager and Head cheese-maker, Woodside Cheese Wrights, (Woodside, Adelaide Hills, South Australia, 24 February 2014).
this could be a requirement that would make a food GI system more inclusive. Most of the South Australian Interviewees revealed that someone like Maggie Beer be able to use a Barossa food GI on her food products that are connected to the region as long as she sources the core ingredients required for her food products from the region. Given that Maggie Beer has promoted the Barossa Valley at such a high level, most of the Barossa based South Australian Interviewees thought it would be unfair to exclude her from a legal food GI system because some of her products were not made using locally sourced ingredients. “Something like a Maggie Beer enterprise is nothing but value for the Barossa. She lives here and is producing the bulk of what she does here and that IP resides in the Barossa, and that’s an intangible.”

Maggie Beer holds the reciprocal view of other producers based in the Barossa Valley, who are also unable to source each ingredient from the region or produce food in the region. As long as there is a connection with the Barossa Valley, in that the core ingredient(s) are sourced from the region, then Maggie Beer would like to see a food system emerge that “includes as many locals as possible…and that celebrates regionality and traditions and promotes these things.”

The South Australian fieldwork revealed that a food GI system must take into consideration that in some instances not all stages of food production can occur within a region. However, I recommend that a certain percentage of the production stages of the food product must take place within the GI region to avoid food products that have no connection with a region being labelled with a food GI. As explained in Chapters 3 and 5, I recommend that the percentage of food production that must take place within a region be high so to ensure that there is a link between food product and the GI region. Having a high percentage will mitigate the risk of food producers using a food GI on their food products where most, or none, of the production stages of their food product takes place within a GI region. There must be production stages that occur within the GI region and a high percentage requirement is essential to ensure that regional food products are connected to their regional origin.

6.5.6.5 Traditional processes and methods

In addition to the above two requirements, a further connection criterion suggested by the South Australian Interviewees is if a food product has been made using traditional processes and methods that are unique to the region. The South Australian fieldwork revealed human factors of a region that influence food’s flavour and characteristics. For example, the smoking of smallgoods in the Barossa Valley, the fermentation process used to make the sour dough bread by Apex Bakery in the Barossa Valley or the artisan cheese making skills used in the Adelaide Hills to take into account the attributes unique to that region that affect

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1264 Interview with Jan Angas, Proprietor and Producer, Hutton Vale Lamb, Margaret Lehmann, Director, Peter Lehmann Wines, Peter Wall AM, Non Executive Director, LogiCamms and Ex-Director, Yalumba Family Vignerons c.1849 (Tanunda, Barossa Valley, South Australia, 17 February 2014).

1265 Interview with Maggie Beer, Proprietor ‘Maggie Beer’s Farm Shop’ and ‘Maggie Beer Products’, (Pheasant Farm, Nuriootpa, Barossa Valley, 25 February 2014).
how the cheese can be made. In his interview Peter Wall AM suggested that it is important that the processes and methods identified be traditional to the place of origin claimed and not ones that can be duplicated in another region to produce similar food. The ability to duplicate will undermine the fact that the processes and methods are traditional to a particular place of origin, and as a result will weaken the degree of connection between food and origin. “It’s the recipes, attitudes, frame of mind and assumptions that lie within a community…the sense of ‘we use our hands with the food’ that should be protected.”

Given the migration to the South Australian Regions, this requirement might be applicable to many of the producers based in those regions who are still drying smallgoods, and preserving vegetables and fruits, using recipes, processes and methods passed down from generation to generation. Many of the South Australian Interviewees regard identification of such processes and methods that are traditional to a region as invaluable not just for current producers, but also for “future generations because as much as people are making huge moves in getting young people involved in the food industry and in regions’ food culture, it’s so easy to lose recipes and knowledge of traditions, processes and methods.”

6.5.6.6 Conclusion on inclusiveness feature

Therefore, overall the consensus among the South Australian Interviewees is that a food GI system needs to be as inclusive as possible. This is most likely to be achieved by requiring that a connection between food and origin necessitate that the core ingredients of a food product must be sourced from the origin. In this sense, the emphasis is on origin of the food, rather than on the production and processing of the food occurring in the region, and/or the existence of traditional processes and methods being used to make the food. This emphasis on origin requirements is in keeping with the origin requirements imposed pursuant to the Australian Grape and Wine Authority Act 2013 for wine producers, as set out in Chapter 2. It also is in keeping with the South Australian Interviewees’ position that Australia’s food GI system should be tailored to Australia’s more flexible cultural and political environment, and not as prescriptive as the EU/Italian Food GI system.

1266 Interview with Peter Wall AM, Non Executive Director, LogiCamms and Ex-Director, Yalumba Family Vignerons c.1849 (Tanunda, Barossa Valley, South Australia, 17 February 2014).

1267 Interview with Peter Wall AM, Non Executive Director, LogiCamms and Ex-Director, Yalumba Family Vignerons c.1849 (Tanunda, Barossa Valley, South Australia, 17 February 2014).

1268 Interview with Dr Angela Heuzenroeder, Food historian and author of ‘Barossa Foods’, (Tanunda, Barossa Valley, South Australia, 7 May 2014).

1269 Interview with Saskia Beer, Proprietor and Producer of Saskia Beer’s Farm Produce, (Nuriootpa, Barossa Valley, South Australia, 7 May 2014).
6.5.6.7 The system needs to be collaborative

Most of the South Australian Interviewees want a food GI system to be collaborative. They view this feature as crucial for the South Australian food industry. Kris Lloyd reflected upon the Australian wine GI system and recognized that it has been successful because of the collaboration in the wine industry. Taking a lead from the wine industry, her feeling is that for a legal food GI system to be as effective as the Australian wine GI system it requires food producers coming together and working through a ‘staged process’ of determining:

What is a GI? What are the regions and what attributes do they have for food? How inclusive can the system be? Let’s set the regions up first and then let’s start filtering it slowly but surely. I personally think that if we can get that across in the food industry that would be a coup, and then start funneling down the system and understand it better. Then say, for locals to use the GI, they must ensure that a percentage of their product comes from that region and has attributes that can be connected back to the region. But let’s understand what we are selling; why is it Adelaide Hills?1270

Kris Lloyd sees this type of thought out and staged system as working more effectively in Australia, than a tiered/leveled system such as the EU/Italian Food GI system.

BGWA also thinks that a new legal framework needs to be collaborative and not “an elitist model that leaves out producers,” and that by having food producers come together to work on the system, as happened with the Australian wine GI system, both producers and consumers will react more quickly and positively to it.1271 From BGWA’s perspective, it has been this type of collaboration in the Barossa Valley that has put brand Barossa at the forefront in being recognized as a region that offers premium food, wine and tourism.

Most of the South Australian Interviewees agreed that for a food GI system to be successful it would need to be community driven. Regional food producers must come together and be involved in establishing the rules and criteria that are relevant to their products and regions in order to have a GI attach to them. The South Australian Interviewees believe that this producer involvement and collaboration would make a food GI system practical, realistic and workable. It would also provide producers the opportunity to determine for themselves what value there could be in a food GI system for them before they invest in it.1272

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1270 Interview with Jan Angas, Proprietor and Producer, Hutton Vale Lamb, Margaret Lehmann, Director, Peter Lehmann Wines, Peter Wall AM, Non Executive Director, LogiCamms and Ex-Director, Yalumba Family Vignerons c.1849 (Tanunda, Barossa Valley, South Australia, 17 February 2014).

1271 Interview with James March, CEO of Barossa Grape and Wine Association Inc, (Tanunda, Barossa Valley, South Australia, 2 April 2014).

1272 Interview with Victoria McClurg, Proprietor, Barossa Valley Cheese Co, (Angaston, Barossa Valley, South Australia, 25 February 2014): For example, Victoria McClurg and Kris Lloyd both spoke to me about this and the fact that a new food system “needs to be
As explained in Chapter 5, the Italian fieldwork revealed that it is important that regional food producers be involved in the designing stages of a *sui generis* food GI system as they understand more than anyone else how regional food is connected to its origin. By including regional food producers in the designing stages, the criteria included in a food GI system will be practical and realistic in relation to the connection criteria required of food producers to be able to use food GIs on their food products.

### 6.5.6.8 Simple rules and criteria for producers to follow

Following on from collaboration, all of the South Australian Interviewees identified that an effective food GI system would require simple rules and criteria for producers to follow. By having producers involved from the outset in the establishment of the rules and criteria that are relevant to their products and regions, in order to have a GI attach to them, would assist in achieving a workable system. This is because producers are in the best position to understand their products, their regions’ geographical and human factors and the manner in which the region has influenced their products. By having producers involved from the outset, the rules and criteria would most likely be reflective of the manners in which producers could satisfy the requirement of connection between food and origin.

Jess Greatwich from the Barossa Farmers Market confirmed that a new food system must be clear and simple. “People need to see what it’s worth. It has to be clear as to criteria and who can use it and who can’t. Every additional level that is added will add time and more work. A new legal framework should avoid bureaucracy. It needs to be self-evident so that people can see what it’s worth for them.”

For most of the South Australian Interviewees, being clear on criteria means providing clarity on both what is to be included and excluded in a new system. “If you want to exclude something that undermines [the connection between food and origin] then you have to be clear on this and exclude it. You should not be constrained and say for example, that if it’s a wine GI it should be a food GI. It has to be workable.”

approached in a really simple manner and staggered. Really clear messages and explanations about why the system is needed; what it is; the point of differences that exist between South Australian regions; are required. Then, people will start resonating with it” and see what’s in it for them. [Reference: Interview with Kris Lloyd, Manager and Head cheese-maker, Woodside Cheese Wrights, (Woodside, Adelaide Hills, South Australia, 24 February 2014)]. Similar to the Australian Wine GI System, Victoria McClurg’s viewpoint is that for a food GI system to be successful, “you need the majority of the community to be on board, such as 50 to 70 percent of the community, not just ten percent driving it.”

1273 For example, interview with Jess Greatwich, Manager, Barossa Farmers Market, (Angaston, Barossa Valley, South Australia, 25 February 2014).

1274 Interview with Jan Angas, Proprietor and Producer, Hutton Vale Lamb, Margaret Lehmann, Director, Peter Lehmann Wines, Peter Wall AM, Non Executive Director, LogiCamms and Ex-Director, Yalumba Family Vignerons c.1849 (Tanunda, Barossa Valley, South Australia, 17 February 2014).
Many of the South Australian Interviewees cautioned that a new food system would need to be “easy for producers and consumers because we don’t want another onerous obligation slapped on us.” Every time producers need to add something to their products, such as ‘Eat Local’ or ‘Brand SA’ labels, “there’s a whole administrative cost to it, but that’s not a reason to do something,” as long as there is value in doing so. If a food GI system were to work effectively, then some of the South Australian Interviewees alluded to the possibility of a ‘one-stop’ legal framework for food with one label.

We have to understand that if we go down this road, there has to be very careful and clear marketing. Already we are asked to put ‘Brand SA’, ‘Eat Local’ on our products. How many things are we going to put on our products? What do they all mean? Everyone wants to develop something that is meaningful, and I think that what we’ll find is that there are a lot of crossovers, and maybe we are going to need to come back to one central, national standard that identifies and rings true with the consumer, so that as soon as the consumer sees that they know what it means across Australia.

The overall aim should be a system that “is easy for everyone to understand and that is simple because once it becomes too prescriptive it becomes too hard…it should be about promoting regionality,” while at the same time being clear on what criteria needs to be met to obtain protection for the connection between food and origin.

Having producers involved in setting up a new food system resonates with one of the key recommendations that the Italian Interviewees made to me. In order to avoid the problems encountered in Italy pursuant to the EU/Italian Food GI system it is imperative that all interested stakeholders in a food GI system in Australia must have an equitable voice in its implementation. Food producers, food industry, food trade representatives and the State and Federal Australian governments must all work together in establishing a food GI system. By working together it is more likely that a food GI system will take into account their respective interests while ensuring that the ideal of protecting and enforcing the connection between regional food and origin is achieved and maintained.

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1275 Interview with Claire Wood, Proprietor ‘Careme Pastry’, (Tanunda, Barossa Valley, South Australia, 26 March 2014). ‘Careme Pastry’ is a family run business specializing in making a range of high quality, ready-to-use pastry dough.

1276 Interview with Sheree Sullivan, Proprietor and Head cheese-maker, Udder Delights, (Hahndorf, Adelaide Hills, South Australia, 7 April 2014).

1277 Interview with Kris Lloyd, Manager and Head cheese-maker, Woodside Cheese Wrights, (Woodside, Adelaide Hills, South Australia, 24 February 2014).

1278 Interview with Maggie Beer, Proprietor ‘Maggie Beer’s Farm Shop’ and ‘Maggie Beer Products’, (Pheasant Farm, Nuriootpa, Barossa Valley, 25 February 2014).
6.5.6.9 Education for consumers about the system

Most of the South Australian Interviewees felt that consumers would need to be educated about what a food GI system means in terms of transparency of origin of food from paddock to plate. In particular, education of a food GI system should address with consumers the regulation that occurs to ensure that food products have a clear and strong connection with a GI region before food GIs are used on food labels. Without this type of education, the South Australian Interviewees were concerned that the average consumer might not respond to a food GI system.

Many of the South Australian Interviewees consider that the time is right for a food GI system to be introduced in Australia because of consumer demand for Regional Branding and food provenance information.

An important reason for considering a deeper policy engagement with GIs in Australia is the burgeoning interest in local products, in the origin of products, and in local, organic and ‘farmers’ markets. Consumers seem to want to know more about the production chain from actual producer to consumer. Consumers are more interested indirect connection with the producer. They are also prepared to pay more for products emanating from specialist niche sectors, such as from…culture and community.

Jess Greatwich from the Barossa Farmers Market affirmed this ‘burgeoning interest in local products’ and in the connection between food and origin revealing to me that:

Consumers who are into food are the clientele that come to the Market and they are willing to spend more on the products because they appreciate the source, quality and that they are certified organic. They will pay more because they are buying an authentic product. The Farmers Market is

\[1279\] For example, interview with James March, CEO of Barossa Grape and Wine Association Inc, (Tanunda, Barossa Valley, South Australia, 2 April 2014).

\[1280\] For example, interview with Michael Wohlstadt, Barossa Heritage Pork and Chairman of Barossa Food Inc, (Barossa Valley, 2 April 2014) who expressed his concern that the average consumer will still choose their food products based on price rather than regionality. He drew a distinction between wines and food, in so much as food is a supermarket commodity that all consumers need; while wine is not a supermarket commodity and is something that consumers need to buy from a wine retailer. With wine therefore, in Michael Wohlstadt’s opinion, consumers who are interested in seeking a wine from a particular region, have come to understand and appreciate the Australian wine GI system and what it represents: that the wine is made up a percentage of grapes from the GI area included on the label. On the other hand, for foods, the average consumer will require education about what a new legal food system means for them: that there is a system of governance, in which consumers can trust, ensuring that there is a real connection between food and origin before it is regionally branded. In Michael Wohlstadt’s opinion, education of a new legal food system should assist in dealing with the gaps in the current legal frameworks that provide for a connection between food and origin, and the current climate of consumer confusion as to what labels really mean.

\[1281\] van Caenegem et al, above n 1084, 3.
showing consumers: that there is value in local products that are of quality; what is an authentic Barossa product and what isn’t; and that regions do have an impact on food products.1282

Looking at the evolution of consumer knowledge of Australian wine GIs, many of the South Australian Interviewees were of the opinion that consumers would come to understand a food GI system rather easily because many of the food GI regions would be analogous to the wine GI regions. Already, many consumers are aware that the South Australian Regions offer three main elements: wine, food and tourism.

One of the great attractions for a system of GI registration for agricultural products and foodstuffs is the effect of decommodifying the relevant product in the market by way of identifying the unique environment from which the product originates. In other words, the observation is that consumers are willing to pay a higher premium for products perceived to be of a certain quality standard associated with the production region and/or method of its place of origin.1283

Most of the South Australian Interviewees shared the same opinion that there is already some consumer knowledge about the connection between food and origin, but that it needs to be developed for food purposes to bring it more into line with wine knowledge. “It’s a natural progression with where things are going…it’s the right time to focus on origin of food and regionality; whereas ten years ago, it wasn’t like this. People are now more aware and probably demand a bit more…they want an authentic product.”1284 Claire Wood, proprietor of Careme Pastry with her husband William Wood, in Tanunda, Barossa Valley, spelt out that the demand for knowledge about where food comes from has:

Come to the forefront in the last five years. Even chefs were not really interested in it, but now they all want to know where the product comes from and some chefs even plant their own ingredients and only use those. Consumers are more open to this now as well and it’s a good time to go with this food movement. An education process on food is needed so that we can bring it the same level as wine.1285

Once again, this feature is akin to my assessment in Chapter 5 that the Italian fieldwork revealed that for an effective and credible legal food GI system, education on what a food GI system represents and how it works is required for food industry organization, producers and consumers. Education is required as

1282 Interview with Jess Greatwich, Manager, Barossa Farmers Market, (Angaston, Barossa Valley, South Australia, 25 February 2014).
1283 van Caenegem et al, above n 1084, 7.
1284 Interview with Matteo and Fiona Carboni, Owners of Casa Carboni, Italian Cooking School & Enoteca, (Angaston, Barossa Valley, South Australia, 7 May 2014).
1285 Interview with Claire Wood, Proprietor ‘Careme Pastry’, (Tanunda, Barossa Valley, South Australia, 26 March 2014).
early on as possible in the process of implementing a legal food system so that everyone understands what a GI represents in terms of information about its origin and core ingredients sourced from there, the influence that the origin has had on the characteristics and quality of the product and signifying that a legal framework of control and audit exists to ensure that criteria has been met for the product to qualify having a GI attached to it.

6.5.6.10 Governing body

In order to ensure that there is a system of governance with a new legal food system, all of the South Australian Interviewees regard it as essential that there be a main governing body that takes on the role of administration and regulation. James March from BGWA conceded that “industry does not have the resources to carry out this function, and we need someone on board to police it and I believe that it should be a government body that does this.” 

Similar to Wine Australia’s role in the Australian wine GI system, the view among the South Australian Interviewees is that there needs to be one main governing body in a food GI system that carries out the due diligence of the system to ensure that all criteria is applied fairly and equally among all producers and that GIs are only attached to products that meet the relevant criteria. Given that most of the South Australian Interviewees have exposure to, or experience in, the wine industry, many of them drew analogies to Wine Australia and its functions and how such a body could be replicated for a food GI system.

As explained in Chapter 2, the Australian Grape and Wine Authority (AGWA), trading as Wine Australia, is the single Australian Government statutory service body for the Australian grape and wine community. Wine Australia is governed by the *Australian Grape and Wine Authority Act 2013* (Cth) (‘AGWA Act’), pursuant to which it has many functions, including governing compliance with the wine regulatory system established pursuant to the Act and Regulations. The regulatory system requires Wine Australia to control wine producers’ compliance with the *Australia New Zealand Food Standards Code*, *Food Standards Australia New Zealand Act 1991* (Cth) (‘Food Standards Code’) as administered by the Food Standards of Australia and New Zealand that underpins how wine is made and the AGWA Act that determines how wine can be described. This control function is monitored by Wine Australia through two main activities: the Label

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1286 Interview with James March, CEO of Barossa Grape and Wine Association Inc, (Tanunda, Barossa Valley, South Australia, 2 April 2014).

1287 *Australian Grape and Wine Authority Act 2013* (Cth) (‘AGWA Act 2013’).

1288 *Australian Grape and Wine Authority Regulations 1981* (Cth) as in force on 1 July 2014 (‘AGWA Regulations 1981’).

1289 *Australia New Zealand Food Standards Code*, *Food Standards Australia New Zealand Act 1991* (Cth) (‘Food Standards Code’).
Integrity Program (LIP) and sampling and chemical analysis of a statistically valid sample of Australian wine to ensure compliance with the Food Standards Code.\textsuperscript{1290}

In addition to these functions, Wine Australia protects the integrity of Australia’s wine producing areas, maintains the Register of Protected GIs and Other Terms and supports the GIC. The reasons why this wine regulatory system was established include to protect consumers and to ensure a fair trading environment for producers and exporters.

\textit{A robust and enforceable compliance regime is essential for supporting the sector’s promotional efforts. A scandal involving the misrepresentation of provenance or composition of wine would potentially damage Australia’s reputation for producing quality wines with truthful labels. Not all wine producing countries share the reputation enjoyed by Australia. It is critical to maintain this competitive advantage. Australia is increasingly recognized as an abundant source of regionally distinctive wines made from an array of both traditional and recently introduced grape varieties. Maintaining the integrity of region and variety claims has never been more important.}\textsuperscript{1291}

Where there is non-compliance with the wine regulatory system, Wine Australia can take action ranging from “instruction to re-label non-compliant product, to the cancellation of a person’s licence to export and, in extreme cases, to prosecution. The penalties for failing to comply with LIP, making false or misleading claims or exporting wines in contravention of the regulations include the possibility of imprisonment.”\textsuperscript{1292}

Given these key features of the wine regulatory system, and Wine Australia’s governing role, it can be appreciated why some of the South Australian Interviewees offered a Wine Australia type body as a viable option for a governing body for a legal food system. “The wine industry GI has worked well because of the collaboration in the wine industry…the wine GI system has been successful and people have an understanding of it. Let’s apply something similar for food.”\textsuperscript{1293}

Comparing whether it would be more ideal to have one main regulatory body to carry out the governance of a legal food system rather than various Consortiums as used in the EU/Italian Food GI system, Matteo Carboni saw the benefits in having

\textsuperscript{1290} Information obtained from Wine Australia’s website: <https://wineaustralia.com/en/Production\%20and\%20Exporting.aspx>.

\textsuperscript{1291} Information obtained from Wine Australia’s website: <https://wineaustralia.com/en/Production\%20and\%20Exporting.aspx> (emphasis added).

\textsuperscript{1292} Information obtained from Wine Australia’s website: <https://wineaustralia.com/en/Production\%20and\%20Exporting.aspx>.

\textsuperscript{1293} Interview with Kris Lloyd, Manager and Head cheese-maker, Woodside Cheese Wrights, (Woodside, Adelaide Hills, South Australia, 24 February 2014).
one governing body take on this function. As discussed at length throughout Chapter 5, Matteo Carboni endorsed that depending on the size of the Consortium in Italy, determined the efficacy of the governance of the EU/Italian Food GI system for particular products. In his opinion, the Consorzio Produttori Antiche Acetaie, the Consortium responsible for the governance of the Aceto Balsamico Tradizionale di Modena PDO, as reviewed in Chapter 5, is one of the best examples in Italy of an effective Consortium.

The Consortium is working to protect the small producers. It’s not a mega factory because you need time and method to make the proper vinegar. And with this, you send the vinegar sample to the Consortium, they then give the approval and the vinegar is then bottled as extra vecchio for 25 years… and there’s also a 12-year-old certification. You get a certain number of bottles depending on the quality. You can then sell that vinegar at a much higher price than one that has not been certified. The front label is from the producer and the back label is the same for everyone as it is issued by the Consortium… That’s the best way to guarantee that the product is authentic; has been quality controlled in the proper way and that you are getting what you pay for.1294

This is in contrast to various Italian cheese Consortiums that, as Matteo Carboni pointed out, can provide for an array of quality of cheeses.

With Grana Padano and Pecorino [cheeses] you have some that are very good and some that are very close to rubbish. By ‘rubbish’ I mean made in a massive production and the milk is not the best quality… there is a wide window of cheese qualities… The Consorzio per la Tutela del Formaggio Grana Padano PDO is not as tightly controlling as the Consorzio Produttori Antiche Acetaie.1295

In order to avoid this discrepancy in governance of a legal food system, Matteo Carboni concluded that the benefits of having one governing body administer a new legal food GI system would better fit Australia’s culture, and that given Australia’s more stable political environment to that of Italy, he believes that such a body would carry out its functions diligently.

In conclusion, the overall view of the South Australian Interviewees was that there needs to be one main governing body that carries out the due diligence of the food GI system to ensure that all criteria is applied fairly and equally among all producers wishing to use the GI on their products, and that GIs are only attached to products that meet the relevant criteria.

1294 Interview with Matteo and Fiona Carboni, Owners of Casa Carboni, Italian Cooking School & Enoteca, (Angaston, Barossa Valley, South Australia, 7 May 2014).

1295 Interview with Matteo and Fiona Carboni, Owners of Casa Carboni, Italian Cooking School & Enoteca, (Angaston, Barossa Valley, South Australia, 7 May 2014).
6.5.6.11 Costs of a food GI system

Most of the South Australian Interviewees raised concerns regarding the potential cost of being part of a food GI system. They all referred to the probable need of government funding to drive such an initiative, but were skeptical of how much funding would be offered given that in their opinion government is more concerned with food manufacturing (and larger food companies) rather than regional food, as already disclosed throughout this part of this chapter.

While it is difficult to predict the likely costs associated with the establishment of a new legal food GI system for Australia, from the Italian fieldwork it is evident that costs to establish and promote a GI can be significant.

Newly established GIs do not have established reputation, so automatic positive effects from acquiring the market share of generically named products cannot be expected...Funds for standard setting and promotion might be available from local private actors (e.g. local community groups, businesses, mining companies), but will likely have to come from government in many cases. Regional, rural and remote development (RRR) Australia will have a significant proportion of smaller farm enterprises and producers who must possess or be provided with financial resources, technical expertise and administration to finance, organize and support the capacity to develop and sustain a newly established GI.\textsuperscript{1296}

In terms of government funding, Food SA provided a realistic overview of how government funding is typically distributed in the Australian food industry:

Government already invests considerably in the regions (disproportionately so, in relation to population) so GI promotion might be an additional or alternative investment with considerable long-term advantages, as it should result in the establishment of value-adding local businesses. Governments already promote regional image in various ways as well, whether for tourism purposes or to attract investment-GIs could be a more cohesive and coordinated framework for such promotion.\textsuperscript{1297}

Whether or not state and federal governments will want to fund a food GI system will depend on whether investment in the establishment and promotion of Australian food GIs is a worthwhile investment, as it has been for the wine industry. Focusing on trade issues and obligations, Australia was committed to obtaining trade concessions as a result of its wine agreement negotiations with the EU in the 1980s and 1990s. Australia accepted to stop using EU wine GIs on

\textsuperscript{1296} van Caenegem et al, above n 1084, 13.

\textsuperscript{1297} Interview with Silvia Estrada-Flores, Project Manager-Competitive Foods, Food South Australia Inc, (Adelaide, South Australia, 12 March 2014).
Australian wines in return for less onerous certification requirements for Australia wines exported to the EU and lifted trade barriers with the EU/UK.\textsuperscript{1298}

Depending on the outcome of the TTIP negotiations, Australia might be in a position where it will need to reconsider its position on food GIs generally and on the Extension Debate. If the EU is successful in its negotiations with the EU this could impact on Australia’s position in relation to EU GIs. Australia might have to make some concessions with the EU in relation to the EU food GIs that Australia recognizes and protects and currently uses on foods produced in Australia and exported to non-EU countries. In doing so, Australia, similar to the USA as discussed in Chapter 5, might start to further consider whether there is any value that GIs can bring to Australian food products and whether investment in a GI food system might be worthwhile for international trade reasons moving forward. This might be especially topical for Australia because of its location in the Asia Pacific Region and given that many of Australia’s neighbouring countries, such as India, Pakistan and Sri Lanka, support the Extension Debate and Multilateral Register.

Some of the South Australian Interviewees recognized that some of Australia’s trading obligations have imposed several restrictions on the promotion of regional food by focusing more on food manufacturing and export of that food.

\textit{Government has not been very supportive of locals rather focusing on the bigger entities that might refer to a region on their products, but that aren’t in fact linked in with the region enough, or at all. Governments are more concerned with food manufacturing rather than regional food, even though they sometimes give the impression that they have the right interest at heart promoting regions, but when it comes to the crunch they are not so supportive.}\textsuperscript{1299}

However the Government of South Australia has promoted the South Australian Regions in various ways. Some examples include as part of the Premium Food and Wine from our Clean Environment Plan, as explained in this chapter, for tourism purposes through the South Australian Tourism Commission (SATC)\textsuperscript{1300} such as the ‘Barossa be Consumed’ tourism campaign launched in 2013\textsuperscript{1301} and the ‘Adelaide

\textsuperscript{1298} Interview with Jan Angas, Proprietor and Producer, Hutton Vale Lamb, Margaret Lehmann, Director, Peter Lehmann Wines, Peter Wall AM, Non Executive Director, LogiCamms and Ex-Director, Yalumba Family Vignerons c.1849 (Tanunda, Barossa Valley, South Australia, 17 February 2014).

\textsuperscript{1299} Interview with Jan Angas, Proprietor and Producer, Hutton Vale Lamb, Margaret Lehmann, Director, Peter Lehmann Wines, Peter Wall AM, Non Executive Director, LogiCamms and Ex-Director, Yalumba Family Vignerons c.1849 (Tanunda, Barossa Valley, South Australia, 17 February 2014).

\textsuperscript{1300} The South Australian Tourism Commission (SATC) is also referred to as Tourism SA.

\textsuperscript{1301} Promoted by the South Australian State Government through SATC, this campaign was launched in 2013 as “part of a strategy to promote the whole state as a food and wine destination” and drew particular “attention to the food produced in the Barossa Valley best known for its wine”. [Reference: Novak, Laura, “$6 million SA tourism campaign unveils commercial featuring Nick Cave promoting Barossa’, news.com.au, \textless http://www.news.com.au/travel/australian-holidays/in-commercial-featuring-nick-cave-\textgreater}
Hills-Lose yourself in the land of the long lunch’ tourism campaign launched in 2015 and to attract investment in the South Australian Regions such as through SATC’s ‘Activating China 2020’ initiative.

Given that the South Australian Government has promoted the South Australian Regions through these various initiatives and the South Australian Regions are already the subject of Australian wine GIs, these features could provide the South Australian Regions with some cost benefits if Australia decided to implement a new legal food GI system in the future. This promotion and GI classification have promoted the South Australian Regions’ reputation as destinations for wine, food and tourism. As a result ‘Barossa Valley’ and ‘Adelaide Hills’ are place-names that already have the “effect of evoking product characteristics in consumers’ minds” and have established reputations for food and wine. This puts the South Australian Regions at an advantage given that for the purposes of establishing a food GI system, the South Australian Regions are not entirely new GIs. This means that some of the start up costs relevant to the establishment of new GIs and GI systems should not be relevant to the South Australian Regions and should provide the Regions with a cost benefit. By already having an established reputation for wine, and for food, it is likely that the time that it will take for the South Australian Regions to acquire the necessary reputation they require for a food GI system will be less than other regions in South Australia that do not have as much of an acquired reputation. This is a positive attribute given that normally investments by state or other external agents (not the producers themselves) in regional reputation are temporary. “At some point where reputation has become sufficiently


1302 Promoted by the South Australian State Government through SATC, this campaign was launched in 2015, as part of Tourism SA’s ‘Best Backyard’ marketing campaign aimed at encouraging South Australians to travel within the state. [Reference: <http://www.tourism.sa.gov.au/media/enchanted-adelaide-hills-focus-new-campaign.aspx>]. For commercial see: <https://youtu.be/UitQ4IJGa3c>.  

1303 South Australian Tourism Commission, 'Activating China 2020' (South Australian Tourism Commission, 2013) <http://www.tourism.sa.gov.au/assets/documents/Research%20and%20Reports/satc-activating-china-full-report-2013.pdf>. The South Australian Government, though SATC, commenced this is initiative in the recognition that: Chinese visitation to Australia has been growing strongly over the last ten years and in 212 exceeded half a million inbound visitors. This figure is tipped to near one million visitors by 2020...Projections show that this rising tide of Chinese travelers to Australia will almost double Chinese visitation to South Australia, from the current 18,000 visitors to 34,000 visitor by 2020. However, if South Australia takes full advantage of the opportunity presented, then this potential rises to 57,000 with expenditure in South Australia of $450 million.” To achieve this potential, “South Australia will offer [Chinese visitors] distinctive experiences centered on [South Australia’s] identified strengths: Wine, Naturalness and Food.

1304 van Caenegem et al, above n 1084, 12.
established, the price premium should allow local producers to carry the cost of maintaining and enhancing the regional reputation themselves.”

The Italian fieldwork revealed that where Consortiums are carrying out effective governance of the EU/Italian Food GI system, such as the Consorzio Produttori Antiche Acetaie (the Consortium responsible for the governance of the Aceto Balsamico Tradizionale di Modena PDO), consumers are more willing to pay a higher price for food products that are labelled with a GI. This is because consumers trust that the relevant Consortium has checked for compliance with the EU/Italian Food GI system by the relevant producer and consumers are able to trust in the veracity of the origin guarantee included on the food label.

Similarly, the AGWA, in its most recent Strategic Plan (Plan), has noted that in order to increase demand and premium paid for all Australian wines one of its main objectives in 2015-2020 is to support Australia’s wine quality and provenance claims. In the Plan, AGWA highlights its two current main challenges as “firstly, the general global perception of the quality and provenance of [Australian] wines is – in our view- less than the reality, and this translates into lower prices for [Australian] wine than warranted; and [secondly] the need to be more profitably compete in a fiercely contested global marketplace.”

Focusing on the first challenge only, the AGWA’s priority moving forward is to increase demand and the premium paid for all Australian wine by increasing the appreciation of Australia’s fine wines. This will involve promoting the provenance and terroir of Australian fine wines, which in AGWA’s opinion will:

_Most quickly elevate the image and reputation of the wines [Australia] produces. We will support Australian wine’s quality and provenance claims with our robust regulatory system and we will provide tangible evidence to support our fine wine claims through research into Australia’s unique terroirs and how these terroirs influence wine style and quality._

The ‘robust regulatory system’ to which the AGWA refers is the Australian wine GI system. The AGWA notes in the Plan that it will, even more than usual, be concentrating its efforts on enforcing this legal framework, especially on the winemaking and labelling requirements pursuant to LIP, so as to provide: a “solid foundation for quality and provenance claims for Australian wine...[and] give

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1305 Ibid 14.
customers and consumers confidence about the authenticity of Australian wine.’”

The Plan therefore emphasizes and supports the view that there is “an economic incentive to adopt and use GIs [that] proposes that products bearing GIs have an added value associated with the placename and, therefore, consumers are willing to pay a higher premium price for origin-guaranteed or ‘authentic’ products.”

With this in mind, the South Australian Interviewees (in particular those who have exposure or involvement in the wine industry and have seen the benefits that GIs have brought to Australian wine, regions and the wine industry) are hopeful that funding for a legal food GI system would eventuate should Australia contemplate such a system in the future. Having a governing body involved in a legal food system, such as AGWA/Wine Australia, would assist with funding a food system, given that example could be taken from Wine Australia’s support to date for a competitive wine sector by investing in research, development and extension, growing global demand and protecting the reputation of Australian wine, and replicated for an Australian legal food system.

What I want to see come out of this is some understanding and respect of what we have on our ground floor. If the government helped in agriculture, things would be better. We don’t think about this value enough in Australia, but we keep pumping the big manufacturers and exports are bugged. This is the shallowness of food promotion…our current framework is not strong…carving out our identity is very important for us to establish what we are actually projecting into the world and what is actually inbuilt into the price. We need to put value in the word Barossa and Adelaide Hills, so that everyone will want to invest in these placenames knowing and trusting that it stands for a credence claim regarding provenance of food and consumers will be willing to pay a higher price for authentic regional food.

6.5.6.12 Concluding comments

The South Australian fieldwork endorsed that most of the South Australian Interviewees are interested in a food GI system to provide protection and enforcement of the connection between regional food and origin. Given their familiarity with the Australian wine GI system, most of the South Australian Interviewee see the worth of a GI system in that it can provide clear criteria as to when geographical location names can be used on regional food products with

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1310 van Caenegem et al, above n 1084, 14.

1311 Interview with Jan Angas, Proprietor and Producer, Hutton Vale Lamb, Margaret Lehmann, Director, Peter Lehmann Wines, Peter Wall AM, Non Executive Director, LogiCamms and Ex-Director, Yalumba Family Vignerons c.1849 (Tanunda, Barossa Valley, South Australia, 17 February 2014).
justification because the central notion of GIs is to legally protect the connection between goods and origin. Most of the South Australian Interviewees believe that a food GI system should:

- Be tailored to Australia’s cultural, political and trading needs;
- Be inclusive;
- Be collaborative;
- Have simple rules and criteria for producers to follow;
- Include an education roll-out for consumers to understand what a legal food GI system represents;
- Be administered by one governing body; and
- Be assisted with government funding.

In most of the South Australian Interviewees’ opinion the time is right for the Australian government to consider the worth of a food GI system for Australian law, food industry and trade given the real interest and real need that exist in a legal framework that protects the connection between regional food and origin and overcomes the deficiencies of current consumer protection, passing off and trade mark laws.

6.6. Conclusion

As noted at the outset of this chapter, it is evident from both the Appellation Have your Say and Premium Food and Wine from our Clean Environment Plan initiatives that in South Australia there have been a demand and need for some form of food protection scheme in the last six-seven years. There are elements in both the Appellation Have your Say and Premium Food and Wine from our Clean Environment Plan that resonate with my research and fieldwork. Most of the South Australian Interviewees do consider that Australia would be better served by a food GI system to legally protect the connection between food and origin than is currently offered pursuant to existing laws. Given their familiarity with the Australian wine GI system, most of the South Australian Interviewees see the worth of a GI system, and using food GIs on food labels, in that it can provide clear criteria as to when geographical location names can be used on regional food products with justification. This is because the central notion of GIs is to protect and enforce the connection between goods and origin.

The South Australian fieldwork revealed that most of the South Australian Interviewees, in particular food producers, are dissatisfied with the current level of protection offered to the connection between food and origin, in particular with that offered pursuant to current trademark and labelling laws. They would welcome clearer laws requiring a connection between food and origin before food provenance claims can be made on food products.

All of the South Australian Interviewees had some degree of knowledge of what is a GI, albeit to various degrees. While all the South Australian Interviews agree that a GI should represent a connection between food and origin, and protect and promote that connection, the proposed degree of connection required to qualify to use a GI varied relevant to their position in the South Australian food industry.
While most of the South Australian Interviewees did not have specific and/or extensive knowledge about the Extension Debate or the Multilateral Register, they all coincidentally discussed with me issues relating to the Extension Debate and the Multilateral Register in context of generic terms, clawing back of terms and the concept of using Regional Branding on foods. Most of the South Australian Interviewees want to use Regional Branding but would like to see the introduction of a food GI system that ensures that all producers who use food GIs can in fact demonstrate that their food is connected to the GI region. Most of the South Australian Interviewees prefer to market their products using labels that are personal to their regions, products and production style, rather than using EU/Old World names. They are willing to respect EU GIs as long as the extended protection, if any in the future, is justified on the basis that there is a qualitative connection between food and origin, the term is in fact not generic and that reciprocal acknowledgement is achieved for Australian food terms, where relevant, similar to what has occurred with the Australian wine GI system.

Many of the South Australian Interviewees, in particular those with an association with the wine industry, and exposure to the Australian wine GI system, told me that they would welcome a similar legal framework for food, where all producers who meet relevant criteria, would be able to use a public right mark to identify and protect the connection between food and origin. Most of the South Australian Interviewees expressed with me their frustration at the lack of clarity in current laws and regulations regarding the degree of connection required between food and origin before regional branding is used on products. The overwhelming response from the South Australian Interviewees was that there needs to be a food GI system that adequately protects and promotes the connection between food and origin. Most of the South Australian Interviewees are no longer willing to accept government putting this in a ‘too hard basket’ and believe that now is an ideal time to focus on this topic given producers’ and consumers’ interest in origin and regionality.

The South Australian fieldwork endorsed significant interest in a food GI system. I therefore recommend that the Australian government give due consideration to the implementation of a sui generis food GI system in order to overcome the deficiencies of current consumer protection, passing off and trade mark laws. Implementing a sui generis food GI system will ensure that food GIs (Australian regional names) are only used on food products that have a clear and strong connection with Australian regions. This will be of benefit at both a national and international level given consumers’ interest and preference for ‘local’ and ‘authentic’ food products. Designing and implementing a food GI system that is tailored for Australia’s needs is essential in order to ensure that protection of Australian GIs is regulated diligently and that they are recognised in international trade. This will mitigate the risk of Australian regional names being used by national and international food producers and traders on food products that lack a clear and strong connection with Australian regions thus protecting the assets that Australia has in Australian regional names and regionality.
Chapter 7 draws together all of the chapters of this thesis. By considering the:

- Deficiencies of current laws and regulations as explained in Chapter 2;
- Connection between food and origin and regionality as explained in Chapter 3;
- International GI and trade issues as explained in Chapter 4;
- Observations made during the Italian fieldwork as explained in Chapter 5, in particular what is required for a successful *sui generis* food GI system; and
- Observations made during the South Australian fieldwork as explained in this chapter, in particular the elements required for a practical Australian *sui generis* food GI system;

In Chapter 7 I provide practical recommendations for: the Australian government; regional food producers; and the broader Australian food, agrifood and agricultural industries on the elements required for a successful Australian *sui generis* food GI system.
Chapter 7. Recommendations

7.1. Case for a *Sui Generis* Food GI system Presented in this Thesis

This thesis has analysed the deficiencies of current consumer protection, passing off and trademark laws that inadequately protect the connection between food and origin. Chapter 2 explained that the deficiencies of these laws and regulations allow food producers and traders to use Regional Branding that falls short of being misleading or deceptive, or involving passing off, even though the food products on which it is used have a very weak connection with the named region. Some food producers and traders use Regional Branding on food products that do not have any connection with the named region, due to the deficiencies of current consumer protection laws. In the absence of a complaint being made to the ACCC about a potentially misleading or deceptive origin claim and the ACCC carrying out an investigation into the claim, place of origin claims on food labels are not investigated. Consequently, food producers and traders can take advantage of the reputation that exists in Australian regions for producing quality regional food and the value that accordingly exists in Australian regional names. This is despite the lack of connection between the food product and the named region.

Chapter 2 explained the deficiencies of current trademark laws. The connection between food and origin is not considered when the Trade Marks Office assesses a trademark application that includes a geographical location name that is to be used in relation to food products. Instead, trademark laws require that trademarks be distinctive of the trademark owner’s goods and services. Even when a trademark includes a geographical location name, it can be accepted and registered on the basis that it has acquired distinctiveness through usage in the marketplace or it is inherently capable of distinguishing because it includes a device or logo. A trademark must be distinctive as it is a badge of origin of the trademark owner’s goods and services, rather than a badge of geographical origin of the products to which it attaches. Therefore, a registered trademark that includes a geographical location name and is used in relation to food products is not regulated by the Trade Marks Office to determine if there is a clear connection between the geographical location named in the trademark and the food products on which it will be used. A trademark does not identify this connection. Instead, a trademark only identifies that the food products originate from the trademark owner or business.

Chapter 2 also explores the limitations of CTMs when registered by an association to certify the geographical origin of food products. CTMs are voluntary and only bind certified users. They do not protect against other food producers and traders using the same regional name, as is included in the CTM, in relation to food products either in common law or as a registered trademark. Therefore, certification trademarks do not protect the connection between food and origin other than in relation to the food products and origin addressed in the CTM and its rules.

Passing off laws also fail to adequately protect the connection between food and origin, instead protecting the reputation of individual traders. Chapter 2 identified the three main challenges that an action in passing off presents for a regional food producer who wants to take an action against a rival food producer who uses
similar Regional Branding on their food products. First, regional names are considered descriptive terms. Second, passing off protects the reputation of individual traders rather than the reputation that a region has for producing quality regional food in which a community of food producers share. Third, a regional food producer must prove that they suffer damage due to a rival food producer using the same regional name on food products that lack a clear and strong connection with the named region. This might not be possible if a regional food producer is only seeking protection against misappropriation of regional name by a rival food producer that has not yet caused any economic loss for the regional food producer. An action in passing off places a considerable evidentiary burden on regional food producers; therefore, many do not rely on this action to protect the reputation that attaches to their food product with Regional Branding. While an action in extended passing off would provide regional food producers with a further option to protect the connection between food and origin, the Australian government is yet to apply extended passing off.

In the absence of laws and regulations that adequately regulate whether there is a connection between food and origin before food producers and traders can use Australian regional names on food products to make an origin claim, food producers and traders can continue using Regional Branding on food products that do not have a clear and strong connection with the named region. Food producers who use Regional Branding in this way will continue to take advantage of, and free-ride on, the:

- reputation that Australian regions have for producing authentic quality regional food
- value that accordingly exists in the relevant regional names.

As consumer protection law, passing off and trademark laws and regulations are not primarily concerned with identifying and protecting the connection between food and origin. they do not provide food producers and traders with sufficient ex ante guidance as to when they can make an origin claim on their food products. Hence, the following four main problems exist in the context of Regional Branding:

1) consumers cannot rely on, or trust, food labels that include Regional Branding to obtain accurate information about the origin of food products
2) regional food producers are being deterred from making additional investment in producing food products with Regional Branding
3) the value that exists in Australian regional names as identifiers of authentic regional food products that have a clear connection with Australian regions is not being adequately protected
4) Australia risks losing the assets that it has in Australian regional names, affecting Australia’s regionality and agricultural and agrifood industries.

To overcome the deficiencies of current consumer protection, passing off and trademark laws, and protect against these types of harm resulting, I have recommended that a sui generis food GI system be implemented in Australia. A sui generis food GI system identifies food that is qualitatively connected to a region and protects that connection. Through this primary focus, a food GI system
provides protection within a legal framework to the value that exists in Australian regional names, regulating how food producers use them on food products.

By implementing a *sui generis* food GI system, the level of protection provided to Australian regional names used on food labels would be more consistent with the protection provided to Australian regional names used on wine labels in the context of the Australian wine GI system. In Chapter 2, I explained that there is currently a clear difference in the treatment and protection of Australian regional names under Australian laws and regulations. The Australian wine GI system effectively regulates the connection between wine and origin and provides that when wine GIs are used on wines that do not originate from the GI area and that do not comply with the Australian wine GI system, there is *ipso facto* an infringement. Sections 40C, 40D, 40E and 40F of the AGWA Act provide a much stricter protection regime, in the form of wine GIs, against the misuse of Australian regional names than do current consumer protection, passing off and trademark laws and regulations against the misuse of Australian regional names on food products. These provisions, combined with the LIP, provide more effective regulation to the connection between wine and origin than current laws and regulations provide to the connection between food and origin.

The Australian wine GI system offers valuable insight into the considerations that must be made by the Australian government and the Australian food industry in implementing a food GI system. However, the Australian wine GI system is a limited GI system in that the connection criteria required for a wine producer or wine grape grower to use a wine GI is based on the regional origin of grapes used to make the wine. The Australian wine GI system does not prescribe any rules about typicality or regionality, or that a wine has certain qualities and characteristics that are ‘essentially attributable’ to its geographical origin to be labelled with a wine GI. Instead, as explained in Chapter 2, it prescribes that 85 per cent of grapes used to make a wine be sourced from the wine GI area. I have recommended that an Australian food GI system go one step further than the Australian wine GI system and provide two levels of GI protection that reflect the various ways in which Australian regional food can be connected to Australian regions.

Chapter 3 explained how regional food is connected to origin and how a region’s geographical and human factors can influence a food’s quality, reputation or other characteristic. Further, both the Italian fieldwork and the South Australian fieldwork revealed the different ways in which food is connected to origin. Regional food’s core ingredients should be locally sourced. As many stages of food production as possible should take place within a region. The Italian and South Australian fieldwork provided examples of human factors that can influence a food product’s quality, reputation or other characteristics. These include food producers using traditional methods to smoke smallgoods and ferment bread and using traditional recipes to make food products. A region’s geographical factors can also influence a food product’s quality, reputation or other characteristics—notably its flavour—as was explained in Chapter 6 in the context of cheeses.

A *sui generis* food GI system is the ideal legal framework to identify how food is connected to origin and to protect that connection. As explained in Chapter 4, this
is because the central premise of a GI system is to protect the connection between food and origin. GIs are signs that identify a link between a product and a place; therefore, they serve a very different purpose to trademarks that are badges of origin of who produced the product to which the trademark attaches. It is the link between product and place that sets GIs apart from trademarks. This is one of the main reasons why GIs should not be protected as a subset of trademarks, but should be protected as GIs under a dedicated (sui generis) GI system. The protection afforded to GIs under a GI system surpasses the protection that is otherwise available for GIs under a trademark system. If a food GI is misused on food products that do not originate from the GI region and that do not comply with the food GI system criteria, there is ipso facto an infringement of the GI, regardless of whether the misuse is misleading or deceptive. Thus, a sui generis food GI system mitigates the risk of food producers taking advantage of the reputation that Australian regions have for producing quality regional food and the value that accordingly exists in Australian regional names. The Australian government has historically opposed protection of GIs for products other than wines and spirits, and has resisted protecting food GIs under a GI system. However, it is because GIs serve a different purpose to trademarks and identify how food products are linked to place that the Australian government needs to reconsider its opposition.

Further, the implementation of a sui generis food GI system would be beneficial for the Australian food, agrifood and agricultural industries at an international level. GIs have become an important aspect of international trade. More countries want to know about the regional origin or provenance of their trading partners’ food products and want to protect their own regionality. If the Australian government does not reconsider its position on the protection of GIs for food products, then the Australian agricultural and agrifood industries run the risk of missing out on trade opportunities with countries that support food GIs. These countries include some of Australia’s neighbouring countries such as China, the Republic of Korea and India. In the absence of implementing a sui generis food GI system, ‘Australia sets potentially strong limits on the present or future protection of Australian food exports to Asia’.1312 Australia risks losing the assets that it has in Australian regional names as identifiers of food products that have a strong and clear connection with Australian regions. It risks losing the ability to negotiate GI protection with neighbouring countries at a level that accommodates the Australian food industry’s needs and it risks losing trading opportunities with neighbouring countries (and other countries) that place importance on GI protection. Therefore, there is a need at an international trade level for the Australian government to seriously consider implementing a sui generis food GI system. The sooner the Australian government considers implementing a food GI system, the stronger its position will be in negotiating GI protection with its neighbouring countries. By having its own sui generis food GI system, Australia demonstrates to neighbouring countries that Australian food exporters are ready and willing to protect their GIs in exchange for their GI protection of Australian GIs and access to their markets.

Thus, there is a clear case for implementing a sui generis food GI system in Australia. This chapter draws on the previous chapters and provides

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1312 van Caenegem, Drahos and Cleary, above n 15, 63.
recommendations for the Australian government, regional food producers, Australian food, agrifood and agricultural industries on how a food GI system can be tailored to cater for Australia’s national and international GI needs and obligations. Specifically, I provide recommendations based on the observations that I made during the Italian fieldwork and the South Australian fieldwork as to the elements that are required for a successful *sui generis* food GI system. A *sui generis* food GI system must be implemented with careful forethought and consideration of how to overcome the deficiencies of current laws and regulations, to provide adequate protection to the connection between food and origin and also cater for Australia’s international GI trading needs and obligations.

In determining the potential worth of food GIs and a *sui generis* food GI system for Australia’s regional food producers and the broader food, agrifood and agricultural industries, I have considered national and international laws, IP, trade, political and cultural issues against the backdrop of significant, original fieldwork in Italy and South Australia. In this chapter, I discuss some of the competing interests that the Australian government will need to consider and work through to implement a food GI system. It is imperative that all the stakeholders in a food GI system in Australia have an equitable voice in the design and implementation of a food GI system. Regional food producers and representatives from the broader food industry, agrifood and agricultural industries and the Australian government must work together to enshrine protection of regional origin of food products within a clear legal framework. Through collaboration, a food GI system can be developed that reflects respective individual interests, while ensuring that the ideal of protecting and enforcing the connection between regional food and origin is achieved and maintained.

### 7.2. Consideration of Competing Interests

#### 7.2.1. Food producers’ interest in Regional Branding and food GIs

As explained in Chapter 2, food producers and traders have realised the intangible value that exists in Regional Branding. Food producers and traders know that consumers want to purchase food products that are local and authentic and that are transparent about the origin of the food products from paddock to plate. However, regional food producers are concerned about the lack of a clear legal framework that supports the protection of the connection between food and origin and that regulates regional origin claims made on food products. They are dissatisfied with the inadequate regulation of, and protection provided to, the connection between food and origin. The South Australian fieldwork revealed that regional food producers are most dissatisfied with the protection offered under current laws and regulations. There needs to be a legal framework in Australia that provides regional food producers with incentives to invest in producing food products with Regional Branding. A legal system that rewards regional food producers for investing in ‘higher cost, low volume, local sourcing and production’, by only allowing food producers to use their relevant regional name on authentic regional food products to make an origin claim. Other food producers and traders whose food products lack a clear and strong connection with the region should not be allowed to use a regional name on their food products to make an origin claim. This is regardless of whether
the Regional Branding falls short of being misleading or deceptive or involving passing off.

The South Australian fieldwork endorsed that the South Australian interviewees who are regional food producers welcome the implementation of a food GI system that identifies, protects and regulates the connection between Australian regional food and origin before food GIs can be used on food products. Many of the South Australian interviewees, particularly those with an association with the wine industry and exposure to the Australian wine GI system, would welcome a similar legal framework to the Australian wine GI system for food, in which all food producers who meet relevant criteria could use a food GI to identify and protect the connection between food and origin.

While the Australian government has been committed to changing the CoOL framework, the PoOL framework has been left to one side. This is because the focus in Australian food exports has mainly been on country of origin claims rather than place of origin claims, as explained in the context of Australia’s agricultural policies in Chapter 3 and Chapter 4. I recommended using food GIs in place of PoOL, given that GIs have a core purpose to identify and protect the connection between goods and origin. Therefore, a food GI system is better at providing protection to the connection between food and origin and the usage and regulation of Australian regional names than current consumer protection, passing off and trademark laws, including the PoOL framework.

Chapter 6 revealed that most of the South Australian interviewees were familiar with the Australian wine GI system and most see the worth of a GI system in that it can provide clear criteria as to when food GIs (i.e., regional names) can justifiably be used on regional food products. A food GI system would provide regional food producers with the incentive to invest in producing authentic regional food products knowing that only food products that have a clear and strong connection with a GI region could be labelled with a food GI. Consistent and diligent regulation of a food GI system would also provide an incentive to regional food producers. They would know that food products labelled with a food GI would be of a consistent quality due to the connection requirements enshrined in the GI system to protect the connection between food and origin and ensure that food GIs are only used on food products that meet the GI criteria under the GI system. A food GI system would provide food producers and traders with clear ex ante guidance regarding the criteria with which they would need to comply to use food GIs on their food products.

7.2.2. Consumer Interest in Regional Branding

Chapter 2 revealed that consumers want to rely on food labels to determine the true origin of food products without the need to carry out their own independent investigation. Further, consumers demand that credence attributes such as provenance and traceability of food be accurately disclosed on food labels, as discussed in Chapter 6. The Government of South Australia’s Premium Food and Wine from our Clean Environment plan notes that understanding these consumer values is paramount: ‘Increasingly, markets and consumers are looking for the “credence attributes” of food. These are the invisible aspects of a product, such as “natural”, “sustainable”, and “product of”… the aim is to support the development
of credence attributes that consumers are known to value. These include provenance, traceability and sustainability. Consumers want food labels to be transparent about the origin of food from paddock to plate. While the Australian Government has considered consumers’ interest in, and demand for, transparency in relation to country of origin claims, it has not given as much consideration to consumers’ interest in, and demand for, transparency in place of origin claims. Rather, state governments such as the Government of South Australia, have taken this consumer interest on board within their own respective states and created incentives to promote Regional Branding and the region’s reputation for food, wine and tourism. The Government of South Australia has provided funding to initiatives such as the Barossa Trust Mark. The Barossa Trust Mark was created by regional food producers and regional groups as a solution to overcome the deficiencies of current laws and regulations that inadequately regulate ‘the protection and promotion of … regionality’ in the context of food products. It was also created to identify for consumers that Barossa Trust Mark products are of a high quality and to guarantee that all Barossa Trust Mark products have a regional origin that has been regulated. However, the Barossa Trust Mark has limited application in that it does not protect or regulate the usage of the regional names ‘Barossa Valley’ or ‘Barossa’ on food products. It only regulates and protects regionality and the usage of the Barossa Trust Mark in relation to the food products produced by the Barossa Trust Mark licensees. If it is misused, that misuse needs to be addressed as a breach of the Barossa Trust Mark’s internal rules. If consumers are misled by any inappropriate use of the Barossa Trust Mark, this needs to be addressed under the consumer protection laws. Further, the Barossa Trust Mark provides very limited protection when compared to the protection provided under a sui generis food GI system.

Therefore, implementation of a food GI system would provide better protection to the connection between food and origin and would provide consumers with regulated transparency of the origin of regional food products. However, education about a food GI system is essential for consumers to understand what GIs represent and to appreciate the regulation that a GI system provides to the connection between food and origin. Education should be provided prior to the implementation of a food GI system so that consumers can understand the protection that a food GI system provides to the connection between food and origin and the transparency that is provided by using food GIs on food labels.

7.2.3. International Trade Issues

Chapter 4 explained that food GIs have become important trading concessions in the context of FTAs, the Extension Debate, the TPP and the TTIP. Authenticity and

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1314 Waye and Stern, above n 526, 483.
provenance of food products have become sought after quality criteria in exports of food products. Australia has traditionally viewed GIs as barriers to trade (other than for wines and grape products). However, there is a growing need for the Australian government to reconsider its position on food GIs. Australia runs the risk of missing out on trade opportunities with countries that support food GIs, including neighbouring countries such as China, the Republic of Korea and India. In the absence of protecting food GIs under a *sui generis* food GI system, Australia risks losing the assets that it has in Australian regional names, the ability to negotiate GI protection with neighbouring countries at a level that accommodates the Australian food industry’s needs, as well as trading opportunities with neighbouring countries and others that place importance on GI protection. Implementing a *sui generis* food GI system would provide the Australian food industry and Australian food exporters with a competitive advantage and the ability to niche market power and lift barriers to trade. The Australian government would be in a strong position to trade and negotiate GI usage through considering and implementing a *sui generis* GI system that caters for Australia’s food industry and trading needs. In the absence of designing and implementing a food GI system that caters for Australian food industry and export needs, Australia weakens its trading and negotiating position by risking agreeing to GI protection with its trading partners on terms that meet the partners’ needs and adopting those countries’ rules and regulations rather than accommodating Australia’s food industry and food export needs.

In relation to Old World terms that Australian food producers and food exporters use as generic product descriptors and common food terms, negotiations such as those between the EU and Canada in the context of the CETA can be examined for guidance on the possible type of GI protection that might need to be negotiated with the EU in relation to food GIs under the AUSEU FTA. As explained in Chapter 5, Australia might have to make some concessions with the EU regarding the EU food GIs that Australia recognises and protects and currently uses on foods produced in Australia that are exported to non-EU countries as generic product descriptors or common food terms. Therefore, to be in a stronger negotiating position with the EU, I recommend that the Australian government begin considering the value that food GIs as part of food GI system can bring to Australia’s regionality, food industry and export industry. The US began this process in negotiations with the EU for the TTIP and it is crucial that the Australian government also start this process. Having a *sui generis* food GI system designed to cater for Australia’s food industry needs and trading needs will place Australia in a stronger position with the EU in the context of its negotiations in relation to the AUSEU FTA. The sooner that the Australian government and the Australian food, agrifood and agricultural industries consider the worth of food GIs and a food GI system, the more potential exists for the Australian food industry to benefit from greater protection of Australian food GIs in export markets.

*Australia could obtain a higher level of protection against free-riding on [food] GIs in some of its significant agricultural export markets than is at present available through consumer deception laws. An attendant benefit of non-wine GI registration may be increased future protection of local*
7.3. Requirements for a Successful Australian Sui Generis Food GI System

In this section, I recommend the key elements that are required for a successful Australian sui generis food GI system. The Italian fieldwork provided insight into the elements that are required for a successful food GI system, while the South Australian fieldwork provided insight into the elements that interviewees believed are needed for a successful food GI system. In considering these elements, as well as the competing interests explained above, I recommend that an Australian sui generis food GI system include two levels of GI protection, must be regulated by one main governing body and be partially funded by Australian government, cater for the protection of foreign food GIs in the future and include an education rollout for consumers and the Australian food industry.

7.3.1. Two levels of GI protection

I propose that an Australian food GI system provide the following two main levels or tiers of GI protection for food products:

1) a basic-level GI protection for food products that are made within a region and made using locally sourced ingredients
2) a higher-level GI protection for food products that are made within a region and made using locally sourced ingredients that also have a quality, reputation or other characteristic that is ‘essentially attributable’ to their regional origin.

For both levels of GI protection, the following two criteria would need to be satisfied:

1) core ingredients must be locally sourced from the GI region

The core ingredients used to make a food product must be locally sourced from the GI region. The food GI system would prescribe a percentage of core ingredients that need to be locally sourced from the GI region for the purposes of providing clear ex ante guidance on this criterion to food producers and traders. This would be similar to the regional origin of grapes requirement under Regulation 21(2) of the AGWA Regulations that prescribes that if the description and presentation of wine uses only one registered Australian GI, then at least 85 per cent of the wine must be sourced from grapes grown in the registered GI area.\(^\text{1316}\)

This criterion encompasses the observations made during the South Australian fieldwork that South Australian regional food producers could not locally source all

\(^{1315}\) van Caenegem, Drahos and Cleary, above n 15, 63.

\(^{1316}\) AGWA Regulations 1981(Cth) reg 21(2).
their ingredients for their food products for reasons such as availability of ingredients (i.e., either not at all or seasonal availability only) and food safety. However, in most instances the core ingredients used to make the food product were all locally sourced. All the South Australian interviewees agreed that at least the core ingredients should be locally sourced from within the region. The Italian fieldwork also endorsed that all core ingredients used to make a food product should be locally sourced.

2) regional food product must be made within the GI region

To be labelled with a food GI, a food product must be made within a GI region. In addition to ingredients being locally sourced, a certain percentage of the food product’s production stages must occur within the GI region. I recommend that the percentage required be high—at least 85 per cent—to ensure that regional food products are connected to their regional origin.

This criterion reflects the South Australian fieldwork that revealed that, in some instances, not all stages of food production can take place within a region. This might be because of laws and council regulations that do not allow some stages of food production to occur within a region. However, I recommend that a certain percentage of the food product’s production stages must occur within the GI region and that the percentage required be high, such as at least 85 per cent. Having such a requirement mitigates the risk of food producers using a food GI on their food products when most, or none, of the production stages of their food product takes place within a GI region. The final percentage included in the food GI system would need to be determined in consultation with regional food producers. I recommend that a standard percentage be included in the food GI system for all food products rather than different percentages for different food products; however, this would need to be determined in consultation with regional food producers.

This corresponds with observations made during the Italian fieldwork in relation to the PDO and PGI registrations. While the PDO registration requires that all food production stages take place within the PDO region, the PGI registration requires that at least one of the production stages take place within the region. However, Italian fieldwork revealed that the more production stages that take place within the PGI region, the tighter the connection between the food product and region.

When a food product is made using locally sourced core ingredients and is made within a region, the food product would be labelled with a first-level GI registration. A first-level GI should be called ‘Barossa Valley GI’ or ‘Adelaide Hills GI’ and have a different coloured seal or logo that distinguishes it from a second-level GI. For example, the seal or logo could be blue and include the GI name ‘Barossa Valley GI’ or ‘Adelaide Hills GI.’ A first-level GI would be similar
to the PGI registration under the EU–Italian food GI system (see Figure 7.1).

![Protected Geographical Indication](http://www.salumi-italiani.it/UserFiles/contents/images/img261immagine1352909779PDO_PGI.png)

**Figure 7.1: PGI registration under the EU–Italian food GI system seal**

Source: http://www.salumi-italiani.it/UserFiles/contents/images/img261immagine1352909779PDO_PGI.png

To obtain the second-level GI protection, the following criterion would need to be satisfied in addition to the above two criteria:

3) regional food has a quality, reputation or other characteristic that is ‘essentially attributable’ to its regional origin.

When a regional food product has a quality, reputation or other characteristic that is ‘essentially attributable’ to its regional origin, then it can be labelled with a second-level GI. For example, a food product might be made using traditional processes and methods that are unique to a GI region. It is important that these processes and methods are traditional to the place of origin claimed and cannot be duplicated in another region to produce a similar food product.

The South Australian fieldwork revealed that the traditional recipe, curing process and smoking method used to make smallgoods in the Barossa Valley are all traditional processes and methods specific and unique to the Barossa Valley. Further, the ferment process that Apex Bakery uses to make breads and pretzels, including the ‘1924 Dough Ferment Loaf’, are traditional processes and methods that are unique to the Barossa Valley, as are the traditional recipe, original Scotch Oven and Malee wood that Apex Bakery uses to make the breads.

The South Australian fieldwork also revealed that a region’s geographical factors could influence a food’s flavour. For example, a region’s climate and geology can affect the flavour of cheeses. A cheese might have a unique flavour due to the geographical factors of the Barossa Valley from which the milk used to make the cheese has been sourced. This could be distinguished from the flavour of cheese made using milk that is sourced from cows bred in the Adelaide Hills.

Similarly, the Italian fieldwork revealed that the geographical and human factors of a region can influence a food product’s quality, reputation or other characteristic. For example, in relation to the Prosciutto di Cuneo PDO, the pork meat used to make the Prosciutto is sourced from pigs born and bred in PDO area of Cuneo and Asti in the region of Piedmont, northwest Italy, as well as in limited provinces in
Turin. The pigs are fed with local cereals. The meat from the thighs of the pig are seasoned with salt, left to dry in the cold and cured in ventilated areas. The air that is used to dry and cure the pigs is Piedmontese air and this is a significant component of the PDO registration. This is because the air is not too dry nor is it too humid and thus, the meat dries out well. This is an example of a food product that is made by regional food producers who invest in high-quality feed regimes in breeding their animals. It is also an example of how geographical and human factors can influence a food’s quality, reputation or other characteristic.

The food GI system should provide examples of how food products might have a quality, reputation or other characteristic that is essentially attributable to its regional origin. By including examples of food products that meet the criteria, such as the examples above, the food GI system will provide food producers and traders with clear ex ante guidance as to what is required to satisfy this criterion.

The food product would be labelled with a second-level GI registration when it is made:

- using locally sourced core ingredients
- within a region that has a quality, reputation or other characteristic that is ‘essentially attributable’ to its regional origin.

I recommend that a second-level GI also be called ‘Barossa Valley GI’ or ‘Adelaide Hills GI’, but have a different coloured logo or seal to that of a first-level GI. For example, the logo or seal could be red and include the name ‘Barossa Valley GI’ or ‘Adelaide Hills GI’. Thus, a second-level GI would be similar to a PDO registration under the EU–Italian food GI system seal (see Figure 7.2).

![PDO registration under the EU–Italian food GI system seal](http://www.salumi-italiani.it/UserFiles/contents/images/img261immagine1352909779PDO_PGI.png)

**Figure 7.2: PDO registration under the EU–Italian food GI system seal**

The South Australian fieldwork revealed that most of the South Australian interviewees liked the concept of a food GI system that provided different levels or tiers of protection. They viewed the PDO and PGI levels under the EU–Italian food GI system as providing opportunities for more food producers to be able to be part of a food GI system. Thus, they saw these levels as promoting inclusiveness. All the South Australian interviewees endorsed that regional food producers should be
able to use a food GI on their food products, as long as the core ingredients of a food product were locally sourced and as many stages as possible of food production took place within a region. Having different levels of GI protection for regional food producers who used a traditional method and process was also endorsed. Therefore, the above criteria accommodate these interests and reflect the findings made during the South Australian fieldwork, while also reflecting the observations made during the Italian fieldwork.

An Australian food GI system with two levels of GI protection would provide ‘true GI’ protection that is more consistent with the TRIPS Agreement definition of a GI under Article 22.1—rather than protection as an ‘indication of source’ provided by the Australian wine GI system.

I also recommend that the scope of protection provided under the Australian food GI system would be extended beyond the Article 22.2 level of protection provided to all products other than wines and grape products under the TRIPS Agreement. Article 23.1 of the TRIPS Agreement provides a higher level of protection than Article 22.2 in that it prohibits the use of an untrue GI, even if it is used in translation or accompanied by an expression such as ‘kind’, ‘type’, or ‘imitation’, or even when the true origin of the wines and spirits is indicated. Further, under Article 23.2 of the TRIPS Agreement, the registration of a trademark containing or consisting of a GI for wines or spirits not having this origin is prohibited, even if the public is not misled as to the true origin of the product. Therefore, there is no need to show that the public might be misled or deceived or that the use constitutes an act of unfair competition. This higher level of protection is provided to Australian wine GIs under sections 40C, 40D, 40E and 40F of the AGWA Act, as explained in Chapter 2.

Similar to the Australian wine GI system, I recommend that when a food GI is used by a food producer on a food product that does not meet the food GI system criteria, that misuse of the food GI would be ipso facto an infringement of the food GI, regardless of whether the food producer has identified the true origin of the product elsewhere on the food product or the public is not misled as to the true origin of the product. By providing this higher level of protection, the Australian food GI system will overcome the deficiencies of current consumer protection, passing off and trademark laws that allow food producers to use Regional Branding that falls short of being misleading or deceptive, or involving passing off, but is used on food products that lack a clear and strong connection with the named region.

I recommend that the food GI system operate in place of the PoOL framework explained in Chapter 2. Given the deficiencies of this framework, a food GI system would present more structured protection of the connection between food and origin, and regulation of that connection before origin claims could be made on food labels in the form of food GIs. Food GIs should be used in place of PoOL to indicate that the regional food is connected to its origin and that the connection has been verified as part of a food GI system that provides legal protection and enforcement of that connection.
7.3.2. Boundary determinations for food GI regions

Boundaries for food GI regions will need to be demarked on their own merit rather than adopting the Australian wine GI boundaries for a food GI system. While the Australian wine GI boundaries might provide a starting point for determining food GI regions, the South Australian fieldwork revealed that the wine GI boundaries would need to be broadened for a food GI system. Most of the South Australian interviewees endorsed the view that a food GI system should be as inclusive as possible of regional food producers. As the Australian wine GI system wine’s boundaries were not demarked for the purposes of food products, these boundaries would need to be broader than current wine GI boundaries given the sprawl of regional food producers across regions.

For example, ‘Barossa’ is a wine zone under the Register of Protected GIs and Other Terms, while ‘Barossa Valley’ and ‘Adelaide Hills’ are wine regions.1317 If the ‘Barossa’ wine zone boundary was used for a food GI system for the food GI region ‘Barossa Valley’ this would be more inclusive of regional food producers than the wine region boundary of ‘Barossa Valley.’ This is because the ‘Barossa’ zone includes the regions of ‘Barossa Valley’ and ‘Eden Valley’. Therefore, it would include regional food producers located in both those regions who make regional food products that meet the connection criteria explained above. Conversely, the wine GI region ‘Barossa Valley’ would only include regional food producers located in the ‘Barossa Valley’ wine region who make regional food products that meet the connection criteria. Hence, this would exclude regional food producers who are located in the Eden Valley wine region such as Hutton Vale Lamb, even though they produce regional food products that are connected to the Barossa Valley under the criteria.

I recommend that while the Australian wine GI zones can be reviewed for the purposes of considering food GI boundaries, they will need to be broadened to be inclusive of regional food producers. I also recommend that the food GI system should only use the word ‘region’ in keeping with the food GI system protecting the connection between Australian regional food and Australian regions. A food GI region will be broader than a wine GI region. It will be closer to a wine GI zone to be inclusive of more than one region, but broader than the current wine GI zones. Using the word ‘region’ rather than ‘zone’ and ‘region’ will make the food GI boundaries easier to understand and identify.

The food GI system should not include state GI boundaries because the food GI system is to protect the connection between regional food and origin. It identifies local and authentic regional food that has a clear and strong connection with Australian regions. It protects the reputation that Australian regions have for producing quality regional food products and the value that accordingly exists in Australia’s regional names. Therefore, there must be a link between Australian regions and food products, as suggested in the criteria above. Including states in a food GI system does not promote regionality nor does it establish that food products have been made using locally sourced core ingredients, or within a region.

1317 See Annex I for the GI boundaries for the wine zone ‘Barossa’ and Annex II for the wine regions ‘Barossa Valley’ and ‘Adelaide Hills.’
or made using traditional processes and methods. State boundaries would be too broad for the purposes of a food GI system that protects the connection between regional food and origin.

A committee will need to be established to demark food boundaries, similar to the GIC established under the Australian wine GI system. The committee will need to manage a food GI register, similar to the *Register of Protected GIs and Other Terms* under the Australian wine GI system, along with a main governing body of the food GI system. I recommend that regional food producers and regional bodies be involved in the initial stages of considering food GI boundaries so that food GI boundaries are inclusive of regional food producers who are located throughout regions and are making food products that have a connection with a food GI region under the above criteria. Although regional food producers will have the required knowledge for determining which food products are connected to regions, the involvement of regional bodies such as Regional Development Australia boards will assist with the demarcation of food GI boundaries by considering local planning regulations. By working together, the food GI boundaries can be inclusive while still ensuring that food products are clearly connected to the food GI boundaries.

In relation to the opposition processes that might affect the determination of a food GI by a body similar to the GIC under an Australian food GI system, the Australian wine GI system provides some guidance as to the types of mechanisms that a food GI system will need to implement to manage oppositions. As explained in Chapter 2, one of the main effects of the AUSFTA on the Australian wine GI system was that a GI could not be registered using a particular name if there were pre-existing trademark rights in the same name in Australia. Hence, amendments were made to the AWBC Act that resulted in a new subdivision dealing with objections to determinations of GIs based on pre-existing trademarks. I discussed the practical effect of sections 40RA to 40RC inclusive of the AGWA Act regarding the determination of wine GIs in Chapter 2. I recommend that similar provisions be included in legislation relating to the Australian food GI system. This will ensure that Australia’s obligations under the AUSFTA are carried through to a food GI system and that similar rules regarding pre-existing trademark rights are maintained under a food GI system. This is particularly relevant given that Australia, as a party to the TPP negotiations, has agreed to provide an opposition period and option for the cancellation of GIs. Therefore, a food GI system must also include an opposition process and have rules to manage oppositions made to the determination of a food GI.

Similarly, registration of trademarks can be affected by GIs. In Chapter 2, I explained that under section 61 of the Trade Marks Act, a trademark registration might be opposed on the ground that it contains or consists of a false GI. The ground is established if the trademark goods are similar to the GI goods or if the use of the trademark in relation to the trademark goods would be likely to deceive or cause confusion. Further, under section 42 of the Trade Marks Act, a trademark application may be rejected if a trademark, or part of a trademark, is identical to, or resembles, a registered GI and the trademark application is in class 33 for wines and grape products. Trademarks that are applied for in relation to food products that include a registered food GI will need to be dealt with in a similar way as
trademarks that are applied for in relation to wine that include a registered wine GI. I recommend that similar provisions will need to apply under the Trade Marks Act in respect of food GIs with the implementation of a food GI system. Sections 42 and 61 of the Trade Marks Act will need to be revised or extended so that similar provisions are included to apply to food GIs. This will ensure that the same rules apply across Australian food and wine GIs in respect of trademark and GI rights.

7.3.3. The food GI system must be regulated by one main governing body

I recommend that one main governing body regulate the Australian food GI system. A new statutory authority must be established with the implementation of a food GI system dedicated to regulating and managing the Australian food GI system. The Italian fieldwork revealed that it would be better to have one governing body monitoring a food GI system rather than multiple bodies such as Consortiums. The South Australian fieldwork also endorsed that one main governing body should carry out the due diligence of a food GI system. Most of the South Australian interviewees were familiar with the Australian wine GI system and they suggested that a governing body similar to Wine Australia is required to successfully regulate a food GI system.

A food GI system governing body must ensure that all criteria relevant to the food GI system be applied fairly and equally among all regional food producers. It must constantly regulate that food GIs are only used on food products that meet the relevant criteria as suggested above. Similar to Wine Australia’s governing role in relation to the Australian wine GI system, a food GI system governing body must protect the integrity of Australia’s food GI regions by ensuring that only food products that have a clear and strong connection with Australian food GI regions be labelled with a food GI, in accordance with criteria explained above. Thus, a label integrity program similar to LIP under the Australian wine GI system must be maintained by are only be used on food products that meet the relevant connection criteria. By having a label integrity program as part of the food GI system, consumers will be able to trust food GI labels as being transparent about the origin of food products from paddock to plate. It will also assist with mitigating the risk of food producers trying to use a food GI on food products that do not meet the connection criteria recommended above.

The food GI system governing body must have the power to act when a food producer does not comply with the food GI system and food GI label integrity program. Much like Wine Australia’s powers under the AGWA Act, the food GI system governing body’s powers should include ordering food producers to relabel non-compliant food products and, in extreme cases, banning the export of the non-compliant food products and ordering prosecution. The food GI system must ensure that the integrity of the food GI system is maintained at all times and that only food products that meet the GI system and are of a certain quality be labelled with a food GI. This will provide incentives to regional food producers to invest in the Australian food GI system on the basis that there is proper regulation of the food GI system that mitigates the risk of non-compliant food producers free-riding on the reputation of Australian food GI regions.

The food GI system governing body must also support the food GI boundary committee that needs to be established to demark food GI region boundaries. It
should assist the committee by maintaining a register of food GIs similar to Wine Australia’s role in protecting the *Register of Protected GIs and Other Terms*.

I recommend that the members of the food GI system governing body should be regional food producers and representatives from the Australian food, agrifood and agricultural industries, as these members understand how Australian regional food is connected to Australian regions. By collaborating, members can work in the best interests of food producers who use the food GI system to ensure that the integrity of the food GI system is maintained and that there is constant regulation of the connection between food and origin before food GIs are used on food products under the food GI system. This will protect Australia’s regionality and the Australian food industry.

### 7.3.4. Costs of a food GI system

I recommend that Australian state and federal governments assist with funding an Australian food GI system. Funding has been important in the establishment and development of the Australian wine GI system and is equally important for the establishment and development of an Australian food GI system. Both the Italian and South Australian fieldwork endorsed the need for government support and funding for a food GI system to assist with covering the costs typically involved with a food GI system. As Van Caenegem, Cleary and Drahos suggest, these included costs for:

- a food GI register and a registrar to administer it
- maintaining a compliance unit to monitor obligations under a food GI system
- audits of individual food producers for compliance with the GI system rules
- application to use a food GI.

The interview with Silvia Estrada-Flores, Project Manager-Competitive Foods from Food South Australia Inc as part of the South Australian fieldwork suggested that state government would be willing to provide some funding to a food GI system, as long as the system would value-add to Australian regions. As I have explained throughout this thesis, food GI systems clearly do value-add to regions by promoting and protecting regionality and the value that exists in regional names as food GIs. Further, the implementation of a food GI system would endorse initiatives that have been funded by state governments and give back value to Australian regions and governments. For example, the Government of South Australia promotes the South Australian regions as food destinations through a variety of government initiatives, as explained in Chapter 6. A food GI system would add value to the South Australian regions and those government initiatives by providing protection to the connection between food and the regions within a legal framework. ‘Barossa Valley’ and ‘Adelaide Hills’ are placenames that already

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1318 van Caenegem, Drahos and Cleary, above n 15, 21-22.

1319 Interview with Silvia Estrada-Flores, Project Manager-Competitive Foods, Food South Australia Inc, (Adelaide, South Australia, 12 March 2014).
have the ‘effect of evoking product characteristics in consumers’ minds’ and have established reputations for food. This puts the South Australian regions at an advantage when establishing a food GI system, as the South Australian regions are not entirely new GIs. This means that some of the start-up costs relevant to the establishment of new GIs and GI systems would not be relevant to the South Australian Regions and would provide the Regions and government with a cost benefit. By already having an established reputation, the time that it will take for the South Australian Regions to acquire the necessary reputation they require for a food GI system will be less than other regions in South Australia that do not have as much of an acquired reputation. This could also apply to other Australian States and Territories that have also promoted their regions for producing premium food. Examples include the Hunter Valley in New South Wales, the Mornington Peninsula in Victoria, the Margaret River in Western Australia. These regions are also protected GI zones and regions under the Australian wine GI system. Therefore, the funding required by state and federal governments would be less for regions that already have an established reputation for producing quality regional food products.

Further, as the Australian wine GI system is already in existence, some costs can be saved in implementing a food GI system. This is on the basis that ideas can be sourced from the Australian wine GI system in terms of what is required to establish a governing body, a food GI boundary committee, a food GI label integrity program and a food GI register. By using the Australian wine GI system as a point of reference, some costs and time in implementing a food GI system will be saved. Although food GI boundaries will need to be broadened for the purposes of a food GI system, using the Australian wine GI boundaries as a starting point will save some time and money in establishing food GI boundaries.

Therefore, while government funding will be necessary to implement a food GI system, the existence of the Australian wine GI system and other government initiatives that have promoted regionality and regional food can be drawn on to save some costs involved with the implementation of a food GI system.

7.3.5. **Education about the system**

I recommend that food industry organisations, producers and consumers receive education on what a food GI system represents and how it works. Education is required as early on as possible in the process of implementing a food GI system so that consumers understand what food GIs mean in relation to the origin of food. The Italian and South Australian fieldwork endorsed that education is a key element required for a successful food GI system. Education on a food GI system should inform consumers that food products are regulated to ensure that they have a clear and strong connection with a GI region before food GIs are used on food

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1320 van Caenegem, Drahos and Cleary, above n 15, 12.

labels. Consumers must be educated about what a food GI system means in terms of transparency of origin of food from paddock to plate. This will restore consumers’ trust in food labels. The seals or logos that include the food GI must be explained to consumers so that they understand how the different levels of GI protection represent the degree of connection between food and origin. This education is essential to ensure that the average consumer responds well to food GI labels.

Part of this education might require education on relabelling of food products that used EU or Old World terms as generic product descriptors or common food terms. This will be particularly relevant if Australia negotiates protection of EU food GIs that Australian food producers currently use as generic product descriptors or common food terms, under the negotiations of the AUSEU FTA.

While it would be beneficial for the food industry if the costs involved with this education were funded by state and federal governments, ‘the wine industry faced the costs of having to re-educate consumers in wine labelling, but these costs were absorbed over a long transitional period’.1322 Therefore, in the absence of government funding, the Australian food industry might need to absorb the education roll-out costs, but will absorb them over time once the food GI system is implemented and provides economic benefits.

7.3.6. Foreign food GIs

If Australia agrees to protect foreign GIs under a food GI system, as explained in Chapter 4, I recommend that provisions be provided under an Australian food GI system similar to those included in Division 4B of the AGWA Act and Part 6A of the AGWA Regulations that provide for the determination of foreign GIs and translations in the context of the Australian wine GI system. This may be relevant depending on the outcome of the AUSEU FTA negotiations or if Australia agrees to protect foreign GIs under a food GI system, rather than as CTMs in the context of any FTAs. Any provisions included under a food GI system would need to be determined in the context of what is agreed between Australia and a foreign country regarding the protection of foreign food GI terms under the relevant international agreement.

If Australia does agree to protect foreign food GIs under a food GI system rather than as CTMs, this might affect registered owners of Australian business names and trademarks that contain the protected foreign food GI term. When the provisions of the Trade Marks Act1323 were amended to implement the 1994 Treaty between the EC and Australia as part of the implementation of the Australian wine GI system, there were ‘approximately 500 trademarks registered in Australia that contained EU GI terms in either the mark itself or in the particulars, such as in the specification of goods, endorsements and conditions of registration, that required to be amended’.1324 Under section 83A(2) of the Trade Marks Act, the owners of the

1322 van Caenegem, Drahos and Cleary, above n 15, 27.
1323 Trade Marks Act 1995.
1324 Explanatory Memorandum, Trade Marks Amendment Regulations 2010 (No.1), Attachment A, 2.
trademarks could request an amendment to the representation of their trademark to remove or substitute part of the representation, or to amend the particulars in respect of the trademark to remove or substitute any or all of the particulars to comply with Australia’s obligation to protect EU GIs and TEs.\textsuperscript{1325} Section 83A applies to a registered trademark:

\begin{quote}
If using the trademark in relation to any or all of the goods or services in respect of which the trademark is registered would be inconsistent with any relevant obligation of Australia under an international agreement and at the time when the particulars of registration of the trademark were entered in the Register the obligation did not exist.\textsuperscript{1326}
\end{quote}

Similarly, current registered owners of a trademark and/or business name containing a foreign food GI term would need to be able to request an amendment for their business name and/or trademark registration depending on whether Australia agrees to protect that particular foreign food GI term pursuant to an international agreement.

A further issue that might arise is that current registered owners of a trademark and/or business name that includes a geographical location name, that is used in relation to food products, might need to request an amendment for their trademark and/or business name where the geographical location name becomes a protected food GI/term pursuant to an Australian food GI system. I carried out research on the Australian Business Names Register, maintained by ASIC and the Trade Marks ATMOSS Database maintained by IP Australia for current business names and trademarks containing the geographical location names ‘Barossa Valley’ and ‘Adelaide Hills’. I searched for trademarks and business names that were ‘registered’, ‘applied for’ and ‘under examination’; as at the date of this thesis, in relation to food goods and services.\textsuperscript{1327} Only usage of the South Australian Regions’

\textsuperscript{1325} Trade Marks Act 1995 s 83A(2).
\textsuperscript{1326} Trade Marks Act 1995 s 83A(1).
\textsuperscript{1327} In relation to trade marks, the main classes of goods searched relating to ‘food’ are class 29 that includes: \textit{Meat, fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams compotes; eggs; milk and milk products; edible oils and fats; 30 coffee, tea, cocoa and artificial coffee; rice; tapioca and sago; flour and preparations made from cereals; bread, pastry and confectionery; edible ices; sugar, honey, treacle; yeast, baking powder; salt; mustard, vinegar, sauces (condiments); spices; ice.}

Class 31 includes: \textit{Agricultural, horticultural and forestry products; raw and unprocessed grains and seeds; fresh fruits and vegetable; natural plants and flowers; live animals; foodstuffs for animals, malt; 32 beers; mineral and aerated waters and non-alcoholic beverages; fruit beverages and fruit juices; syrups and other preparations for making beverages.}

Class 35 includes “advertising; business management; business administration; office functions; 40 treatment of materials” and class 43 includes “services for providing food and drink; temporary accommodation.” Some of the results also appeared in classes 16 that includes: \textit{Paper and cardboard; printed matter; bookbinding material; photographs;}

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names was researched. Research into other Australian geographic location names used in trademarks and/or business names relating to food goods and services would be required to determine the complete impact of the introduction of a food GI system on trademark and business name owners across Australia.

In some instances, Internet research was also carried out in order to obtain more information on the business entity/registered owner of the business name and/or trademark to determine the connection, if any, between the food good and geographical location name used in the trademark and/or business name.

7.3.6.1 Barossa Valley business names

While 100 business name results containing ‘Barossa Valley’ appeared on the Business Names Register, only the following four business names were registered in relation to food:

stationer; adhesives for stationery or household purposes; artists’ materials; paintbrushes; typewriters and office requisites (except furniture); instructional and teaching material (except apparatus); plastic materials for packaging; printers’ type; printing blocks; and 41 education; providing of training; entertainment; sporting and cultural activities.
Table 7.1: Barossa Valley Business Names

<table>
<thead>
<tr>
<th>Business name/ABN No.</th>
<th>Registered Owner</th>
<th>Connection to Barossa Valley</th>
</tr>
</thead>
<tbody>
<tr>
<td>'Barossa Valley Cheese Wrights'/Not Available</td>
<td>Cheese Cellar Pty Ltd (also owns the names: 'Barossa Farmstead Cheese,' 'Barossa Provincial Cheese,' 'Barossa Farmhouse Cheese,' 'Barossa Artisan Cheese').</td>
<td>The Internet results for this business name were for: 'Barossa Valley Cheese Co' (one of the South Australian Interviewees and not connected to this business name or registered owner). Cheese Cellar Pty Ltd is an active ABN company that has been registered since October 2015. From the Internet search results it appears that the company is not actually using these names yet, but has registered them for intended future use. An ABN report search for Cheese Cellar Pty Ltd revealed that it has another entity with matching name: 'Barossa Farmstead Pty Ltd.' Barossa Farmstead Pty Ltd has applied for trademark 'Barossa Farmstead’ (TM No. 1726706) in class 29 and is currently under examination. (See trademark result below).</td>
</tr>
<tr>
<td>'Barossa Valley Chicken'/53 429 199 623</td>
<td>The Trustee for BFF (also owns the names: 'Barossa Chooks' and 'Barossa Chicken').</td>
<td>The Internet results for this business name were for: 'Barossa Farm Produce'-this was the previous name for ‘Saskia Beer’s Farm Produce’ (one of the South Australian Interviewees) given that she used to market her chooks as 'Barossa Valley Chooks;' ‘Feast! Fine Foods’ because it is a distributor of ‘Saskia Beer’s Farm Produce;' and ‘Barossa Fine Foods’ (one of the South Australian Interviewees). No results appeared for this actual business name. A search for ‘Barossa Chooks’ appeared in a Yellow Pages result that noted that the business name related to poultry farmers and dealers located in Angaston. However, on the whole, the Internet results were for ‘Saskia Beer’s Farm Produce’ and ‘Feast! Fine Foods.’</td>
</tr>
<tr>
<td>‘Barossa Valley Chocolate Company’/88 600 251 438</td>
<td>Owned, Made &amp; Grown in Australia Pty Ltd (the address for service and principal place of business is in Netherby, South Australia).</td>
<td>No Internet searches resulted for this business name. Rather results kept occurring for ‘Melba’s Chocolate Factory’ in the Adelaide Hills.</td>
</tr>
<tr>
<td>‘Barossa Valley Chocolate’/31 562 696 607</td>
<td>The Trustee for Barossa Trust (the principal place of business is Nuriootpa, Barossa Valley, South Australia).</td>
<td>No Internet searches resulted for this business name. Rather results appeared for ‘Liebichwein’ chocolate, truffles and fortified wine tastings in the Barossa and chocolate matched with wines at Schild Estate winery in the Barossa.</td>
</tr>
</tbody>
</table>


7.3.6.2 Barossa Valley trademarks

While 140 trademark results contained the words ‘Barossa Valley’ most of these related to class 33 wine. Only the following 18 trademarks results appeared for food goods and services that include ‘Barossa Valley’ in them.
<table>
<thead>
<tr>
<th>Trademark/No./Status</th>
<th>Registered Owner</th>
<th>Classes/Connection to Barossa Valley</th>
</tr>
</thead>
<tbody>
<tr>
<td>‘Maggie Beer A Barossa Food Tradition’/No. 707372/Registered</td>
<td>Colin &amp; Maggie Beer</td>
<td>29, 30-Refer to Chapter 6 for details on this South Australian Interviewee.</td>
</tr>
<tr>
<td>‘Food Barossa Premium Produce South Australia <a href="http://www.foodbarossa.com%E2%80%99/876190/Registered">www.foodbarossa.com’/876190/Registered</a></td>
<td>Food Barossa Inc, Tanunda</td>
<td>29, 30, 31, 32, 42-‘Food Barossa Inc’ was established in 2001 for the benefit of food producers in the Barossa Valley region. Food Barossa Inc debates to improve food-labelling legislation so that food branded ‘Barossa’ is exactly that.(^\text{1330}) The Chair is Jan Angas, and two committee members are also South Australian Interviewees: Margaret Lehmann (Peter Lehmann Wines) and Jess Greatwich (Manager of Barossa Farmers Market).</td>
</tr>
<tr>
<td>‘The Barossa Valley Cheese Co’/No. 954175/Registered ‘Barossa Living’/No.1036477/Registered</td>
<td>Victoria Glaetzer &amp; Mary McClurg Ianrich Pty Ltd</td>
<td>29-Refer to Chapter 6 for details on this South Australian Interviewee. 41-Quarterly magazine that focuses on Barossa Valley lifestyle and community.</td>
</tr>
<tr>
<td>‘Maggie Beer A Barossa Food Tradition’/No. 1314078/Registered</td>
<td>Colin &amp; Maggie Beer</td>
<td>41-books-Refer to Chapter 6 for details on this South Australian Interviewee.</td>
</tr>
<tr>
<td>‘Taste Barossa’/No.1331582/Registered</td>
<td>Elemental Viticulture</td>
<td>33, 35, 41, 43-Provider of food and drink.</td>
</tr>
<tr>
<td>‘Barossa Fine Foods’/No.1438647/Registered</td>
<td>Knoll Investments &amp; Investments Pty Ltd</td>
<td>29, 35, 40-meats, butcher-Refer to Chapter 6 for details on this South Australian Interviewee.</td>
</tr>
<tr>
<td>‘Farmers Barossa Almonds’/No.1439410/Registered</td>
<td>Barry Farmer</td>
<td>29, 30, 31-Refer to ‘Barossa Almonds’ discussed in Chapter 2.</td>
</tr>
<tr>
<td>‘100% Australian Barossa Beef Co’/No.1578453/Registered</td>
<td>Chatenois Pty Ltd</td>
<td>29-meat-no Internet search results for this trademark other than the trademark details.</td>
</tr>
<tr>
<td>‘Maggie Beer A Barossa Food Tradition’/No.1607752/Registered</td>
<td>Colin &amp; Maggie Beer</td>
<td>9-epublications, 20-hampers, 29-fruit, 32-syrups, 33-alcohol, 35-retail/wholesale, 43-information, preparation of food, recipes. This trademark has a wine GI endorsement given that it is registered in class 33 for alcohol(^\text{1331}). Refer to Chapter 6 for details on this South Australian Interviewee.</td>
</tr>
</tbody>
</table>


\(^{1331}\) The endorsement is as follows: *It is a condition of registration that the trade mark will only be used in respect of wines originating (as defined in the Wine Australia Corporation Act 1980) in the area in respect of which the geographical indication BAROSSA VALLEY is registered and that the use is in accord with the Wine Australia Corporation Act 1980.* It is a condition of registration that when used in respect of alcoholic beverages, spirits and liqueurs the trade mark will only be used in respect of alcoholic beverages, spirits and liqueurs produced in the BAROSSA VALLEY area.
‘Pheasant Farm of the Barossa Valley’/No.1607785/Registered
Maggie Beer as trustee for The Beer Family Trust
20, 21, 29, 33, 35-This trademark has a wine GI endorsement given that it is registered in class 33 for alcohol. Refer to Chapter 6 for details on this South Australian Interviewee.

‘Barossa Creme Potatoes’/No.1611797/Registered
Adelview Pty Ltd (address for service is Virginia, South Australia).
31-potatoes-no Internet search results were available for the trademark, but a search for ‘Adelview Pty Ltd’ disclosed that it is a farm management service and vegetable growing company in Virginia, South Australia.1332

‘Barossa Rouge Potatoes’/No.1613374/Registered
Adelview Pty Ltd (address for service is Virginia, South Australia).
31-potatoes-no Internet search results were available for the trademark, but a search for ‘Adelview Pty Ltd’ disclosed that it is a farm management service and vegetable growing company in Virginia, South Australia.1332

‘Barossa Room’/No.1623910
Skycity Entertainment Group Limited
16, 41, 43-This is the name of one of the function rooms at the Skycity Casino in Adelaide which offers a ‘Barossa Café Menu’ and ‘Barossa Café Beverage Menu’.1334

‘Barossa Made Pantry Essentials’/No.1653349/Registered
Maggie & Colin Beer as trustees for the Beer Family Trust
29, 32, 33, 35-jams and pastes. This trademark has a wine GI endorsement given that it is registered in class 33 for alcohol. Refer to Chapter 6 for details on this South Australian Interviewee.

‘Barossa Farmers Market’/No.1664148/Registered
Barossa Farmers Market Incorporated
29, 30-Refer to Chapter 6 for details on this South Australian Interviewee.

‘Barossa traditional and gourmet pizza: A product of Amanti Pizza and Pasta’/No.167797
Owen David Lewis and Donna Jane Noble as the Trustees for The Oggwami Family Trust (address for service is Kapunda, South Australia).
30-chilled pizzas, frozen pizzas, prepared meals in the form of pizzas. The information on the ‘Barossa Traditional and Gourmet Pizza’ website discloses that the business entity is “a proudly South Australian owned and operated family business located in the Barossa Valley.” Furthermore, it explains that ‘Barossa Pizza is a product line created by Barossa Pizza and is a subsidiary company of Amanti Pizza and (Oggwami Pty Ltd) located in Tanunda, Barossa Valley.”1335

‘Barossa Farmstead’/No.1726706/Under examination
Barossa Farmstead Pty Ltd (address for service is Mid North, Barossa Valley, South Australia).
29-cheese. This is the trademark that was discussed above under the Business Name search result for ‘Barossa Valley Cheese Wrights’. There are no Internet search results for the trademark or cheese, but only company information results for the registered owner as discussed in the Business Names table.

1335 <http://www.barossapizza.com.au/>. While Tanunda is located in the Barossa Valley, research is required on the ‘Barossa Pizza’ product line as to whether it has a qualitative connection with the Barossa Valley for GI purposes. However, Kapunda is not located in the Barossa Valley, but is a town on the Light River and near the Barossa Valley in South Australia [Reference: <https://en.wikipedia.org/wiki/Kapunda>]. This therefore calls into question the integrity of the label/trade mark.
7.3.6.3 Adelaide Hills business names

While 100 business name results containing ‘Adelaide Hills’ appeared on the Business Names Register, only the following three business names are registered in relation to food.

Table 7.3: Adelaide Hills Business Names

<table>
<thead>
<tr>
<th>Business name/ABN No.</th>
<th>Registered Owner</th>
<th>Connection to Adelaide Hills</th>
</tr>
</thead>
<tbody>
<tr>
<td>‘Adelaide Hills Avocados’/Not Available</td>
<td>Tania &amp; Glenn Fitzpatrick (both the address for service and principal place of business is in Aberfoyle Park, South Australia), but the avocados are grown on a Chandlers Hill property (located in the City of Onkaparinga) near Clarendon, Adelaide Hills, South Australia).</td>
<td>Internet search results for this business name led to the ‘Willunga Farmer Market’ Internet page that ‘Adelaide Hills Avocados’ are sold at the Willunga Farmers Market weekly from December to March and that the avocados are grown on a Chandlers Hill property near Clarendon, South Australia. Clarendon is a small town in the Adelaide Hills. Further research would be required to determine if the Chandlers Hill property would fall within the Adelaide Hills GI boundary for food (if and when demarcated).</td>
</tr>
<tr>
<td>‘Adelaide Hills Beef’/70 533 234 166, ‘Adelaide Hills Beef and Lamb’/70 533 234 166</td>
<td>Danae Reed</td>
<td>The principal place of business is Chapel Hill, McLaren Vale, South Australia. McLaren Vale for wine purposes is in the GI of ‘Fleurieu’, not ‘Adelaide Hills’. Therefore, it is unlikely that Chapel Hill would come under the Adelaide Hills GI for food if similar GI boundaries were followed to those for wine. No Internet search results appeared for this business name.</td>
</tr>
<tr>
<td>‘Adelaide Hills Beef Parabanks’/53 360 288 301</td>
<td>Rik Albert Carr</td>
<td>The principal place of business is the Parabanks Shopping Centre, Salisbury South Australia, while the address for service is Onkaparinga Hills, South Australia. The Internet search result for this business name provided details of the Facebook page that disclosed that some of the beef sold at ‘Adelaide Hills Parabanks’ is sourced from Strathalbyn, Adelaide Hills, South Australia. More research would be required into other products sold under this label to determine the connection, if any, between the meat goods and the Adelaide Hills.</td>
</tr>
</tbody>
</table>

7.3.6.4 Adelaide Hills Trademarks

While 25 trademark results contained the words ‘Adelaide Hills’ most of these related to class 33 wine. Only the following five trademark results appeared for food goods and services that include ‘Adelaide Hills’ in them.

Table 7.4: Adelaide Hills Trademarks

<table>
<thead>
<tr>
<th>Trademark/No./Status</th>
<th>Registered Owner</th>
<th>Connection to the Adelaide Hills</th>
</tr>
</thead>
<tbody>
<tr>
<td>‘Bishops Adelaide Hills’/No.1073124/Registered</td>
<td>Douglas James Bishop</td>
<td>29, 31, 43-for meat, dried and coked fruit and vegetables, and jams and jellies. The Internet search results disclosed that this trademark is used in relation to a heritage property owned by the Bishop family since 1871. It is located in the Adelaide Hills at Basket Range and is an operational cherry orchard. However, no specific information was found on the goods that are listed in the classes on the trademark registration details-that is for meat, dried and coked fruit and vegetables, and jams and jellies-and so it is unknown as to whether any of these food goods are in fact connected to the Adelaide Hills.</td>
</tr>
<tr>
<td>‘Adelaide Hills Fine Foods’/No.1554201/Registered</td>
<td>Skara Smallgoods Pty Ltd</td>
<td>29-meats. Skara Smallgoods’ website explains that their smallgoods are influenced by the family’s Croatian heritage and that the family has ‘brought their traditional artisan smallgoods to the Adelaide Hills.’ It also notes that the products are made using only Australian meat. “We have worked together with South Australian family run dedicated farmers who are free range and raise pastured free to roam pigs, ethically and sustainably.” More research would be required into whether the meat is sourced from the Adelaide Hills or elsewhere in South Australia.</td>
</tr>
<tr>
<td>‘The Adelaide Hills Dairy Company’/No.1666335/Under examination</td>
<td>Mark Anthony Williamson (address for service is Woodville, South Australia).</td>
<td>29-No Internet search results appeared for this trademark. Rather results appeared for ‘Udder Delights’ and ‘B.-d. Farm Paris Creek Pty Ltd’.</td>
</tr>
<tr>
<td>‘Adelaide Hills Iced Coffee’/No.1666336/Under examination</td>
<td>Mark Anthony Williamson (address for service is Woodville, South Australia).</td>
<td>29-No Internet search results appeared for this trademark.</td>
</tr>
<tr>
<td>‘Simply Adelaide Hills’/No.1706465/Accepted</td>
<td>Capscal Pty Ltd</td>
<td>29- No Internet search results appeared for this trademark.</td>
</tr>
</tbody>
</table>

7.3.6.5 CTMs

While there are currently approximately 51 registered CTMs in Australia relating to food goods, most of them prescribe rules relating to quality standards, rather than standards of geographical origin. For the purposes of this part, the focus is on Australian based certification trademarks that relate to food and indicate that the food (goods) meet standards of geographical origin. In Chapter 2 I included details of the current four CTMs that are owned by Australian organisations that certify geographical origin of food. I also explained that only two of them are registered, namely:


**Figure 7.3: Mornington Peninsula Produce CTM No. 1666917 (Registered)**


![Northern Rivers Food CTM No. 1362223 (Registered)](http://www.northernriversfood.org.au/images/logo.png)

**Figure 7.4: Northern Rivers Food CTM No. 1362223 (Registered)**


A food GI system would impact on these CTMs in that their rules might need to be amended to take into account any conflicts with the food GI system criteria. Alternatively, the laws relating to a new food GI system might provide that any CTMs registered before the enactment of the new laws will not be affected by the new system, but this is uncertain.

While only usage of the South Australian Regions’ names was focussed on in the above analysis, the research indicates that there are registered owners of names, trademarks and brands who will be affected by a food GI system, should Australia decide to implement such a system in the future. Further research would need to be carried out, as indicated in the tables above, on the precise connection that the goods and services behind each name/trademark have to the corresponding geographical location. Such research would include looking at issues similar to those raised in the proposed criteria set out in part 3.1 above. Notwithstanding this further research required, it is anticipated that given the number of business names and trademarks identified that currently include the South Australian Regions’ names in them, it is likely that a new food GI system
would similarly impact on registered business name/trademark owners in other Australian States using other Australian regional names on their food products. Therefore, amendments to the *Trademarks Act* would be required if Australia were to implement a food GI system in the future. In particular, another likely required transitional provision would be to allow a phase out period for trademark and business owners to stop using food GIs where there is no connection between food and origin (pending the criteria that needs to be satisfied) and re-labelling and rebranding food products. Factors of time and money incurred in changing food labels/branding would also need to be factored into the legal framework pertaining to food GIs. Businesses, registered trademark and business name owners, would need a phasing out period during which they could make any label/branding changes required as a result of a food GI system.

In terms of whether a new food GI system would include a provision that caters for it to not apply to trademarks (that include food GIs in them) that were registered before the commencement of the food GI system legal framework, it is predicted that this will ultimately depend upon the reasons why Australia goes ahead with a food GI system should Australia decide to do so. For example, depending on the negotiations of the *Australia-EU Free Trade Agreement*, as explained in Chapter 4, Australia might have to make some concessions with the EU in relation to the EU food GIs that Australia recognises and protects and currently uses on foods produced in Australia and exported to non-EU countries. Moreover, depending on any other agreements that Australia might enter into as a result of outcomes of international GI issues will determine the necessary amendments required to existing Australian laws, including amendments to the *Trade Marks Act*. These outcomes could also determine, to a certain extent, the provisions of a food GI system in order to cater for specific requirements that Australia agrees to under various international GI related agreements.

Therefore, the protection of foreign food GIs pursuant to an Australian food GI system will be an important consideration to be made in the context of implementing an Australian food GI system.

**7.3.7. Collaboration and inclusiveness**

I recommend that regional food producers and representatives from the Australian food, agrifood and agricultural industries work together with Australian government (both state and federal) in designing a food GI system that incorporates the elements recommended in this chapter. Regional food producer involvement and collaboration is critical in designing a food GI system that is practical and reflective of how Australian regional food is connected to Australian regions.

Both the Italian fieldwork and the South Australian fieldwork revealed that the success of a food GI system depends on interested stakeholders working together to establish the rules and criteria relevant to a food GI system. Regional food producers understand more than anyone else how regional food is connected to its origin. By including regional food producers in the designing stages of a food GI system, the criteria included in a food GI system will be practical in relation to the connection criteria required of food producers to use
food GIs on their food products. Therefore, I recommend that regional food producers be involved in determining the percentage of food production stages that are required for the second criterion. In relation to the second criterion, it is important to understand from regional food producers what percentage reflects the connection between food and origin based on how many stages of food production regional food producers conduct within a region.

Further, I recommend that regional food producers be involved in determining which processes and methods are traditional and unique to a region, in the context of the third criterion. They can offer insight into production methods and processes that are unique to a region and part of a region’s culture and history and that influence a food’s quality, reputation or other characteristic. Both the Italian fieldwork and the South Australian fieldwork endorsed that a food GI system must be as inclusive as possible of regional food producers who invest time and money in producing authentic regional food products using locally sourced core ingredients and processes and methods that are unique to a region.

However, while inclusion is important it must not undermine the connection between food and origin. This is clear from the Italian fieldwork. A food GI system must never lose sight of protecting the connection between food and origin. This connection, and the regulation of it under a food GI system, must never be compromised to enable as many food producers as possible to benefit from a food GI system. Therefore, the connection criteria must be practical but also ensure that food products that are labelled with a food GI have a strong and clear connection with the GI region. This will ensure that there is value in a food GI system and that the quality of food products labelled with a food GI is consistent.

### 7.4. Concluding Comments

In making recommendations for the elements required for a successful Australian food GI system, I have considered how a food GI system can be tailored to accommodate the needs of Australian regional food producers and Australian food, agrifood and agricultural industries in relation to protecting the connection between Australian regional food and origin. I have considered this against the backdrop of significant, original fieldwork in Italy and South Australia. The South Australian fieldwork and the Italian fieldwork confirmed the worthiness of implementing a food GI system to overcome the deficiencies of current consumer protection, passing off and trademark laws and regulations. A food GI system will identify and protect the connection between food and origin and will ensure that Australian regional names, in the form of food GIs, are only used on food products that have a clear and strong connection with an Australian GI region in accordance with the connection criteria provided in the food GI system. A food GI system will encourage regional food producers to invest in producing authentic regional food products that are clearly connected to Australian regions and will mitigate the risk of other food producers and traders free-riding on the reputation that Australian regions have for producing quality regional food and the value that accordingly exists in Australian regional names. A food GI system will provide regional food producers with a legal framework that supports their investment and regionality. Any use of a food GI
on a food product that does not originate from that region, or does not comply with particular criteria regarding how food is connected to a particular region, will be *ipso facto* an infringement, regardless of whether the misuse of the food GI is deceptive or confusing as to the origin of the food product.

By having a legal framework that strictly regulates when food GIs can be used on food products, the assets that Australia has in Australian regional names (i.e., food GIs) will be better protected than they are under current laws and regulations. The protection provided to Australian regional names used on food products will be more in line with the protection provided to Australian regional names used on wines under the Australian wine GI system. Consequently, consumers could rely on food labels and trust that food labels accurately identify the origin of food products. They could easily identify local and authentic regional food products and have transparency of origin of food from paddock to plate that has been regulated. Australia’s agricultural and agrifood industries will benefit from this consumer confidence, as sales of food products bearing Australian regional names will increase. This will also place Australia in a stronger international position when exporting Australian regional food products, as other countries are increasingly interested in importing food products that have a ‘story’ to tell about their provenance. Further, a food GI system will place Australia in a stronger position in relation to FTAs and trade negotiations in which food GIs have become important trade concessions.

This thesis has demonstrated that there is a strong case for the implementation of a *sui generis* food GI system in Australia. The Australian food industry, particularly regional food producers, is ready and interested in implementing a food GI system. Without a food GI system, the identification and protection of the connection between Australian regional food and origin will continue to be inadequately provided for under current consumer protection, passing off and trademark laws. Australia will continue to lose the assets that it has in Australian regional names and its regionality, placing it in a vulnerable position at both a national and an international level at a time when origin of food is a valuable quality indicator and local and authentic regional food is highly sought after. This thesis has demonstrated the worth of using food GIs on food products to make an origin claim that is regulated in the context of a *sui generis* food GI system.
Figure A.1: Wine GI zones of Australia

Source: Wine Australia (8 November 2017),
Annex II: Wine GI Regions of Australia

Figure A.2: Wine GI regions of Australia

Source: Wine Australia (8 November 2017),
Figure A.3: Wine GI regions of South Australia

Source: Wine Australia (8 November 2017),
Annex IV: Translated Participant Information Sheet

UNIVERSITA’ di ADELAIDE

Comitato per le Ricerche sui Diritti Morali Umani (CRDMU)


Ricercatrice: Paula Zito

Candidata: Professoressa Associata Melissa deZwart (Ispettrice Principale della Ricercatrice)

Informazioni sul Progetto

Questo progetto serve a determinare se potrebbe essere utile all’Australia espandere l’uso e la registrazione delle Indicazioni Geografiche (IG) da vini ed alcolici a cibi, prodotti agricoli ed altri prodotti artigianali, come nel caso della Comunita’ Europea. La ricercatrice ha scelto tre zone geografiche locali del Sud Australia: quali Barossa Valley, Mc Laren Vale e le colline di Adelaide, dove c’è’ abbondanza di cibi, prodotti agricoli ed altri prodotti artigianali ben conosciuti, che potrebbero ottenere molto beneficio dall’espansione delle IG. A questo fine, vorrebbe fare dei paragoni con tre regioni italiane assai simili: quali Piemonte, Emilia Romagna e Toscana. Queste tre regioni, infatti, sono tra le prime dieci in Italia nella registrazione di cibi e prodotti agricoli. Il progetto vuole dimostrare come l’uso delle IG ha aiutato la promozione di prodotti e regioni italiane e, allo stesso tempo, ha aiutato i produttori ad essere più conosciuti ed a migliorarne la qualita’. Piu’ importante ancora, ha eliminato la diffusione di possibili imitazioni dei prodotti. Questi fattori dovrebbero, pertanto, favoreggiare l’espansione delle IG in Australia.

Un colloquio potrebbe durare da una a una ora e mezza e sara’ registrato e trascritto. Se lei lo desidera, potra’ controllare la trascrizione del colloquio per verficarne l’accuratezza. Tutto il materiale del colloquio, sara’ tenuto, con massima sicurezza, dal Reparto Legge dell’ Universita’ di Adelaide, con solo accesso, ai dati originali, alla Ricercatrice del Progetto stesso ed alla Candidata (Ispettrice Principale della Ricercatrice).

Il colloquio sara’ usato per facilitare altre ricerche future e le informazioni da lei fornite saranno usate nella compilazione di pubblicazioni, gazette e libri. Se lei desidera che la sua contribuzione rimanga anonima, la preghiamo di farcelo notare spuntando la casella apposita del Modulo Consensuale allegato. Se sceglie questa opzione, cancelleremo tutto cio’ che potrebbe identificare e lei e il suo impiego.

Lei potra’ ritirare la sua contribuzione dalla ricerca qualora lo ritenesse necessario, fino al momento delle pubblicazioni, notificando la Ricercatrice oppure la Candidata sotto elencata.
Se ha delle lagnanze su come questa ricerca è stata condotta, la preghiamo di fare riferimento al Modulo Lagnanze allegato, che offre informazioni in merito.

**Avvocato Paula Zito**

Insegnante Associata, Candida PhD

Reparto Legge, Università di Adelaide, North Terrace, Adelaide SA 5005

Email: paula.zito@adelaide.edu.au

Tel: (08) 8313 5304

**Professoressa Associata Melissa deZwart**

Reparto Legge, Università di Adelaide, North Terrace, Adelaide SA 5005

Email: melissa.dezwart@adelaide.edu.au

Tel: (08) 8313 5304
Annex V: Translated Consent Form

UNIVERSITA’ di ADELAIDE

Comitato per le Ricerche sui Diritti Morali Umani (CRDMU)

MODULO CONSENSUALE

1. Dopo aver letto il foglio allegato, accetto di partecipare nel progetto seguente:


Numero di Matricola

Per i Valori Morali: HP-2013-075

2. Per tutto ciò’ che mi riguarda, il progetto mi e’ stato spiegato dalla ricercatrice. Pertanto, do il mio consenso spontaneamente.

3. Sebbene io capisca lo scopo di tale progetto, mi e’ stato spiegato comunque che il mio aiuto non mi apporterebbe alcun beneficio personale.

4. Mi e’ stato inoltre spiegato che, sebbene le informazioni ottenute durante tale studio potrebbero essere pubblicate, io non saro’ identificato e nessun risultato personale sara’ rivelato.

5. Capisco che potro’ ritirarmi da questo progetto qualora lo desiderassi.

6. Accetto che il colloquio sia registrato/filmato.(spuntare)

Si’ O No O

7. Sono consapevole che dovro’ tenere una copia compilata di questo Modulo Consensuale e del Foglio Informazioni allegato.

Partecipante da compilare:

Nome:________________ Firma:___________________Data:______________

Ricercatrice/Testimone (da compilare):

Ho descritto lo scopo della ricerca a: (inserire il nome del partecipante)________________________

e sono dell’opinione che abbia capito la mia descrizione.

Firma:_______________ Titolo:_______________Data:_______________
Annex VI: Translated Independent Contacts and Complaints Procedure Sheet

UNIVERSITA’ di ADELAIDE

Comitato per le Ricerche sui Diritti Morali Umani (CRDMU)

Questo documento è’ per i partecipanti al progetto ricerca

INFORMAZIONI SU CHI METTERSI IN CONTATTO IN CASO DI LAGNANZE SUL PROGETTO

Lo studio seguente è’ stato revisionato ed approvato dal Comitato per le Ricerche sui Diritti Morali Umani dell’Universita’ di Adelaide:


Numero di Matricola: HP-2013-075

Il Comitato per le Ricerche sui Diritti Morali controlla tutti i progetti ricerche da esso approvati. Il comitato considera assai importante il fatto che coloro che partecipano ai progetti approvati abbiano l’ opportunità di poter riportare lagnanze e preoccupazioni sulle ricerche indipendentemente e confidenzialmente.


1. Se ha delle domande o preoccupazioni sugli aspetti pratici della sua partecipazione in questo progetto oppure ha delle lagnanze riguardo questo progetto, e’ pregato di mettersi in contatto con la co-ordinatrice del progetto:

   Nome: Professoressa Associata Melissa deZwart
   Reparto Legge, Universita’ di Adelaide
   North Terrace, Adelaide SA 5005
   Email: Melissa.dezwart@adelaide.edu.au
   Telefono: (08) 8313 5304

2. Se desidera parlare con una persona indipendente riguardo:

   • lagnanze, oppure
   • preoccupazioni sulla condotta del progetto, oppure
   • le regole che l’Universita’ segue in ricerche che concernono partecipanti, oppure
   • i suoi diritti come partecipante,
e’ pregato di mettersi in contatto con il Segretariato del Comitato per le Ricerche sui Diritti Morali Umani, telefono (08) 8313 6028) oppure scrivendo a hrec@adelaide.edu.au
Annex VII: Participant Information Sheet

Participant Information Sheet for Geographical Indications: What Is Their Worth? A Comparison of Geographical Indication Registrations Between Australia And Italy Project

Researcher: Paula Zito

Applicant: Associate Professor Melissa deZwart (Researcher’s principal supervisor)

Project Information

This Project aims to determine whether it would be worthwhile for Australia to expand its Geographical Indication (GI) usage, and registrations, from wines and spirits to food, agricultural products and other artisan products, as has been the trend in the European Community. The Researcher has chosen three local South Australian areas where there is an abundance of well-known food, agricultural products and artisan products that could benefit from such GI expansion: Barossa Valley, McLaren Vale and the Adelaide Hills. These areas are compared with three similar geographical areas in Italy: Emilia-Romagna, Piemonte and Toscana that are areas among the top 10 highest food and agricultural product registrations in Italy. The Project looks at how using a GI has helped promote the products and areas in Italy, assisted the producers increase the awareness and quality level of their products and has assisted with eliminating imitation products being made available, favouring a move towards GI expansion in Australia.

An interview may take between one and two hours to conduct. Interviews will be recorded and transcribed. If you wish, you can see the transcription of the interview to check for its accuracy. Interview material will be kept securely at the University of Adelaide Law School and only the Project Researcher and Applicant (the Researcher’s primary supervisor) will have access to the original data.

Your interview will be used as part of ongoing research and information you give may be used in the publication of journal articles and books. If you wish your contribution to be anonymised, please indicate this by ticking the relevant box on the Consent Form accompanying this Information Sheet. Should you choose this option we will strip any identifying information about you or your place of employment from any quotes used.

You may withdraw from the research at any time up to publication by notifying the Researcher or Applicant below. If you have any complaint about the conduct of this research, please see the attached Complaints Sheet which gives information on who to contact.

Paula Zito

Associate Teacher, PhD Candidate
Law School, The University of Adelaide, North Terrace, Adelaide SA 5005
Email: paula.zito@adelaide.edu.au
Telephone: 0409 475 123

Associate Professor Melissa deZwart
Law School, The University of Adelaide, North Terrace, Adelaide SA 5005
Email: melissa.dezwart@adelaide.edu.au
Telephone: (08) 8313 5304
Annex VIII: Consent Form

Human Research Ethics Committee (HREC)

CONSENT FORM

I have read the attached Information Sheet and agree to take part in the following research project:

<table>
<thead>
<tr>
<th>Title:</th>
<th>Geographical Indications: What is their worth? A comparison of Geographical registrations between Australia and Italy.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ethics Number: Approval</td>
<td>HP-2013-075</td>
</tr>
</tbody>
</table>

I have had the project, so far as it affects me, fully explained to my satisfaction by the research worker. My consent is given freely.

Although I understand the purpose of the research project it has also been explained that involvement may not be of any benefit to me.

I have been informed that, while information gained during the study may be published, I will not be identified and my personal results will not be divulged.

I understand that I am free to withdraw from the project at any time.

I agree to the interview being audio/video recorded. Yes ☐ No ☐

I am aware that I should keep a copy of this Consent Form, when completed, and the attached Information Sheet.

Participant to complete:

Name: __________________ Signature: __________________

Date: __________________

Researcher/Witness to complete:

I have described the nature of the research to __________________

(print name of participant)

and in my opinion she/he understood the explanation.
Signature: ___________________ Position: ______________________
Date: _____________________
Annex IX: Independent Contacts and Complaints Procedure Sheet

The University of Adelaide

Human Research Ethics Committee (HREC)

This document is for people who are participants in a research project.

CONTACTS FOR INFORMATION ON PROJECT AND INDEPENDENT COMPLAINTS PROCEDURE

The following study has been reviewed and approved by the University of Adelaide Human Research Ethics Committee:

<table>
<thead>
<tr>
<th>Project Title:</th>
<th>Geographical Indications: What is their worth? A comparison of Geographical Indication registrations between Australia and Italy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Approval Number:</td>
<td>HP-2013-075</td>
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</tbody>
</table>

The Human Research Ethics Committee monitors all the research projects which it has approved. The committee considers it important that people participating in approved projects have an independent and confidential reporting mechanism which they can use if they have any worries or complaints about that research.

This research project will be conducted according to the NHMRC National Statement on Ethical Conduct in Human Research (see http://www.nhmrc.gov.au/publications/synopses/e72syn.htm)

1. If you have questions or problems associated with the practical aspects of your participation in the project, or wish to raise a concern or complaint about the project, then you should consult the project co-ordinator:

<table>
<thead>
<tr>
<th>Name:</th>
<th>Associate Professor Melissa deZwart</th>
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<tbody>
<tr>
<td></td>
<td>Law School</td>
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<td>The University of Adelaide</td>
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<td>North Terrace</td>
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<td></td>
<td>Adelaide SA 5005</td>
</tr>
<tr>
<td></td>
<td>Email: <a href="mailto:melissa.dezwart@adelaide.edu.au">melissa.dezwart@adelaide.edu.au</a></td>
</tr>
</tbody>
</table>

| Phone: | (08) 8313 5304 |

2. If you wish to discuss with an independent person matters related to:
• making a complaint, or
• raising concerns on the conduct of the project, or
• the University policy on research involving human participants, or
• your rights as a participant,

contact the Human Research Ethics Committee’s Secretariat on phone (08) 8313 6028 or by email to hrec@adelaide.edu.au
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Wine Australia GI zones and regions <https://www.wineaustralia.com/en/Production%20and%20Exporting/Register%20of%20Protected%20GIs%20and%20Other%20Terms/Geographical%20Indications.aspx>


### H. Conference Papers


Dr Danny Friedmann, ‘TPP’s coup de grâce for the shield against becoming generic: Trademark system victorious as Geographical Indication system,’ (Paper presented at the EU Centre for Global Affairs, The University of Adelaide, Luncheon Discussion, ‘What’s in a Name? Geographical Indications.’
How are they handled in the Trans-Pacific Partnership (TPP) and implications for the EU/Australia FTA? Adelaide, South Australia 28 October 2016


I. Interviews

Interview with Jan Angas, Proprietor and Producer, Hutton Vale Lamb, Margaret Lehmann, Director, Peter Lehmann Wines, Peter Wall AM, Non Executive Director, LogiCamms and Ex-Director, Yalumba Family Vigneron 1849 (Tanunda, Barossa Valley, South Australia, 17 February 2014)

Interview with Kris Lloyd, Manager and Head cheese-maker, Woodside Cheese Wrights, (Woodside, Adelaide Hills, South Australia, 24 February 2014)

Interview with Maggie Beer, Proprietor ‘Maggie Beer’s Farm Shop’ and ‘Maggie Beer Products’, (Pheasant Farm, Nuriootpa, Barossa Valley, 25 February 2014)

Interview with Stephan Knoll MP, Co-Proprietor, Schulz Butchers Angaston and Barossa Fine Foods, (Angaston, Barossa Valley, South Australia, 25 February 2014)

Interview with Jess Greatwich, Manager, Barossa Farmers Market, (Angaston, Barossa Valley, South Australia, 25 February 2014)
Interview with Stephan Knoll MP, Co-Proprietor, Schulz Butchers Angaston and Barossa Fine Foods, (Angaston, Barossa Valley, South Australia, 25 February 2014)

Interview with Victoria McClurg, Proprietor, Barossa Valley Cheese Co, (Angaston, Barossa Valley, South Australia, 25 February 2014)

Interview with Paul Henry, Creative Director, Tasting Australia, and Director, Winehero Australia, (Adelaide, 3 March 2014)

Interview with Silvia Estrada-Flores, Project Manager-Competitive Foods, Food South Australia, (Adelaide, South Australia, 12 March 2014)

Interview with Claire Wood, Proprietor ‘Careme Pastry’, (Tanunda, Barossa Valley, South Australia, 26 March 2014)

Interview with Michael Wohlstadt, Barossa Heritage Pork and Chairman of Barossa Food Inc, (Barossa Valley, 2 April 2014)

Interview with Corey Fechner, Co-Proprietor APEX Bakery, (Tanunda, Barossa Valley, South Australia, 2 April 2014)

Interview with James March, CEO of Barossa Grape and Wine Association Inc, (Tanunda, Barossa Valley, South Australia, 2 April 2014)

Interview with James March, CEO, Barossa Grape and Wine Authority, (Tanunda, Barossa Valley, South Australia, 2 April 2014)

Interview with Sheree Sullivan, Proprietor and Head cheese-maker, Udder Delights, (Hahndorf, Adelaide Hills, South Australia, 7 April 2014)

Interview with Saskia Beer, Proprietor and Producer of Saskia Beer’s Farm Produce, (Nuriootpa, Barossa Valley, South Australia, 7 May 2014)

Interview with Dr Angela Heuzenroeder, Food historian and author of ‘Barossa Foods’, (Tanunda, Barossa Valley, South Australia, 7 May 2014)

Interview with Matteo and Fiona Carboni, Owners of Casa Carboni, Italian Cooking School & Enoteca, (Angaston, Barossa Valley, South Australia, 7 May 2014)

Interview with Egidio Fiandino, Director of Fattorie Fiandino, (Saluzzo, Piedmont, Italy, 9 September, 2014) and Fiorenzo Giolitto, Director of Giolitto Formaggi, (Bra, Piedmont, Italy, 11 September, 2014)

Interview with Luigi Allasia, Director of Prosciutto di Cuneo, and majority holder in the Consorzio di Tutela di Prosciutto di Cuneo for the Cuneo province, (Lagnasco, Piedmont, Italy, 10 September 2014)
Interview with Dr Matteo Ascheri, Cantine Ascheri Giacomo S.A.S., (Bra, Piedmont, Italy, 11 September 2014)

Interview with Fiorenzo Giolitto, Director of Giolitto Formaggi, (Bra, Piedmont, Italy, 11 September, 2014)

Interview with Francesca Guidetti, Consorzio del Prosciutto di Parma PDO, (Ruliano, Langhirano, Parma, Emilia-Romagna, 16 September 2014)

Interview with Acetaia Villa Bianca, Famiglia Biancardi, (Modena, Emilia-Romagna, Italy, 17 September 2014)

Interview with Andrea Galeotto, Director of Consorzio Produttori Antiche Acetaie, (Modena, Emilia-Romagna, Italy, 17 September 2014)

Interview with Gianluigi Zenti, Executive Director, Academia Barilla, (Parma, Emilia-Romagna, Italy, 18 September 2014)

Interview with Mauro Rosati, General Director, Qualivita, (Siena, Tuscany, Italy 19 September 2014)

Interview with Andrea Righini, Director of Consorzio di Tutela Pecorino Toscano PDO, (Grosseto, Italy, 22 September 2014)

Interview with Cristiano Bruni, Director of Tenute Bruni, (Poggio La Mozza, Grosseto, Tuscany, Italy, 23 September 2014)

Interview with Massimo Felice Neri, President of OL.MA, producer of Olio Extravergine di Olive Toscano PGI and member of the Consorzio per la Tutela dell’Olio Extravergine di Oliva Toscana IGP, (Montepascali Scalo, Grosseto, Italy, 23 September 2014)