

Executive Summary

Recommendations for an Australian Food Geographical Indications Framework

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January 2020

The current *Australia European Union Free Trade Agreement* (AUSEU FTA) negotiations present an opportunity for the Australian government to consider whether there are any Australian regional names that Australia would like protected from the European Union (EU) as Geographical Indications (GIs) in relation to food products. By considering Australian regional names that are frequently used by food producers and traders on food labels to make an origin claim (Regional Branding), such as Barossa Valley, Mornington Peninsula, King Valley, Moreton Bay to name just a few, Australia could seek protection of those names as food GIs from the EU. Moreover, the current negotiations provide an occasion for the Australian government and food industry to consider the worth of an Australian food GI framework to protect the connection between Australian regional food and origin, as well as the assets that Australia has in regional names.

There is a strong case for the implementation of an Australian food GI framework at a local, national and international level. At a local and national level, an Australian food GI framework would assist the Australian food industry with catching up with the sort of provenance branding and regional integrity requirements expected in the wine-industry pursuant to the Australian wine GI framework. It would overcome deficiencies of current laws and regulations that regulate the usage of Regional Branding on food labels by diligently regulating that there is a connection between food and origin *before* Australian food GIs can be used on food labels to make an origin claim. A food GI framework would protect the assets that Australia has in Australian regional names that are used as identifiers of food products that have a clear and strong connection with Australian regions. It would do this by providing clear *ex ante* guidance to food producers and traders as to when Regional Branding can be used on food labels to make an origin claim, and would make it an automatic infringement where Australian regional names were used on food products that lack a clear connection with Australian regions, regardless of whether the usage was misleading or deceiving or made in good faith. An Australian food GI framework would therefore bring the level of protection provided to Regional Branding used on food labels to the same level as currently provided to Regional Branding used on wine labels pursuant to the Australian wine GI framework, doing away with the differentiation in the levels of protection that exist at the moment.

At an international level, an Australian food GI framework would protect the connection between Australian regional food and origin, and Australia's regionality, by effectively regulating that Australian regional names are not used on food products made outside of Australia that lack a clear and strong connection with the Australian region being claimed on the food label. An Australian food GI framework would place Australia in a stronger international trading position by providing a basis for Australia to obtain protection of Australian food GIs from trading partners. It would also provide trading partners with reassurance that Australia is ready and willing to protect food GIs pursuant to a dedicated GI framework. It would send a clear message to trading partners that Australia places significance on provenance of food, culture and traditions, and processes and methods used to make food products, by having a dedicated framework that protects the connection between food and origin.

The sooner the Australian government considers implementing a food GI framework, the stronger its position will be in negotiating GI protection with the EU and with many of its neighbouring countries that are already on the food GI protection radar.

These include China, Japan, Singapore, Vietnam, India, New Zealand and South Korea. By having its own food GI framework, Australia demonstrates to neighbouring countries that Australian food exporters are ready and willing to protect their GIs in exchange for reciprocal GI protection of Australian GIs and access to their markets. Therefore, an Australian food GI framework 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 also be in a stronger position to trade and negotiate GI usage by having contemplated and implemented an Australian food GI framework that caters for Australia's food industry and trading needs. In the absence of designing and implementing a food GI framework 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 trading partners' needs and adopting those countries' rules and regulations.

In sum, the current AUSEU FTA negotiations present an exciting opportunity for the Australian government to consider the value of an Australian food GI framework and the benefits that it could bring to the Australian food industry at a local, national and international level. By thinking *locally* in terms of the distinctive regional qualities of Australia's food products and implementing a food GI framework to protect Australia's regionality and Australian regional names, Australia could act *globally* in seeking GI protection worldwide for Australian food GIs. This would have far-reaching positive consequences for Australian regions, food producers and the food industry.

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**Frequently Asked Questions about Food Geographical
Indications and Their Worth for Australia**

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What is a food Geographical Indication (GI)?

A GI is an indicator that identifies and protects goods (such as 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 *Agreement on Trade Related Aspects of Intellectual Property Rights 1994 (TRIPS Agreement)* to which Australia is a Member:

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.

How does Australia protect GIs?

In an international context, as a Member to the TRIPS Agreement, Australia currently provides protection of GIs in two main ways:

- Pursuant to the Australian wine GI framework in relation to wines and grape products; and
- As registration of certification trade marks (CTMs) in relation to GIs for all other products including food products.

Are CTMs and GIs the same thing?

No. While trade marks and GIs are both badges of origin, a trade mark that includes a regional name that is used on food labels does not necessarily 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 a food label 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. Furthermore, while a CTM might identify the geographical origin of a food product, a CTM does not regulate the usage of a regional name that is part of the CTM, generally. Rather, it only regulates the usage in respect of the food products to which the CTM relates and only within the ambit of the rules attaching to the CTM. Unlike GIs, a CTM is a private right binding only its registered users. Therefore, CTMs do not stop other food producers from using the geographical location name in a CTM on their food products or obtaining trade mark registration of a mark that includes the same regional name.

What is the Australian wine GI framework?

Australia has had a dedicated wine GI framework since 1994. Wine Australia currently regulates the Australian wine GI framework pursuant to the *Wine Australia Act 2013* (Cth), the *Wine Australia Regulations 2018* (Cth) and the Label Integrity Program. The Australian wine GI framework provides clear ex ante guidance to grape growers and wine producers that 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. It regulates that wine is connected to the GI area in this manner *before* a wine GI can be used on a wine label.

Does Australia have a similar GI framework for food?

No. Australia does not have a similar GI framework for food to the Australian wine GI framework. Instead, there is a patchwork of Australian laws and regulations that attempt to regulate the usage of regional names on food labels to make an origin claim (Regional Branding).

What are the current Australian laws and regulations regulating 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* that is set out in Schedule 2 of the *Competition and Consumer Act 2010* (Cth)
- Passing off and extended passing off (although the latter is yet to be implemented by Australian courts)
- Trade mark laws under the *Trade Marks Act 1995* (Cth).

Do these laws and regulations offer adequate protection to the connection between food and origin and the value that exists in Australian regional names used in the context of Regional Branding on food labels?

No. These laws and regulations are deficient and inadequately protect the connection between food and origin, as well as the value that exists in Australian regional names used on food labels to make origin claims.

How are Australian laws and regulations deficient in regulating Regional Branding on food labels?

They are deficient in the following 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.

What is the effect of these deficiencies?

The 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. Food producers who use Regional Branding in this way take advantage of, and free-ride on, the reputation that Australian regions have for

producing quality authentic regional food products and the value that accordingly exists in the relevant regional names.

What problems arise from the deficiencies with current Australian laws and regulations?

Usage of Regional Branding and free-riding by food producers causes the following four main problems:

- 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.

Why is there value in protecting the connection between food and origin and the usage of Australian regional names on food labels?

Australian food producers and traders realise the intangible value that exists in using Australian regional names on food labels. This value exists primarily because the provenance of food is a substantive issue for many consumers. There is significant consumer demand to have correct and specific information about the *regional* origin of food included on food labels. This is different to Country of Origin Labeling (CoOL) that identifies where a food products is 'Made in Australia' or is made using a percentage of Australian ingredients. In many instances, consumers want to know from which specific Australian region food originates so that they can support local producers and purchase authentic regional food products. The CoOL framework does not identify regional origin of food products for consumers.

Can consumers trust food labels that include Regional Branding to identify from which Australian region their food originates?

No. Owing to the deficiencies with current Australian laws and regulations that regulate the usage of Regional Branding on food labels, 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. In many instances, food labels that include Regional Branding fall short of being misleading or deceiving because the actual place of production of the food product is disclosed elsewhere on the food label. This does not overcome the lack of connection between food and origin claimed on the front label and associated problems that arise from such usage of Regional Branding. This is a significant deficiency of current Australian consumer protection laws, particularly pursuant to the Place of Origin Labeling (PoOL) framework, and trade mark laws.

Does the Australian Competition and Consumer Commission (ACCC) effectively regulate the usage of Regional Branding on food labels?

No. 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 *Australian Consumer Law*. 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 *Australian Consumer Law*. This is inadequate regulation and protection of the connection between Australian regional food and origin.

Can consumers trust wine labels that include Regional Branding to identify from which Australian region their wine originates?

Yes. Wine Australia, pursuant to the Australian wine GI framework, regulates that wine is connected to the region claimed *before* an Australian wine GI can be used on a wine label. The Australian wine GI framework provides clear rules regarding description and presentation of wine and makes it clear that it will be false, misleading and deceptive if a GI is misused *even if* it indicates the country, region or locality in which it is located. Therefore, no disclosure of actual place of production or good faith defence is available for GIs. If a wine GI has been misused, that is enough to require protection pursuant to the Australian wine GI framework without the need to prove that the GI usage was misleading or deceiving.

How can GIs assist to overcome the deficiencies and problems with current Australian laws and regulations relating to Regional Branding of food products?

Food GIs can assist by identifying and protecting the connection between food and origin. A food GI framework is dedicated to identifying and protecting the connection between food and origin. A GI framework is more effective in protecting the connection between food and origin, and the value that exists in Australian regional names used on food labels to make origin claims, 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.

What would a food GI framework bring to the Australian food industry?

Having a dedicated Australian food GI 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 to make an origin claim. Food producers and traders would need to comply with one legal framework rather than three different areas of laws and regulations. Where a food GI would be used on a

food product that does not originate from the region claimed, that would be an automatic infringement regardless of whether the usage of the regional name fell short of being misleading or deceiving.

Could an Australian food GI framework be as effective as the Australian wine GI framework?

Yes. An Australian food GI framework would assist the Australian food industry with catching up with the Australian wine industry by bringing the protection of Australian regional names used on food labels to make an origin claim to the same level as that currently provided to Australian wine GIs.

Could an Australian food GI framework also be valuable at an international level?

Yes. Australian regional names are often used on food products that are made outside of Australia to denote an origin claim. This is notwithstanding that in many instances the food products have no connection with the region claimed. In many instances the usage of Regional Branding by internationally based food producers falls short of being misleading or deceiving because the actual place of production has been disclosed. Having an Australian food GI framework would make it an automatic infringement if an Australian food GI was used on a food product that was not connected to the Australian region claimed regardless of whether it was misleading or deceiving or used in good faith.

Do any of Australia's neighbouring countries protect food GIs?

Yes. Many of Australia's neighbouring countries such as China, Thailand, Japan, Malaysia, India, Indonesia and Singapore protect food GIs at a national level pursuant to a dedicated food GI framework. They seek to trade with countries that provide food GI protection pursuant to a dedicated GI framework so to achieve the same high-level food GI protection at an international level as that provided pursuant to their national framework. Many of these countries place significant emphasis on culture and traditions, and processes and methods used to make food products, and are seeking out stories of provenance from their trading partners as well as frameworks that identify and protect provenance.

Have any of Australia's neighbouring countries entered into negotiations with the European Union (EU) in relation to food GI protection?

Yes. Many of Australia's neighbouring countries are negotiating with, or have completed negotiations with, the EU in relation to Free Trade Agreements (FTAs) and Bilateral Trade Agreements (BTAs) that provide for food GI protection. These include the following:

- New Zealand – Free Trade Agreement with EU negotiations ongoing – 7th round in 2020
- Vietnam – signed a Trade Agreement and an Investment Protection Agreement on 30 June 2019 that are yet to enter into force

- Japan – Economic Partnership Agreement with the EU entered into force on 1 February 2019
- Singapore – Free Trade Agreement with the EU entered into force on 8 November 2019 and the Investment Protection Agreement with EU signed on 19 October 2018 but not yet in force
- China – Negotiations on bilateral agreement with EU to protect 100 EU GIs in China and 100 Chinese GI in the EU concluded on 6 November 2019 and expected to enter into force before the end of 2020
- South Korea – Free Trade Agreement ratified in December 2015

What are the impacts of Australia’s neighbouring countries entering into food GI protection agreements with the EU?

Where Australia’s neighbouring countries agree to protect EU food GIs pursuant to FTAs or BTAs with the EU, that are also terms that Australian food producers use on food products that they export to those countries, this has the potential to impose trade restrictions on Australian food producers in that they will not be able to use the EU food GI on food products that they export to those countries. Moreover, Australian neighbouring countries that protect food GIs pursuant to their own national frameworks, and that receive food GI protection from the EU, means that these countries are more likely to demand protection of their food GIs from Australia as GIs pursuant to a dedicated GI framework, not as CTMs.

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Recommendations for an Australian Food Geographical Indications Framework

1.1. Background

From 2013-2017, I undertook my Doctor of Philosophy at the University of Adelaide on the topic *Geographical Indications: What is Their Worth? A Comparison of Geographical Indication Registrations Between Australia and Italy*. The University of Adelaide conferred my Doctorate in March 2018.¹

1.2. Thesis

In my thesis, I explore the worth of using food Geographical Indications (GIs) on food labels to make an origin claim in the context of a *sui generis* (dedicated) food GI framework. I assess the value of using a dedicated food GI framework 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.

1.3. Fieldwork

In 2014, I undertook fieldwork in Italy and South Australia. I chose Italy as a case study of a European country that has been operating under a food GI framework 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 framework).² Italy currently has 299 food GI registrations,³ 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 framework.

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

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² *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').

³ This number is current as at January 2020. Sourced from *Qualivita* <<https://www.qualivita.it/statistiche-italia/>>.

- 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 framework 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 framework in protecting the connection between food and origin and what lessons could be learned from the EU–Italian food GI framework in considering implementation of a dedicated food GI framework 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 dedicated food GI framework.

1.3.1. Findings from the Italian and South Australian fieldwork

The Italian fieldwork revealed that a dedicated food GI framework 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 framework.

The South Australian fieldwork revealed that regional food producers who are based in the Barossa Valley and Adelaide Hills are interested in a dedicated food GI framework. They would like to see a similar framework implemented for the food industry as the Australian wine GI framework. 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 framework.

1.4. Case for a Dedicated Food GI framework Presented in the Thesis

In my thesis, I analyse the deficiencies of current consumer protection, passing off and trademark laws that inadequately protect the connection between food and origin.⁴ I explain that the deficiencies of these laws and regulations allow food producers and traders to use regional names on food labels to make an origin claim (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

⁴ For more information on my analysis and findings, refer to my series of articles ‘Australian Laws and Regulations on Regional Branding on Food and Wine Labels: Part 1 and 2’, *Australian Intellectual Property Journal* Vol 29/2 and 29/3, 2019.

Branding on food products that do not have any connection with the named region, due to the deficiencies of current consumer protection laws.⁵ In the absence of a complaint being made to the Australian Competition and Consumer Commission (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.

I explain the deficiencies of current trademark laws.⁶ In most instances, 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, generally, 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.

I also explore the limitations of Certification Trade Marks (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, CTMs 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. I identify 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

⁵ Consumer Protection Laws under the *Australian Consumer Law* set out in Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

⁶ *Trade Marks Act 1995* (Cth).

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, Australian courts are 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 recommend that a dedicated food GI framework be implemented in Australia. A dedicated food GI framework identifies food that is qualitatively connected to a region and protects that connection. Through this primary focus, a food GI framework provides protection within a legal framework to the value that exists in Australian regional names, regulating how food producers use them on food labels.

By implementing a dedicated food GI framework, 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 framework. There is currently a clear difference in the treatment and protection of Australian regional names under Australian laws and regulations. The Australian wine GI framework 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 framework, there is *ipso facto* an infringement. The *Wine Australia Act 2013* (Cth) (WA Act) and the *Wine Australia Regulations 2018* (Cth) (WA Regulations) 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 Label Integrity Program (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 framework offers valuable insight into the considerations that must be made by the Australian government and the Australian food industry in implementing a food GI framework. However, the Australian wine GI framework is a limited GI framework 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 framework 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, it prescribes that 85 per cent of grapes used to make a wine be sourced from the wine GI area. As discussed in section 1.7.1 of this document, I recommend that an Australian food GI framework go one step further than the Australian wine GI framework and provide two levels of GI protection that reflect the various ways in which Australian regional food can be connected to Australian regions.

In my thesis, I also explain 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—and I examine this in my thesis in the context of cheeses.

I recommend that a dedicated food GI framework is the ideal legal framework to identify how food is connected to origin and to protect that connection. This is because the central premise of a GI framework 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 pursuant to a dedicated GI framework. The protection afforded to GIs pursuant to a GI framework surpasses the protection that is otherwise available for GIs pursuant to a trademark framework. 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 framework criteria, there is *ipso facto* an infringement of the GI, regardless of whether the misuse

is misleading or deceptive. Thus, a dedicated food GI framework 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 pursuant to a GI framework. 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 dedicated food GI framework would be beneficial for the Australian food, agrifood and agricultural industries at an international level. GIs have become an important aspect of international trade, as is evident in the context of the current negotiations between Australia and the EU in relation to the *Australian European Union Free Trade Agreement* (AUSEU FTA). However, the EU is not Australia's only trading partner interested in food GI protection pursuant to a dedicated GI framework. Closer to home, many of Australia's neighbouring countries such as China, Japan, India, South Korea and Singapore are also seeking to trade with countries that provide food GI protection pursuant to a dedicated GI framework so to achieve the same high level food GI protection at an international level as that provided pursuant to their national framework. They are not only interested in Australian food producers' 'clean and green' image and satisfaction of quality standards, but are also very interested in knowing the story behind Australian food products. Many of these countries, such as China, place significant emphasis on culture and traditions, and processes and methods used to make food products, and are seeking out stories of provenance from their trading partners. They also want to trade with countries that have dedicated GI frameworks that identify and protect provenance. More and more countries want to know about the regional origin or provenance of their trading partners' food products and want to protect their own regionality. It is therefore important that the Australian government reconsider its traditional position on the protection of GIs for food products, so that the Australian agricultural and agrifood industries do not run the risk of missing out on trade opportunities with countries that support food GIs, including with some of Australia's neighbouring countries. In the absence of implementing a dedicated food GI framework, Australia sets potentially strong limits on the present or future protection of Australian food exports to Asia. 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. The sooner the Australian government considers implementing a food GI framework, the stronger its position will be in negotiating GI protection with its neighbouring countries. By having its own dedicated food GI framework, 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, my thesis discloses that there is a clear case for implementing a dedicated food GI framework in Australia.

1.5. Recommendations

As a result of my Doctorate, and ongoing work on food GIs since my Doctorate was conferred in March 2018, I make recommendations for the Australian government, regional food producers, Australian food, agrifood and agricultural industries on how a food GI framework can be tailored to cater for Australia's national and international GI needs and obligations. Specifically, in my thesis, 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 dedicated food GI framework. A dedicated food GI framework 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 dedicated food GI framework for Australia's regional food producers and the broader food, agrifood and agricultural industries, I have considered national and international laws, Intellectual Property, trade, political and cultural issues against the backdrop of significant, original fieldwork in Italy and South Australia.

In the following sections of this document, I discuss some of the competing interests that the Australian government will need to consider and work through to implement a food GI framework. It is imperative that all the stakeholders in a food GI framework in Australia have an equitable voice in the design and implementation of a food GI framework. 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 framework 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.

1.6. Consideration of Competing Interests

1.6.1. Food producers' interest in Regional Branding and food GIs

In the last three to four years, Australian 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 pursuant to 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 framework 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 framework 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 framework, would welcome a similar legal framework to the Australian wine GI framework 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 Country of Origin Labeling (CoOL) framework, the Place of Origin Labeling (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. 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 framework 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.

Most of the South Australian interviewees were familiar with the Australian wine GI framework and most see the worth of a GI framework 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 framework 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 framework 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 framework to protect the connection between food and origin and ensure that food GIs are only used on food products that meet the GI criteria pursuant to the GI framework. A food GI framework 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.

1.6.2. Consumer Interest in Regional Branding

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. 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. For example, the Government of South Australia has provided funding to initiatives such as the Barossa Trust Mark. Regional food producers and regional groups created the Barossa Trust Mark 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 pursuant to consumer protection laws. Further, the Barossa Trust Mark provides very limited protection when compared to the protection provided pursuant to a dedicated food GI framework.

Therefore, implementation of a food GI framework 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 framework is essential for consumers to understand what GIs represent and to appreciate the regulation that a GI framework provides to the connection between food and origin. Education should be provided prior to the implementation of a food GI framework so that consumers can understand the protection that a food GI framework provides to the connection between food and origin and the transparency that is provided by using food GIs on food labels.

1.6.3. International Trade Issues

As mentioned above in section 1.4, food GIs have become important trading concessions. Authenticity and 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, Japan, Singapore, the Republic of Korea and India. In the absence of protecting food GIs pursuant to a dedicated food GI framework, 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 dedicated food GI framework 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 dedicated GI framework that caters for Australia's food industry and trading needs. In the absence of designing and implementing a food GI framework 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 Comprehensive Economic Trade Agreement (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 pursuant to the AUSEU FTA. 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 framework can bring to Australia's regionality, food industry and export industry. Having a dedicated food GI framework 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 framework, 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.

1.7. Requirements for a Successful Australian Dedicated Food GI Framework

In this section, I recommend the key elements that are required for a successful Australian dedicated food GI framework. The Italian fieldwork provided insight into the elements that are required for a successful food GI framework, while the South Australian fieldwork provided insight into the elements that interviewees believed are needed for a successful food GI framework. In considering these elements, as well as the competing interests explained above, I recommend that an Australian dedicated food GI framework 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.

1.7.1. Two levels of GI protection

I propose that an Australian food GI framework 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 framework 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 pursuant to Regulation 26 of the *Wine Australia 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.⁷

The final percentage included in the food GI framework would need to be determined in consultation with regional food producers. I recommend that a standard percentage be included in the food GI framework 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 criterion encompasses the observations made during the South Australian fieldwork that South Australian regional food producers could not locally source all 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**

In addition to ingredients being locally sourced, a certain percentage of the food product’s production stages must occur within the GI region. This criterion reflects the South Australian fieldwork that revealed that, in some instances, not all stages of

⁷ *Wine Australia Regulations 2018* (Cth) reg 26.

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. 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 framework would need to be determined in consultation with regional food producers. I recommend that a standard percentage be included in the food GI framework 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 framework (see Figure 1).



Figure 1: PGI registration under the EU–Italian food GI framework 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 framework 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 framework 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 framework seal (see Figure 2).



Figure 2: PDO registration under the EU–Italian food GI framework seal

Source: http://www.salumi-italiani.it/UserFiles/contents/images/img261immagine1352909779PDO_PGI.png

The South Australian fieldwork revealed that most of the South Australian interviewees liked the concept of a food GI framework that provided different levels or tiers of protection. They viewed the PDO and PGI levels under the EU–Italian food GI framework as providing opportunities for more food producers to be able to be part of a food GI framework. 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 framework with two levels of GI protection would provide ‘true GI’ protection that is more consistent with the *Agreement on Trade Related Aspects of Intellectual Property Rights 1994* (TRIPS Agreement) definition of a GI pursuant to Article 22.1—rather than protection as an ‘indication of source’ provided by the Australian wine GI framework. Article 22.1 provides that:

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.*⁸

I also recommend that the scope of protection provided pursuant to the Australian food GI framework 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, pursuant to 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 pursuant to the WA Act and WA Regulations.

Similar to the Australian wine GI framework, I recommend that when a food GI is used by a food producer on a food product that does not meet the food GI framework 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 framework 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 framework operate in place of the PoOL framework. Given the deficiencies of this framework, a food GI framework 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 framework that provides legal protection and enforcement of that connection. This would also bring regulation of transparency on food labels regarding regional origin of food products to the same level as currently provided in the Australian wine industry using Australian wine GIs on wine labels pursuant to the WA Act, WA Regulations and LIP.

1.7.2. 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 framework. 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 framework. Most of the South Australian

⁸ *Agreement on Trade Related Aspects of Intellectual Property Rights 1994* (World Trade Organisation) Art 22.1.

interviewees endorsed the view that a food GI framework should be as inclusive as possible of regional food producers. As the Australian wine GI framework 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*.⁹ If the 'Barossa' wine zone boundary was used for a food GI framework 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 framework should only use the word 'region' in keeping with the food GI framework 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 framework should not include state GI boundaries because the food GI framework 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 framework does not promote regionality nor does it establish that food products have been made using locally sourced core ingredients, or within a region or made using traditional processes and methods. State boundaries would be too broad for the purposes of a food GI framework that protects the connection between regional food and origin.

⁹ Wine Australia GI zones and regions, <<https://www.wineaustralia.com/labelling/register-of-protected-gis-and-other-terms>> (current at November 2019).

A committee will need to be established to demark food boundaries, similar to the Geographical Indications Committee (GIC) established under the Australian wine GI framework. 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 framework, along with a main governing body of the food GI framework. 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 framework, the Australian wine GI framework provides some guidance as to the types of mechanisms that a food GI framework will need to implement to manage oppositions. For example, one of the main effects of the 2004 Australia-United States Free Trade Agreement (AUSFTA) on the Australian wine GI framework 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 *Australian Wine and Brandy Corporation Act 1980* (Cth) that resulted in a new subdivision dealing with objections to determinations of GIs based on pre-existing trademarks. These amendments were carried forward into sections 40RA to 40RC inclusive of the *Australia Grape & Wine Authority Act 2013* (Cth), now the WA Act, regarding the determination of wine GIs. I recommend that similar provisions be included in legislation relating to the Australian food GI framework. This will ensure that Australia's obligations under the AUSFTA are carried through to a food GI framework and that similar rules regarding pre-existing trademark rights are maintained under a food GI framework. Therefore, a food GI framework 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. Pursuant to section 61 of the *Trade Marks Act 1995* (Cth) (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, pursuant to 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 framework. 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.

1.7.3. The food GI framework must be regulated by one main governing body

I recommend that one main governing body regulate the Australian food GI framework. The Italian fieldwork revealed that it would be better to have one governing body monitoring a food GI framework 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 framework. Most of the South Australian interviewees were familiar with the Australian wine GI framework and they suggested that a governing body similar to Wine Australia is required to successfully regulate a food GI framework.

A food GI framework governing body must ensure that all criteria relevant to the food GI framework 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 framework, a food GI framework 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 framework 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 framework, 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 framework governing body must have the power to act when a food producer does not comply with the food GI framework and food GI label integrity program. Much like Wine Australia's powers pursuant to the WA Act, the food GI framework 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 framework must ensure that the integrity of the food GI framework is maintained at all times and that only food products that meet the GI framework 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 framework on the basis that there is proper regulation of the food GI framework that mitigates the risk of non-compliant food producers free-riding on the reputation of Australian food GI regions.

The food GI framework 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 framework 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 framework to ensure that the integrity of the food GI framework 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 framework. This will protect Australia's regionality and the Australian food industry.

1.7.4. Costs of a food GI framework

I recommend that Australian state and federal governments assist with funding an Australian food GI framework. Funding has been important in the establishment and development of the Australian wine GI framework and is equally important for the establishment and development of an Australian food GI framework. Both the Italian and South Australian fieldwork endorsed the need for government support and funding for a food GI framework to assist with covering the costs typically involved with a food GI framework. These include costs for:

- A food GI register and a registrar to administer it
- Maintaining a compliance unit to monitor obligations under a food GI framework
- Audits of individual food producers for compliance with the GI framework 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 framework, as long as the framework would value-add to Australian regions.¹⁰ Food GI frameworks 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 framework 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. A food GI framework 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 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 framework, 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 frameworks 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 framework will be less than other regions in South Australia that do not have as

¹⁰ Interview with Silvia Estrada-Flores, Project Manager-Competitive Foods, Food South Australia Inc, (Adelaide, South Australia, 12 March 2014).

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 framework.¹¹ 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 framework is already in existence, some costs can be saved in implementing a food GI framework. This is on the basis that ideas can be sourced from the Australian wine GI framework 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 framework as a point of reference, some costs and time in implementing a food GI framework will be saved. Although food GI boundaries will need to be broadened for the purposes of a food GI framework, 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 framework, the existence of the Australian wine GI framework 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 framework.

1.7.5. Education about the framework

I recommend that food industry organisations, producers and consumers receive education on what a food GI framework represents and how it works. Education is required as early on as possible in the process of implementing a food GI framework 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 framework. Education on a food GI framework 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 labels. Consumers must be educated about what a food GI framework 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.

¹¹ Wine Australia GI zones and regions, <<https://www.wineaustralia.com/getmedia/e2f60e4c-ad52-454e-a22e-eff6b5c729f9/Australian-Wine-Zones.pdf>> (current at November 2019).

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. 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 framework is implemented and provides economic benefits.

1.7.6. Foreign food GIs

If Australia agrees to protect foreign GIs under a food GI framework, I recommend that provisions be provided under an Australian food GI framework similar to those included in the WA Act and WA Regulations that provide for the determination of foreign GIs and translations in the context of the Australian wine GI framework. 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 framework, rather than as CTMs in the context of any FTAs. Any provisions included under a food GI framework 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 framework 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 Act were amended to implement the *Agreement between Australia and the European Community on Trade in Wine* (1994 Treaty) as part of the implementation of the Australian wine GI framework, 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'.¹² Pursuant to section 83A(2) of the Trade Marks Act, the owners of the 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.¹³ Section 83A applies to a registered trademark:

*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.*¹⁴

¹² Explanatory Memorandum, Trade Marks Amendment Regulations 2010 (No.1), Attachment A, 2.

¹³ *Trade Marks Act 1995* s 83A(2).

¹⁴ *Trade Marks Act 1995* s 83A(1).

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 framework. In the context of my thesis, 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 my thesis, in relation to food goods and services.¹⁵ Only usage of the South Australian Regions' 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 framework 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. While only usage of the South Australian Regions' names was focussed on, the research indicated that there are registered owners of names, trademarks and brands who will be affected by a food GI framework, should Australia decide to implement such a framework in the future. Further research would need to be carried out on the precise connection that the goods and services behind each name/trademark have to the corresponding

¹⁵ In relation to trade marks, the main classes of goods searched relating to 'food' are class 29 that includes: *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: *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: *Paper and cardboard; printed matter; bookbinding material; photographs; stationery; 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.*

geographical location. Such research would include looking at issues similar to those raised in the proposed criteria set out in section 1.7.1 above. Notwithstanding this further research required, it is anticipated that given the number of business names and trademarks identified that included the South Australian Regions' names in them, it is likely that a new food GI framework 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 Trade Marks Act would be required if Australia were to implement a food GI framework 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 framework.

In terms of whether a new food GI framework 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 framework legal framework, it is predicted that this will ultimately depend upon the reasons why Australia goes ahead with a food GI framework should Australia decide to do so. For example, depending on the negotiations of the AUSEU FTA, 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 framework 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 framework will be an important consideration to be made in the context of implementing an Australian food GI framework.

1.7.7. 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 framework that incorporates the elements recommended in this chapter. Regional food producer involvement and collaboration is critical in designing a food GI framework 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 framework depends on interested stakeholders working together to establish the rules and criteria relevant to a food GI framework. 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 framework, the criteria included in a food GI framework 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 framework 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 framework must never lose sight of protecting the connection between food and origin. This connection, and the regulation of it under a food GI framework, must never be compromised to enable as many food producers as possible to benefit from a food GI framework. 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 framework and that the quality of food products labelled with a food GI is consistent.

1.8. Concluding Comments

In making recommendations for the elements required for a successful Australian food GI framework, I have considered how a food GI framework 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 framework to overcome the deficiencies of current consumer protection, passing off and trademark laws and regulations. A food GI framework 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 framework. A food GI framework 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 framework 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 framework. 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 framework will place Australia in a stronger position in relation to FTAs and trade negotiations in which food GIs have become important trade concessions.

My Doctorate research and ongoing work on food GIs have demonstrated that there is a strong case for the implementation of a dedicated food GI framework in Australia. The Australian food industry, particularly regional food producers, is ready and interested in implementing a food GI framework. Without a food GI framework, 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. Overall, I recommend that using food GIs on food labels to make an origin claim in the context of a dedicated food GI framework would be a very worthwhile investment for the Australian food, agrifood and agricultural industries.

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