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## Pride and Profit: Geographical Indications as Regional Development Tools in Australia

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# Pride and Profit: Geographical Indications as Regional Development Tools in Australia

## **Abstract**

Geographical Indications (GIs) are intellectual property rights in placenames that evoke the typical qualities of agricultural products and foodstuffs that originate in particular districts. Presently, the EU is the dominant holder of protected GIs and the EU asserts that they are used extensively and effectively in EU countries as a rural and regional development tool. To date, Australia's response to GIs has largely been driven by perceptions of their impact upon trade gains and losses. Currently, Australia only has legal protection for wine-related GI's because of an agreement with the EU.

Given an increased focus on GIs internationally, particularly in China and India, we raise the question of whether Australia should more deeply consider a special regime for the legal protection of GIs in relation to agricultural products and foodstuffs more generally, something that has not been investigated to date because of Australia's negative attitude towards GI protection in international trade negotiations. This paper sets out the challenges and opportunities of considering GI development against the backdrop of Australia's regional, rural and remote diversity.

## **Keywords**

Geographical indications of origin, property rights, rural regional and remote development

## **Cover Page Footnote**

The authors would like to thank Diana Knight for her input into this paper.

## Introduction

Geographical Indications (GIs) are intellectual property rights that have their origin in 19<sup>th</sup> century Europe. The first multilateral treaty dealing with them dates back to 1883 (Paris Convention for the Protection of Industrial Property, March 20, 1883), with another important treaty being signed in 1958 (Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, October 31, 1958). But it was the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of April 15, 1994 that propelled GIs into the global limelight by way of creating standards for their protection. Ratification of the TRIPS agreement obliged governments to take positive action to protect GIs (Sell, 2003). For reasons of history the EU is the dominant holder of protected GIs. Countries such as France, Italy and Spain have national schemes of GI protection that go back more than a hundred years.

An EU GI scheme was introduced in 1992 for agricultural products and foodstuffs<sup>1</sup>. The utilisation of the scheme is not as great as it might be, but nevertheless as of June 2012 there were 1056 registrations under the scheme (Advisory Group International Aspect of Agriculture, 2012). That number will continue to grow as the European Parliament and European Commission continue to improve its operation through amendments to the regulatory framework, the most recent of which came into effect on 3 January 2013 (Regulation (EU) No 1151/2012 of 21 November 2012). Of particular note is the clear identification and inclusion of the rationale underlying the quality schemes, namely:

‘...to contribute to and complement rural development policy as well as market and income support policies of the common agricultural policy (CAP). In particular, they may contribute to areas in which the farming sector is of greater economic importance, and especially, to disadvantaged areas. (Regulation (EU) No 1151/2012, (4)).’

In other words, expanded GI registration schemes are designed to function as economic development tools for regional, rural and remote areas. The Advisory Group ‘International Aspect of Agriculture’ (2012) reported that 24 EU Member States and three non-EU countries (China, Columbia and India) have registered agricultural products and foodstuffs names in GI schemes. We anticipate that the prominence of European GI schemes as tools for rural development will lead

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<sup>1</sup> Regulation (EC) No 510/2006 of the Council on the protection of geographical indications and designations of origin for agricultural products and foodstuffs repealed and replaced Regulation (EEC) No 2081/92. Note also, Council Regulation 510/2006 repealed by EU Regulation No 1151/2012; end of validity of 510/2006 on 02/01/2013.

additional World Trade Organisation (WTO) member states to consider their adoption and/or expansion.

Australia's response to GIs has largely been driven by perceptions of possible trade gains and losses. Australia was one of the first countries to sign a bilateral agreement with the EU for the protection of GIs in the context of the wine trade<sup>2</sup>. However, in the context of the WTO's Doha Round, Australia has remained an opponent of the broader GI protection being proposed by the EU<sup>3</sup>. Australia sees trade risks, including the risk that some of the current WTO proposals for extended GI protection for products other than wine and spirits have the potential to disrupt trade in goods Australia presently supplies to third-party countries under genericised geographical terms (e.g., Feta or Parmesan for cheese). The right to use GIs as generic descriptors of certain kinds of goods remains the principal sticking point in the WTO GI agenda.

Despite Australia's opposition, would an extended GI scheme for agricultural products and foodstuffs be appropriate for its economy and agriculture? This is an especially relevant question in light of the vast proportions of rural and agriculturally diverse regions comprising Australia's landscape, and the recent EU emphasis of GI registration as a rural development tool.

Our purpose in this paper is to draw attention to another set of factors that are relevant to evaluating Australia's position on GI protection for products other than wine. Looking to the future of domestic Australian regional, rural and remote (RRR) development, we examine the arguments against Australia's adoption of the extended GI scheme for agricultural products and foodstuffs, and consider instead the possibility that Australia is better served by a specially designed GI system tailored to its own conditions. As we discuss in the next section, RRR areas face pressures of change that require creative policy responses. In this

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<sup>2</sup> The Agreement between the European Community and Australia on trade in wine, 1994; repealed and replaced by the Agreement between Australia and the European Community on trade in wine, 2008, in effect 2010.

<sup>3</sup> Other countries opposing extension include Argentina, Australia, Canada, Chile, Colombia, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, New Zealand, Panama, Paraguay, the Philippines, Chinese Taipei and the United States. They argue that the existing Art 22 level of protection is adequate. They caution that providing enhanced protection would be a burden and would disrupt existing legitimate marketing practices. They also reject the 'usurping' accusation particularly when migrants have taken the methods of making the products and the names with them to their new homes and have been using them in good faith. Brazil is included. See [http://www.wto.org/english/tratop\\_e/trips\\_e/gi\\_background\\_e.htm#protection](http://www.wto.org/english/tratop_e/trips_e/gi_background_e.htm#protection). China, along with Albania, Croatia, EU, Georgia, Guinea, Jamaica, Kenya, Liechtenstein, Madagascar, Sri Lanka, Thailand, Turkey and Switzerland submitted a draft decision to amend section 3 of TRIPS re extension in April 2011. See WTO TN/C/W/60; TN/IP/W/10/Rev.2.

context, it is important to consider whether an Australian GI system adapted to Australia's unique landscapes and regions might be an unexpectedly useful policy tool. The critical question we are asking is: *Can GI regulation bring greater economic benefits for RRR communities through linking people, places and products than current branding and marketing strategies alone?* This premise is one of the key arguments of the Food and Agriculture Organisation of the United Nations (FAO) guide for promoting quality linked to geographical origin (Vandecastelaere, Arfini, Belletti and Marescotti, 2010).

In posing such a question, we do not come down firmly on the side of GIs. Rather our intent is to broaden the debate about GIs in Australia beyond its present confines in the trade context and to help catalyse an independent evaluation of these property right tools in the broader context of RRR development policy. We point to evidence that is suggestive of the greater positive role that GIs might have in the Australian context, but we do not attempt to make a compelling case for them.

An important reason for considering a deeper policy engagement with GIs in Australia is the burgeoning interest in local products, in the origin of products, and in local, organic and 'farmers' markets. Consumers seem to want to know more about the production chain from actual producer to consumer. Consumers are interested in direct connection with the producer. They are also prepared to pay more for products emanating from specialist niche sectors, such as from Aboriginal country, culture and community (Cleary, 2012; Hurst, 2007).

In this regard there is also a strong connection between food, place and culture. In the heartland of GIs in France, for example, consumers are encouraged to visit specific regions and even to get to know producers themselves. The GI serves to organise local producers, to focus the forging of local identity and to maintain and broadly promote local character over time, encouraging local tourism. The economic impact of GI regulation potentially extends beyond the farm sector itself into tourism, travel and associated activities such as artisanal production more generally (Alonso and Liu, 2012).

This phenomenon is already visible in Australia in relation to 'cellar door' wine sales, wine routes and district promotion. To some extent it can also be seen with native Australian foods that grow in specific environments, having evolved to adapt to local climates. As an example, we draw upon the innovative connections between producers and consumers created by the 'Virtual Trade Fair' hosted by Desert Knowledge Australia. It showcases desert and rain-forest products that are promoted as such and sold in situ as part of regional promotion, via video

conferencing (Desert Knowledge Australia, 2011). Aside from a possible general usefulness in the context of RRR development, there have been suggestions that GIs might be a suitable regulatory tool for protecting and promoting the knowledge and interests of Indigenous people involved in the native foods industry (Addor and Grazioli, 2005; Bramley and Kirsten, 2007; Cunningham, Garnett, Gorman, Courtenay and Boehme, 2008; Downes, 2000).

The remainder of this paper is organized in the following way: the next section summarizes the development challenges facing RRR Australia, including a summary of regional policy responses. We then highlight the difference between GIs and trade marks (including voluntary certification marks) and suggest reasons why GIs might have some additional advantages compared with trademarks alone when it comes to addressing the developmental needs of RRR communities. The third section of the paper looks at the evidence of the performance of GI systems and draws out some possible design lessons for the Australian context, as well as the implications for our argument that the potential of GIs as a possible tool for regional economic development needs much closer investigation. We conclude by stressing the importance of a careful consideration of the potential domestic costs and benefits of possible GI regulatory models for Australia uncoloured by the current international trade negotiation environment.

### **The ongoing policy challenges of rural, regional and remote Australia**

Regional Australia is beset by changes, including increased minerals exploration and mining activity, outmigration leading to depopulation, and climate-induced environmental challenges. The mining and energy resources boom in some regions has drawn attention to farmers, established farming practices and forms of cultivation, and to Indigenous interests, particularly in remote Australia, which may clash with mining interests. For example, uranium mining in the Alligator Rivers region in the Northern Territory and aluminum production in Portland, Victoria, were both strongly opposed by Aboriginal interests but were instigated despite this opposition (Moody, 1988). More recently, clashes between farming and mining interests are highly evident as regular news items in relation to coal seam gas mining in Queensland and NSW. In this context there is growing consciousness amongst the general public about farming areas, and what sort of production occurs where, as well as renewed pressure around the regulatory effectiveness of land use policy. Also currently regarded with considerable public ambivalence are the twin (perceived) trends in agriculture towards consolidation of land holdings, corporatisation and foreign ownership of farming concerns. There is also a growing trend towards the financialisation of agriculture, primarily through the takeover of food manufacturers and food retailers and direct

investment in farmlands (Burch and Lawrence, 2009). Agricultural commodities speculation is also increasing (Clapp, 2012).

Farmers have also been in the news because of the price pressure large retail groups can bring to bear on supplies of bulk products, such as milk. In 2011, when supermarket duopoly Coles and Woolworths entered a ‘milk war’ to competitively cut the cost of a litre of milk to AUD\$1, it was recognised that these unsustainable practices would only result in forcing farmers out of the industry, especially smaller farmers who are unable to compete and only have bulk milk to offer (Lawrence, Richards and Lyons, 2012).

There is great economic, social and cultural diversity in regional Australia, which is reflected in varying income levels, employment rates and productivity (Lloyd, Harding and Hellwig, 2001; Garnaut, Connell, Lindsay and Rodriguez, 2001). Some regions, for example, have highly diverse local economies, and larger, more demographically diverse populations concentrated in relatively small areas (e.g. regional Victoria). Other regions are dominated by single or few industries that are agglomerative in nature, and contain smaller and less demographically diverse populations spread over vastly greater areas (e.g. remote South Australia and the Northern Territory).

In the Australian regional development policy context, there has traditionally been an emphasis on market-led approaches through primary industry, whose profitability is assumed to be the key contributor to social and economic wellbeing of RRR Australia. However, this assumption does not reflect the high level of diversity outlined above, nor is there any universally accepted theory of what drives regional development or decline (Collits, 2006). Regional development policy for RRR Australia has, for the most part, comprised one-size-fits-all approaches that are centrally driven (Hogan et al., 2012) while the drivers of ‘success’ in regions are varied, and remain (for the most part) beyond state control (Sorensen, 2000). Indeed, as far back as 1944, commentators were warning about the ‘rhetoric of regionalism’ and the need to ensure policy approaches reflected the significant differences between regions in Australia (e.g. Bland, 1944). Over the last three or more decades, regardless of political persuasion, federal governments in Australia have vigorously pursued these neo-liberal policies of deregulation, labour market reform and privatization, with an emphasis on ‘hands-off’ (and thus lightly funded) governmental approaches to regional development (Maude, 2004). These policy approaches have largely emphasised community-driven self-help and adaptability as key components of regional success (Tonts, 1999). This in turn, continues to present challenges for policy development that can take account of differences between regions,

especially in the task of mobilizing local assets vested in human, social, economic, built and financial capital in some regions (Cleary and Carson, 2013).

The current Australian Government focus in RRR Australia is on place-based initiatives as a means to reduce the impact of ‘one-size-fits-all’ regional development policy (Crean, 2011). This ‘localism’ approach seeks to assist RRR communities to diversify and broaden their economic base and to “take ownership of their future” (Crean, 2011, p. 1). The premise of this policy is that local communities can and will develop partnerships with and across industry and across the multiple sectors of local, state and national government to drive their own vision of their development futures (Hogan et al., 2012).

Added to the complexities of the ongoing economic development of RRR Australia are the challenges of supporting Australia’s remote Indigenous peoples, i.e. those approximately 120,000 Indigenous peoples who dwell in some 1200 communities in remote Australia (Altman, 2005). This group is arguably the most marginalised in Australian society (Altman, 2005; Productivity Commission, 2003). There has been considerable state input and economic development policies in various forms spanning nearly 100 years (Bannerjee and Tedmanson, 2010), yet poverty is still a major problem for Indigenous people in Australia, particularly those in remote locations. Improving Aboriginal wellbeing has been the major driver for reform proposed in the ‘Closing the Gap on Indigenous Disadvantage’ strategy of the Australian Government (Department of Families, Housing, Community Services and Indigenous Affairs, 2009). However, Indigenous Australians remain economically challenged, with participation in public and private economies continuing to be minimal by comparison with other Australians (Altman, 2004; Duncan, 2003). In remote Australia, business development ideas and subsequent Indigenous enterprise activity have focused on pastoralism, cultural tourism and bush food enterprises reflecting the connections of Indigenous landholders to their land. There have been several attempts to develop Indigenous community enterprises based on bush food harvesting and production in remote Australia, for example, and particularly the Northern Territory, with many of these supported by public funding initiatives. Success again, has been marginal (Armstrong Mueller Consulting, 2008; Gorman, Pearson and Whitehead, 2008; Whitehead et al., 2006). However, the question of property rights, and particularly the protection of Indigenous knowledge and genetic resources, and the development of effective benefit-sharing arrangements and business mechanisms through which this can occur must first be addressed, if remote Indigenous peoples are to derive real benefit from the bush foods industry or other land-based enterprises (Drahos, 2011).



The deep and abiding kinship relationships between Indigenous peoples and country are firmly situated in 'place', giving rise to an understanding of Australian Indigenous identity as being inherently place-based (Bell, 2002; Rose, 1996; Ross, Sherman, Snodgrass and Delcore, 2011). Plants, animals and inanimate objects such as particular sites, landscapes, rocks and other geological features including water-holes share a relationship with people in understandings of place-based identity and cosmology. The links between GIs and the protection of Indigenous knowledge have been the subject of analysis at the international level (e.g. Blakeney, 2009), as have the links between Indigenous knowledge in Australia and other forms of intellectual property (Bowery, 2012). But the collection of data concerning the use of GIs as a tool of economic development to benefit Indigenous groups in remote locations is scarce, and even more so in the context of Australian Indigenous peoples. There is general speculation that GIs, with their emphasis on place and boundaries, would be a more culturally proximate form of property rights for Indigenous groups as compared with, for example, patent or plant variety rights systems (Addor and Grazioli, 2005; Dagne, 2010; Rangnekar, 2004).

In summary, technological change, demographic change, agglomerative economies, Indigenous economic development and geographical differences across RRR Australia present a challenging backdrop to further economic development in this part of Australia and to the various policy approaches that support such development.

### **Consumer perception**

One of the great attractions for a system of GI registration for agricultural products and foodstuffs is the effect of decommodifying the relevant product in the market by way of identifying the unique environment from which the product originates. In other words, the observation is that consumers are willing to pay a higher premium for products perceived to be of a certain quality standard associated with the production region and/or method of its place of origin (Menapace, Colson, Grebitus and Facendola, 2011). Consumer perceptions of what constitutes quality vary; however, research has shown that authenticity is closely linked with perceived quality and, therefore, consumer satisfaction (Skuras and Vakrou, 2002; Tregear, Kuznesof and Moxey, 1998).

Moreover, consumers are increasingly more aware and concerned about being ethical global citizens, opting for fair trade, animal-safe and eco-friendly products (Rangnekar, 2004; Hutchens, 2009), thus suggesting that consumers pay greater attention to origin and certification labelling. Evidence appears to support this

trend of the informed consumer. London Economics (2008) reported higher price premiums of a range between 2% and 150% as a result of Protected Designation of Origin (PDO)/Protected Geographical Indications (PGI) schemes in the EU over an evaluation period of 15 years. The Advisory Group International Aspect of Agriculture (2012) also reported a rise in both volume (+9%) and value (+17%) between 2005 and 2007, although it must be determined to whom the added value accrues. As a result, it appears that it would be favourable for producers and farmers in rural areas to adopt a system of GIs, thereby harnessing the benefits of a decommodified product. Certification of compliance with GI standards by an independent third party also means that GI registration has an enhanced consumer protection and reliability function (Belletti, Burgassi, Maresscotti and Scaramuzzi, 2005).

### **Why GIs as a RRR development tool?**

Global brands are, at least on one account, “the logos of the global economy” (Lury, 2004). However, the branding strategies in global, regional and national markets overwhelmingly depend on trade marks. The case for using trade marks to extract more value from value chains does not need much argument, and the underlying reasoning can be readily applied to the present context. Thus when farmers sell undifferentiated bulk rural commodities competition is largely cost and thus price based. It favours upscaling through amalgamation and consolidation of rural holdings. If producers invest in value adding (for instance, cheese making, meat processing, and mixed products with multiple local ingredients) they no longer simply compete on cost alone, but on quality, uniqueness, and image. But is there a case for considering a branding strategy using GIs, either cumulatively or exclusively?

GI regulation is based on the premise that particular geographical and historical/human characteristics of a region with a unique *terroir* impart a particular and unique character to goods produced there (Blakeney, 2009; Bramley and Kirsten, 2007; Rangnekar, 2004). This means any goods produced elsewhere which pretend to be the same (by using the same geographical term in a descriptive or generic sense) are ipso facto misleading and wrong. GI regulation also encourages consistency in the characteristics of the relevant goods, by setting up mechanisms that to varying extents ensure that the product concerned consistently displays the characteristics that derive from its local origin and processing. Most GI regimes prescribe agreed production standards for this purpose that guarantee consistency and ‘typicality’ over time to consumers of the

product supplied by reference to the name of its region of origin and determine the inclusion or exclusion of certain producers.

Traditionally the initiation of a GI regulatory scheme for a particular regional name lies with the local producers, who confer and cooperate within the framework of a representative association to which all interested producers should have access. Any local initiative to introduce a GI scheme is normally supported by a central body or institution with relevant expertise. From this perspective, a local GI scheme might serve to consolidate large and small producers into a form of association or organised group that can deploy the mechanisms required to agree on boundaries, specifications (standards) and sometimes also marketing strategies. Support from a national or regional body tasked to provide technical expertise and to encourage the development of a local rural or remote image and defend it nationwide and internationally is rational to increase efficiency (Sanchez-Hernandez, Aparicio-Amador and Alonso-Santos, 2010). Although all these structural elements entail costs, there are also benefits in terms of economies of scale, at least in promotional costs, of local coordination and solidarity, and in product diversification and increased quality. A GI scheme can also prevent producers in other areas from adopting a regional name to describe a kind of product, rendering it generic and destroying its distinctive association with the originating region.

A GI scheme is also an instrument of rural and remote regulation because it tends to concentrate resources around developing specialisation in the production of a product in a particular region (Dagne, 2010). If that product has special characteristics derived from particular geographic and human characteristics, then GIs might have a tendency towards optimisation, whether historically developed or more scientifically identified (Alonso and Northcote, 2009; Galtier, Belletti, and Marescotti, 2008). GI schemes might encourage producers to adopt the most sustainable and adapted production and associated processing standards for an area.

GI schemes therefore influence choices for rural and remote producers – they provide some structure and incentive to engage in certain forms of production in certain ways, and thus prefer such production to others (Bramley and Kirsten, 2007). In that sense a GI scheme regulates agricultural production, without however, amounting to a system of central or national planning or control. A GI scheme depends crucially on local initiative, the local or tacit knowledge by locals of the conditions of production, and ambitious pursuit of goals by private, if collaborative, individual producers. It is not an instrument of state determination and mandating of production choices, although the resources of the state might

justifiably be devoted to the development and policing of a GI scheme or schemes to some degree. Done well, a GI system offers communities within a region the chance to develop a local governance of shared economic opportunity.

## **GIs and registered trade marks**

A significant question when considering GI legislation is ‘what is the difference between a GI regulatory system and trademarks?’ and another related question is ‘aren’t trademarks adequate to protect intellectual property rights?’ GIs are of course similar to trademarks in that they serve as a shorthand message to consumers about the qualities of a marked product (van Caenegem, 2003). In a GI system, the regional name is used in more than a simple origin-descriptive sense (which is a non-trademark aspect); it also has a ‘secondary meaning’, i.e. a reputation for certain qualities or character associated with a particular regional origin. It signifies a product with particular characteristics that the consumer has come to recognise because of their consistent association with the place name over time. A fundamental difference between the two systems is that whereas a trade mark is private property, a GI scheme has characteristics that are more typical of a form of public regulation (Corte-Real, 2005; Rangnekar, 2004). That distinction holds even where a certification mark, as opposed to a standard (corporate) trademark, is considered.

Further, a profound difference between trademarks and GIs lies in the competing concepts of distinctiveness and descriptiveness. A GI’s primary nature is descriptive, i.e. an existing placename is used to indicate that a certain product originates in a certain place. However, a GI also acquires the secondary meaning mentioned above. Trademarks are required, on the other hand, to be non-descriptive or ‘distinctive’, and that also holds for certification marks, which must meet the same statutory standard. A mark that is descriptive of goods or services in relation to which it is used cannot normally be registered, and that includes marks incorporating existing placenames in Australia.

This might suggest that a regional name that is used in relation to goods actually produced in that place cannot be registered as a trademark. However, the reality is that, if certain onerous conditions are fulfilled, marks incorporating geographical names can sometimes obtain trademark registration, even in relation to goods or services of a kind that are, or might well be, produced in that place (Handler, 2004).

Registration may also be possible because what is registered as a trademark is not the placename as such, but the name with a twist or an additional element, or in a particular or fanciful representation. It may also be the case that the name is of an ill-defined or unascertainable region, and therefore lacks descriptiveness to a certain degree. Court decisions provide some examples of place names in registered trademarks: Yarra Valley Dairy; Persian Fetta; Bavaria beer; Colorado; and the controversial US example of Ethiopian coffee regions becoming a corporate registered mark: Sidamo and Harar (Arslan and Reicher, 2010; Rotstein and Christie, 2010).

A further limitation of trademarks law lies in the fact that trademark rights will never extend so far as to permit the trademark owner to prohibit a local producer from using words to the effect of ‘Made in [placename]’. First, as indicated above, the unadorned placename is highly unlikely to obtain trademark registration; but secondly, such use of the name would not amount to ‘trade mark use’ and therefore not be actionable. This points to a very significant advantage of GI registration: because of its public nature, once a placename is registered as a GI, a producer within the region who does not adhere to the conditions of use (origin and standards) cannot in any form use the placename in relation to the goods (Bramley and Kirsten, 2007). No producer is thus able to take advantage of the reputation resulting from the investment of complying regional producers while itself avoiding the additional costs that come with compliance. For all these reasons trademarks do not, in our view, amount to a clear substitute such that it becomes unnecessary or irrelevant to consider GI regulation for RRR production in Australia.

### **Certification marks**

An association or group of producers can apply for a certification mark (or collective mark) for their products, and voluntarily agree on certain standards to be observed as a precondition for its use. The standards must not be anti-competitive in nature, but otherwise any party could agree to register any kind of certification mark. The latter could be a regional name to indicate origin of certified goods – indeed that was the form of protection obtained by some foreign wine GIs in Australia prior to the introduction of domestic GI registration.

However, the certification mark use is entirely voluntary, and nothing could stop a producer uninvolved with the certification mark from using the regional name registered as a certification mark to indicate that goods *originate* in the particular area.

By contrast, once a GI is registered, a producer cannot opt out of it and still continue to use the geographical name to indicate the origin of the goods concerned in the particular place whose name is registered. There is thus an element of compulsion inherent in GI registration that does not exist for an ordinary certification mark. The legal effects of GI registration extend to parties that do not volunteer to join the system: this is the ‘public law’ element of the system.

A further (and to some degree consequential) difference relates to the permanency of certification marks *vis a vis* GIs. A GI, once registered, cannot become genericised, whereas there is a significant risk of genericisation for a trade mark, whether corporate or certification (think ‘hoovering’, ‘a kleenex’, ‘googling’, etc.). A GI is based on a real name indicating a real place that has a presence and continuity all its own. Trademarks are also subject to removal for non-use (as well as a lack of genuine intention to use). The law requires the mark to remain in actual use as a mark within statutorily determined time periods, something that does not apply to GIs.<sup>4</sup> Thus, unless the regional product or foodstuff is not sold in the market for an extended period of time, GI protection is normally as permanent as the placename concerned.

The ownership and governance of GIs is local and collective by nature. Registration necessarily requires a dialogue amongst regional producers about regional identity and the possibilities of shared economic opportunities that result from it. Trademarks do not have this same dialogic effect. If the goal is RRR development then GIs, much more than trademarks, have the potential to trigger processes of engaged regional planning (Rangnekar, 2004). Of course, the dialogue may not lead anywhere; the regional conditions may be such that no GI model of any kind may be suitable. No property rights scheme guarantees a reward, but it may create the opportunity to pursue one.

### **Investment in GIs**

One essential question that must be dealt with in any discussion of the implementation of a GI system is the cost of establishing a new GI. Investment is needed before a placename will have the effect of evoking product characteristics in consumers’ minds. This was observed in the case of the Pico Duarte GI in the Dominican Republic. A new coffee GI was created based on scientific analysis of

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<sup>4</sup> GI law does recognise that GI registration can lapse over time due to desuetude. Under Art 24(9) of the TRIPS agreement, there is no obligation to protect GIs that have fallen into disuse or which cease to be protected in the origin country.

the soil type, topography, etc. for the best zones in which to grow coffee. However, the study concluded that the new GI, despite its potential for distributed benefits from a decommodified product, was ineffective and unfair. The costs of production were high, the volume produced was small, and any increase in price was uncertain due to insufficient development of the reputation for Pico Duarte coffee (Galtier et al., 2008). The economic benefits of GIs depend, as it were, on making reputation travel beyond the local boundaries of the GI. As another example, one study of the promotion of Indigenous beverages in India identified, among other obstacles, the need for social, business and scientific rigour to set up a GI that identifies both uniqueness and specialty (Soam and Hussain, 2011). Newly established GIs do not have an established reputation, so automatic positive effects from acquiring the market share of generically named products cannot be expected. In other words, the mere fact that a product may be different (e.g. pink grains of rice) is not an indication that the product is of a particular quality (Soam and Hussain, 2011).

Funds for standard setting and promotion might be available from local private actors (e.g. local community groups, businesses, mining companies), but will likely have to come from government in many cases. RRR Australia will have a significant proportion of small farmer enterprises and producers who must possess or be provided with the financial resources, technical expertise and administration to finance, organise and support the capacity to develop and sustain a newly established GI (Evans and Blakeney, 2006). Spain's Consejo Regulador, for example, facilitated a cooperative collective supply chain for the production of Teruel Ham. It introduced a system of regular meetings between participants at different stages of the supply chain to improve communication, reduce misunderstandings and, most importantly, build trust (Rangnekar, 2004).

In terms of state resources, the question becomes whether investment in establishment and promotion of a GI might be a comparatively efficient investment: government already invests considerably in the regions (disproportionately so, in relation to population), so GI promotion might be an additional or alternative investment with considerable long-term advantages, as it should result in the establishment of value-adding local businesses. Governments already promote regional image in various ways as well, whether for tourism purposes or to attract investment – GIs could be a more cohesive and coordinated framework for such promotion.

However, the investment in regional reputation by state or other external agents (not the producers themselves) should normally be temporary – at some point where reputation has become sufficiently established, the price premium should

allow local producers to carry the cost of maintaining and enhancing the regional reputation themselves.

The state could invest in promoting GIs quite efficiently in a consolidated way (think one departmental website for instance that informs about and promotes all regional Queensland GIs, or investing in promotion of all Queensland GIs through overseas Queensland promotional offices, for instance). A successful GI scheme should generate the necessary surpluses to fund promotion and development on a continuous basis. A GI scheme may have the potential to augment RRR incomes not by ongoing subsidy but by a relatively short-term public investment in regulatory infrastructure and some start-up investment for particular schemes.

An economic incentive to adopt and use GIs proposes that products bearing GIs have an added value associated with the place name and, therefore, consumers are willing to pay a higher premium price for origin-guaranteed or ‘authentic’ products. Since most GI registrants are in the EU, most of the evidence supporting the socio-economic benefits of GI registration tends to be derived from established, well known products, such as cheese and wines from France (+30% and +23%, respectively) or extra-virgin olive oil from Italy (Menapace et al., 2011). Similarly, in one US price analysis of the value of producer brands versus geographical indicators, evidence suggested that wines from producers from France and Italy still maintained a better regional reputation (and therefore higher prices) than wines from top ‘new world’ Napa Valley producers (Schamel, 2006). Despite this, another study collected price data from specific regions in California and found that wines labelled with specific regional attributes, e.g. ‘Napa Valley’, ‘Monterey’ and ‘Lodi’, were able to sell at higher average prices than those from non-specified regions (Sumner, Bombrun, Alston and Heien, 2004), suggesting a positive correlation between region branding and returns to producers.

## **Design issues for Australia**

GI regulation around the world is by no means homogenous. Some countries have established protection systems particular to geographical indications, while in other countries, GIs are afforded protection under a combination of trademark, consumer protection and unfair competition laws (Shimizu, 2011; WTO IP/C/W/253/Rev.1, 2013). GI schemes leave a lot of scope for individualisation and development of standards that suit a particular locality. Existing international treaty commitments do not greatly constrain Australia’s choice of a regulatory model. That applies both from a cost, size and capacity perspective. A GI system is a form of property regulation that can accommodate diversity. The



establishment and form of GI regulation for a particular area can be determined purely by local initiative and determination through voluntary collaboration.

We do not advocate consideration of a mandatory system, where governments compel locals to organise themselves in regions, make product choices, or systematically review what products are best for what regions, etc. Australia is very diverse in terms of geography, populations, and cultures and therefore a flexible model will likely be the best adapted to our conditions. Australia's diverse landscape uniquely comprises rainforests, arid zones, maritime climates, wet zones, broad acre, small scale, indigenous, highly technological, and highly traditional attributes. This suggests that a relatively flexible regulatory scheme allowing for sufficient local variations in terms of intensity, content and complexity of requirement for any particular local GI might be suitable for Australia.

A design framework for an Australian GI system should thus address the following issues:

1. Are there mandatory product standards, or only requirements of origin?
2. Does production and processing of the relevant product all have to take place within the specified area?
3. Are there mandatory processing requirements?
4. What are the procedures for enforcement?
5. What are the procedures for local initiation and governance of a scheme?
6. By what mechanisms and criteria are the regions geographically delineated, and possible standards determined?

Existing systems provide different answers to these questions. For example, the 'French model', which is replicated in other European countries, requires both that ingredients originate in the designated area, and that production steps comply with certain standards or 'specifications'<sup>5</sup>. For European GIs there is a distinction between PDOs and PGIs. PDOs require ingredients to originate and all the production steps to take place within the relevant area. Products under PGIs allow some of the production to occur outside the designated area and the product's quality, characteristic or reputation is essentially attributable to its geographical origin<sup>6</sup>. The PGI designation allows more flexible management of product supply issues within a particular region because local processors can potentially meet increased demand by sourcing raw materials outside a small area. However, the level of protection afforded PDO and PGI are both dealt with under the same

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<sup>5</sup> European Regulation (EU) No 1151/2012, Article 5

<sup>6</sup> European Regulation (EU) No 1151/2012, Article 5(1)-(2)

provision (Regulation (EU) No 1151/2012, Article 13) and therefore, there is no apparent distinction in terms of the level of legal protection afforded PDOs and PGIs – the difference lies in the message the GI sends to the consumer. A further level of GI protection in Europe is also available as a Traditional Speciality Guaranteed (TSG; see Regulation (EU) No 1151/2012 of the European Parliament and the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs).

The existing Australian scheme, which applies only to Australian wines and not to other foodstuffs, imposes origin requirements only. It neither imposes production standards nor does it require processing within the area. Although the definition of a GI in the *Wine Australia Corporation Act 1980* requires that the product reflect local characteristics, our wine system presumes this comes about simply by using local product, whereas the French model presumes that local product is not enough: there must also be typical local production methodology, which is normally historically derived, ‘typical’, and continuous. In Australian wine production, consistency comes about on a voluntary rather than mandatory basis. Self-interest may well create a strong voluntary incentive for collective action by growers not to damage their regional reputation by producing a great variety of products, resulting in considerable homogeneity.

Clearly, the ‘French model’ is more onerous than the existing Australian model. However, although the conditions for registration for the French and Australian models are different, the level of legal protection is the same: an absolute prohibition of the use of the GI for products that do not meet the regulatory conditions. This implies prohibition on uses such as ‘*méthode ...*’, ‘...-style’ and the like. The prohibition extends to producers within (who use ingredients from outside or unauthorised production methods) as well as outside the area of the GI. The protection may to some degree also extend to use on different products.

There is thus an extensive range of regulatory options. One possible option is to see whether the present Australia wine GI model should be extended to other rural, regional and remotely produced food and drink. Certainly the experience with the Australia wine GI model on crucial issues such as the delineation of the GI region needs careful study (Edmond, 2006). GIs may be determined having regard to factors such as the history of the founding and development of the area, existence in relation to other natural features (e.g., rivers), or the existence and history of a word or expression in relation to and indicative of that area (Wine Australia Corporation Regulation, 1981).

However, given the diversity of Australia's regional economies there is merit in approaching the issues of GI protection afresh rather than simply extending the wine model. We stress that not only do the basic legal conditions differ between the French and the Australian models, so do the administrative and other procedural aspects of GI delineation. Proper processes for geographical delineation are, of course, a core aspect of GI law, since the inclusion or exclusion from a GI region can have severe consequences for local producers, and is significant for the integrity of the scheme. Those who fall outside a delineated area will often not enjoy the benefits of GI use, such as higher land values and 'buying into' a famous name such as Champagne (Overton and Heitger, 2008). Furthermore, the more GI regions fluctuate over time, or expand, and the more standards vary or are relaxed, the less legitimacy GI protection has, and the more the adverse competition implications of a strict regime come into view.

We have referred to the French and Australian models, but while remaining in accordance with the general requirement of the TRIPS definition, there are of course other models with their own variations in existence as well. Wine growers of California for example, have embraced a GI system, even though the US has rejected introducing national GI laws, which is a significant consideration from our perspective. The Napa Valley Vintner's Association's pressures for protection have resulted in GI protection through state legislation, which is upheld by state courts (Kemp and Forsythe, 2007). Specifically, the *California Business and Professions Code* §25241 prohibits use of 'Napa Valley' and 'Napa County' on wine labels, unless the wine was created with the distinctive grapes of the Napa regions. The Association's assertion to protect the Napa GI extended to a Chinese wine, made with Chinese grapes and sold in China, using the phonetic equivalent of 'napa' in Chinese characters. Similar to the plight of European origin wines, China's industry in wine production is 'new' in relation to California and, as a result, California sought protection against deceptive use in China (Kemp and Forsythe, 2007). It is thus apparent that despite US legal frameworks relying on trademark law, certification marks, and fair competition laws, California wine makers have found these systems insufficient to protect geographical terms and have opted for greater regulatory control via a GI system.

## Conclusion

The international developments, whether they result in the increased adoption of national schemes around the world, or any strengthening of the WTO/TRIPS requirements, may in any case mean that Australian rural products will need to, or derive benefit from, a re-branding with more emphasis on regional origin. A national GI scheme may aid in that process as well. It may also be that if a scheme

with some multilateral protection comes about, there is some advantage in ensuring that local producers at least have the option of participating by being able to register regional GIs for all foodstuffs, not just wine, and obtaining some form of protection worldwide.

In other words, we stress that refusing to consider GI regulation now assumes the future will be like the past. GIs are becoming an increasingly significant regulatory tool globally. In this context it is worth noting the '10 plus 10' project between the EU and China in which the European Commission and the Chinese regulator undertook a feasibility study of protecting each other's GIs, using GIs related to foodstuffs as the basis for a pilot study (European Commission, 2012). Consumers overseas are more attuned to GIs. If, or when, an international or multilateral register is established, Australia would only suffer the consequences and enjoy none of the benefits if it does not have local non-wine GIs.

However, our main aim is to ensure that the potential advantages of GI regulation in terms of RRR development are properly considered, irrespective of the current international trade negotiating perspective. GI regulation has at least the potential or the advocated advantage of encouraging local value adding, small-scale production, and regional collaboration and cost-sharing. In the present climate, which sees a renewed emphasis on innovative policy thinking for regional development, and increased consumer focus on the origin of foods and the character of their production, we consider it essential that a thorough examination of the regulatory and economic aspects of a GI scheme for all foodstuffs in Australia be urgently considered.

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