

Problematic Aspects of the Legal Framework for Protecting Australia's Wine Regions

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Abstract:

Purpose - To explore whether the current Australian legal framework for geographical indications is fit for the purpose of protecting and promoting Australia's wine regions

Design/methodology/approach - Case law and statutory developments regarding geographical indications for Australian wine are analysed. Australian practice is compared with wine law practice in the USA and the EU.

Findings - Legal changes are required to implement a framework that better aligns with Australian winemakers' aspirations and consumer expectations regarding Australian regionally branded wine.

Keywords: Geographical indications, appellations of origin

INTRODUCTION

At face value it appears that Australia has a well-functioning legal framework of geographical indications (GIs) for protecting the reputation and profitability of its regional wine. However, appearances can be deceptive. Notwithstanding the evolution of Australia's legal framework over a number of years, problems related to the scope of what the Australian legal system actually protects remain. This is not simply a dry legal matter. Being inside or outside a regional boundary can have a significant impact on winemaker success. Second, if confident and well-informed consumers of wine are the ultimate beneficiaries of Australia's legal framework, it remains unclear whether the framework supports their expectations and therefore whether regional wine marketing expenditure will be effective in returning Australia's wine sector back to profitability. GIs may have little meaning for consumers if they are unable to connect them with wine characteristics and qualities (Adinolfi, et al., 2011). In this paper, we argue that Australia's current GI legal framework is not fit for the purpose of protecting and promoting Australia's wine regions. However, before advancing that argument we commence by outlining a number of basic concepts associated with the legal character of GIs and with the broader concepts of typicality and regionality.

BASIC CONCEPTS

Appellations of Origin, Geographical Indications and Indications of Source

When applied to wine, geographical terms can be categorised as:

1. Indications of source – refer to the country or place within a country where grapes are sourced.
2. Geographical indications – refer to the region or locality where the wine is made and where a given quality, reputation or other characteristic is essentially attributable to that geographical origin, or
3. Appellations of origin – refer to the region or locality where the wine is made such that its quality and characteristics are due exclusively or essentially to that geographical environment including natural and human factors.

Typicality

The above hierarchy is correlated with the degree of typicality (*typicité*) exhibited by wine. By 'typicality' we mean the characteristics of a wine made in one locality that make it distinctive compared with wines made in other localities (Cadot, et al., 2012). Typicality derives from the soil and climate where grapes are grown, viticultural techniques, varietal, vintage, and local oenological practices (King, et al., 2014). Typicality can be measured using a variety of chemical and sensory techniques (Cadot, et al., 2012). Wine which is 'Made in France' or 'Made in Australia' exhibits low levels of typicality, whereas wine made within an appellation of origin generally exhibits a higher degree of typicality (Perrin & Pagès, 2009).

Regionality

Although typicality is an important driver of regionality, the concept of regionality encompasses much more (Easingwood, et al., 2011). Wine regionality also incorporates perceptions and experiences of regional gastronomy, local social and commercial networks, culture, heritage and the surrounding built environment. Thus, it is impossible to divorce the Barossa Valley wine region from the legacy of its early Prussian settlers, the grandiose facades of its wineries such as Seppeltsfield or Chateau Tanunda, and its 'Barons of the

Barossa' wine fraternity (White, 2014). Regionality characterises wine as an artisanal and culturally authentic product rather than simply a product determined by the bio-physical properties and winemaking practice of the locality where it is made (Lewis, 2012).

In spite of their differences, typicality and regionality can be symbiotically related. Taste and style become memorable partly because they are hooked together with a regional profile comprised of these elements. Similarly, regionality is stronger where the region specialises in one or two notable wine styles (Easingwood, et al., 2011), that is, where wine typicality is also clearly demonstrated. Wine achieves this typicality through the collective strategies of grapegrowers and winemakers operating within their localised institutional, social and cultural mileius (Barrère, 2013).

GEOGRAPHICAL INDICATIONS IN AUSTRALIA

When enacting the GI provisions in the *Australian Wine and Brandy Act 1980* (Cth) in 1993, the Australian Parliament stated that the work of the legislation was to be confined to determining GI boundaries to support enforcement of the Label Integrity Program (Australia, Parliament, 1993, p. 1342), thus evincing an intention to implement an indication of source framework. Accordingly, the Act defined GIs in two alternative ways:

- *A word or expression used in the description or presentation of the wine to indicate the country, region or locality where the wine originated, or*
- *A word or expression used in the description and presentation of the wine to suggest that a particular quality, reputation or characteristic of the wine is attributable to the wine having originated in the country, region or locality indicated by the word or expression*

Regulations promulgated a short time later muddled the waters as they implied that a nexus between wine quality and origin was essential to attain GI status. Subsequent case law comprising the *Coonawarra (Beringer Blass Wine Estates Ltd v Geographical Indications Committee, 2002)* *Baxendale Vineyards (Baxendale's Vineyard Pty Ltd v The Geographical Indications Committee, 2007)* decisions firmly contradicted that interpretation.

The *Coonawarra* case reached the Full Court of the Federal Court on appeal from the GIC and the Australian Administrative Appeals Tribunal (AAT), which had held that the Coonawarra's GI boundaries should be fixed by reference to the 'Hundreds of Penola and Comaum,' administrative boundaries established to facilitate South Australia's colonisation. The principal matter that the Full Federal Court of Australia in the *Coonawarra* case had to contend with was the interpretation of *Australian Wine and Brandy Corporation Regulations 1981* (Cth), Regulations 24 and 25. Regulation 24 defines regions and sub-regions as follows:

1. Region – a single tract of land that is discrete and homogenous in its grape growing attributes in a manner that is measurable but less substantial than a sub-region; that produces at least 500 tonnes of grapes per annum; and comprises at least 5 independently owned grape wine vineyards of at least 5 hectares each
2. Sub-region – a single tract of land that is discrete and homogenous in its grape growing attributes to a substantial degree; that produces at least 500 tonnes of grapes per annum; and comprises at least 5 independently owned grape wine vineyards of at least 5 hectares each

Regulation 25 lists the criteria that must be taken into account by the GIC. These include the history of the founding of the area, its geographical and topographical features, its built

environment, its local government boundaries, the history of grape growing and wine making, and in relation to a region's grape growing discreteness and homogeneity, its geology, its climate, typical harvest dates, soil drainage, access to irrigation, elevation, as well as any other matter deemed relevant.

The Court interpreted the issues from the starting point of the *Agreement between the European Community and Australia on Trade in Wine* (1994). The term 'Coonawarra' had already been designated as a GI under the Agreement. Consequently, the GIC and the AAT were required to concentrate on matters pertinent to the drawing of its boundary. When considering where the boundary should lie, the chief factors to bear in mind were the degree of homogeneity and discreteness in grape growing attributes set out in Regulation 24. Pre-existing administrative boundaries such as the Hundreds that were fixed many years before grape growing and wine making were established in the area were therefore of limited relevance to that task. The appeal was therefore upheld.

The *Baxendale Vineyard* case arose after an interim determination regarding King Valley by the GIC, when the Whitlands vignerons made an independent application for the determination of the 'Whitlands High Plateaux' region. The proposed Whitlands region fell wholly within the proposed King Valley region. The King Valley vignerons wanted the King Valley region extended and the Whitlands vignerons wanted the King Valley region reduced so that it excluded the proposed Whitlands region. Unhappy with the GIC determination, the parties appealed to the AAT. Although the AAT acknowledged differences between the plateaux land which made up the proposed Whitlands region and the valley land which made up a large portion of the proposed King Valley region, it found high levels of homogeneity regarding grape growing attributes (in particular, in relation to climate and geology) across the King Valley including its plains, valleys, ridges and plateaux. Consequently, the AAT did not consider that the King Valley and the Whitlands were separate regions. The Full Court of the Federal Court upheld the AAT's decision. In reaching this position the Court indicated that history and economic activity within a grape growing region could be relevant to determining its boundaries. Importantly, however, the Court also held that it was not necessary for an Australian GI to evoke wine typicality or regionality. The term 'King Valley' did not evoke anything about the wine produced in that region, but nonetheless it could still be a GI because all that was required by the Act was the name of a locality where wine originated.

In line with an overarching indication of source legal framework, both the *Coonawarra* and *Baxendale* decisions underscore that the focus of the Regulations is upon grape growing homogeneity. Although the Regulations incorporate historical and social factors such as the history of grape growing and development within the relevant region, they say nothing about localised wine making practices that might also affect typicality. Nor is there any requirement that the wine conform to a regional profile. Indeed, such a requirement contradicts the ability to incorporate up to 3 different geographical indications on Australian wine labels. Moreover, it seems that bio-physical factors related to grape growing predominate how a region or sub-region will be demarcated. Apart from harvest date, there is no explicit reference in the Regulations to differentiating viticultural practices (such as trellising) and other human aspects of grape growing, let alone wine making.

The requirement of a 'discrete' grape growing area coupled with the 5 x 5 x 500 rule in the definitions of region and sub-region reinforce the lack of typicality and low level of regionality. The 5 x 5 x 500 rule, designed to prevent monopolies, is a threshold requirement that need not hold once the GI has been promulgated. Nonetheless, it signals a legislative

intention that small, low producing GIs are not welcome. The requirement of a ‘discrete’ land area vis-à-vis grape growing means that there is no provision for a region to be comprised of more than one ‘island.’ All that can be promulgated is a sub-region with even stronger grape growing homogeneity than the region in which it sits. The architecture of Australia’s legal framework thus inevitably leads to the designation of large wine regions, making it difficult for winemakers to express typicality in their wine.

LEGISLATIVE REFORM

The 2008 *Agreement between Australia and the European Community on Trade in Wine* prompted a major overhaul of the legislation, including how it defined GIs. The new definition reverted to the European original so that in relation to wine goods, a GI is now:

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

The Explanatory Memorandum accompanying the amendment indicated that the change was implemented to align Australia’s definition of geographical indications with Article 22.1 of the multi-lateral *TRIPS Agreement*. Otherwise, there was little discussion of the costs and benefits of the change, consideration of how the change might affect existing GIs that were previously registered on a different legal basis, nor any discussion as to how the change might impact upon the practices of the GIC. Apart from semantics, it appears that not much actual change was envisaged. Moreover, as most of Australia’s wine growing regions had already attained a GI, unless there were future applications to amend existing GIs, any change to the framework was only likely to affect a negligible number of new applicants. Only 1 of Australia’s 114 registered GIs has been registered since the amendment came into effect on September 1st, 2010. Since that application was submitted to the GIC by the Mount Gambier Regional Winemakers Association with apparently no opposition in May 2010 it throws little light on the amendment’s impact.

PRACTICE ELSEWHERE

The lack of typicality and emphasis upon grape growing attributes within the Australian GI framework, are also features of the US, American Viticultural Area (AVA) regulations. To label US wine with an AVA, 85% of the wine’s grapes must come from the AVA and the relevant wine must be fully finished within the State or States where the AVA(s) are located. Although the regulations characterise AVAs as forms of appellation of origin, as in Australia, there is no requirement that the finished wine conform to a particular profile (Mendelson & Gerein, 2011, p. 254).

Initially many of the US AVAs were very large. For example:

- Napa Valley established in 1981 and comprised of 91,176 hectares of land
- Sonoma County established in 1981 and comprised of 462,600 hectares of land
- Paso Robles established in 1983 and comprised of 269,771 hectares of land

Like Australia, the large area of these AVAs constrain US winemakers from consistently articulating the unique regional characteristics of their wine. To counter that problem, smaller nested AVAs (referred to as sub-appellations or sub-AVAs) have been created within the larger AVAs. Napa Valley, Sonoma County and Paso Robles currently consist of 16, 16 and 11 sub-AVAs respectively. The purpose of the sub-AVAs is to advance regionality and,

to a lesser extent, typicality (Elliott-Fisk, 2012, p. 54). This has proven to be financially advantageous. Being a winemaker in a sub-AVA is a much better investment than being in a larger AVA in terms of the premiums available for grape and vineyard prices (Cross, et al., 2011).

US sub-AVAs operate differently from Australia's sub-regions. If the sub-AVA shares some of the existing geography of the larger AVA but at the same time is sufficiently distinctive, then the sub-AVA can nest inside the larger AVA. However, if the new AVA shares no common features with the pre-existing AVA, then the new AVA must be excised from the pre-existing larger AVA. In other words, US law accommodates islands, whereas Australian law does not.

Private strategies have also been adopted by grape grower and winemaker associations to further develop typicality and regionality beyond the minimalist AVA framework (Mendelson & Gerein, 2011, pp. 275 - 280). These include Coro Mendocino, a voluntary association of Mendocino winemakers that has set blending, production and ageing specifications for its members' wines, which are blind tasted by a panel of experts prior to acceptance. Together with the proliferation of sub-AVAs these private strategies demonstrate that US winemakers want more than a pure indication of source framework.

Typicality and regionality are far more important in European regulation. Applicants for appellations (known as PDOs) or GIs (known as PGIs) must submit a technical file to the relevant national body responsible for examining the application. The file must address the analytical and organoleptic qualities of the wine, if applicable, the specific oenological practices used in making the wine, permissible grape varieties, and provide details of the causal link between the wine and the wine's geographical origin (European Union, 2013). Otherwise national requirements can vary. In France, a number of PGIs and PDOs require certification by independent organisations that audit the implementation of the registered wine profile and organise accreditation wine tastings to ensure that wines proposing to bear the designation are typical of the region. Each year a representative range of wines is selected and used as a reference point for the particular characteristics of the vintage. Wine which fails to express typicality is rejected and cannot be marketed using the relevant PGI or PDO. However, because the typicality requirements are subjective, accreditation tastings are controversial (Teil, 2014). Typicality is sometimes more of an expression of winemaker preference than bio-physical terroir (Cadot, et al., 2012). Australian winemakers must therefore be wary of adopting tasting accreditation to substantiate the causal link between their wines and a region or sub-region unless tasting profiles are published in advance. In the United Kingdom, PDO wine conformity assessment comprises analytical and organoleptic testing and a no fault tasting (United Kingdom Vineyards Association, 2015). This objective approach is more feasible for the Australian context.

OUR RECOMMENDATIONS

To maximise the value of the GI in the minds of consumers, wine must remain true to what the GI represents. As an indication of source framework our legal system has failed to promote regionality and typicality, and, consequently, Australian wine's international reputation as a commodity rather than as an artisanal product has been difficult to bat away. First, for future applications including applications to amend existing GIs we therefore recommend a review of the Regulations to ensure their constructive alignment with the new definition of GIs in the *Australian Grape and Wine Authority Act 2013* (Cth). As well as the existing factors outlined in Reg 25, consideration should be given to incorporating a wine

profile for regions and sub-regions that sets out the analytical and organoleptic qualities that must be met to qualify for the GI. As demonstrated by the Pays D'Oc PGI, such a requirement will not unduly hamstring winemakers in terms of their choice of varietal, style or blend. Nevertheless, it will allow winemakers to show consumers that their wines meet production and origin criteria. The outstanding success of the Pays D'Oc region in France (Niederle, 2012) in transforming itself from to a region known as a producer of bulk wine into a region with a reputation for producing high quality wine establishes that being able to articulate wine regionality and typicality (while still promoting varietal and brand) has significant benefits.

Second, we recommend that consideration be given to creating a special category of GI that conforms more closely to an appellation of origin. Provided the qualities of the appellation are communicated consistently, coherently and regularly to consumers, appellations are more highly valued than other region of origin claims (Sàenz-Navajas, et al., 2013). Should regional winemaking associations attain an appellation, they will be able to extract higher price premiums for their wine and increase their impact in export markets (Agostino & Trivieri, 2014).

Although it is possible for regional winemakers to band together like the winemakers in Coro Mendocino and create their own appellation by agreement among themselves, official recognition of an appellation of origin will ensure that any private investment undertaken by regional associations to establish regional styles and branding is legally protected from unfair competition. It will also ensure that consumers are not misled by references to wine exhibiting the style of the appellation when it does not originate from that appellation. An institutional warranty is an important quality dimension for consumers (Spielmann & Charters, 2013). While a certification trade mark might achieve something similar, incorporating the appellation within Australia's GI framework, enables protection of the appellation to be advanced on a government to government basis through means such as the *EU-Australia Wine Trade Agreement* and thus reduces the cost of enforcement to regional wine producing associations who would otherwise be required to initiate private litigation in domestic and foreign courts. Embedding the appellation within the GI framework also reduces co-ordination costs between regional wine associations that might lay claim to overlapping boundaries. One single GI and appellation scheme also makes it easier for consumers to discriminate between each category of legal object. If there was a plethora of inconsistent rules for certification marks, consumers would find it difficult to navigate between them.

If such an appellation were established it should be called an appellation to clearly distinguish it from a GI. The concept of an appellation that encompasses a causal link between a wine's character and a region needs to be differentiated from a GI wine that accommodates relatively lower levels of typicality. We also recommend post production control to prevent free riding by winemakers within the appellation that are unwilling to abide by typicality obligations and who thereby undermine consumer perceptions of appellation quality. While we would not recommend subjective accreditation tasting, we would recommend analytical and organoleptic testing as well as tasting against an objectively determined but reasonably liberal sensory profile incorporated within the appellation's wine profile and reviewed from time to time by the relevant regional winemaking association. Winemakers and the community ought to be able to publicly access information that will assist inform their production and consumption choices.

Contrary to Australia's existing blending regulations and consistent with evidence from the United States related to the benefits of conjoining regional and appellation labelling (Bruwer & Johnson, 2010) we would also recommend that winemakers should be permitted to claim association with the broad regional GI and the more specialised appellation on wine labels. This will prevent existing Australian regional GIs from being diluted through fragmentation into smaller islands and also enable winemakers in appellations to continue to enjoy the halo effect of the region while developing the reputation of their appellation.

CONCLUSIONS

The industry and marketing arm of the Australian Grape and Wine Authority has identified the promotion of regionality as a key plank for the recovery of the Australian wine industry. If that strategy is to be successfully advanced the legislative reform of the definition of GIs implemented in 2010 will require changes in the *Australian Grape and Wine Authority Regulations*. We believe that Australian winemakers should be given the option of establishing true appellations of origin. Should they wish to pursue both typicality and regionality they will need an effective legal framework to support their aspirations. Without it, consumers are unlikely to be convinced of their appellation credentials and winemakers may find it hard to maintain the collective approach that is required to create and grow the economic value of the appellations.

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