



‘Where’s the Slice for King Island?’¹

A case study of provenance protection models in King Island*

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¹ Interview with **Respondent 14**: ‘You see the prices they’re charging in the shop fronts as double, but where is the slice for King Island? We’re getting the same slice as everyone else. How can we leverage that to come back to us?’

* This report could not have been completed without financial assistance for which we acknowledge the support of WTI Advisors and the European Union. However, this is an independent, scholarly study and the analysis and conclusions are entirely those of the authors. Ethics approval was obtained from the Bond University Human Research Ethics Committee for the conduct of interviews.

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Executive Summary

The findings in this case study are based on desktop research augmented with approximately thirty-two (32) interviews conducted on King Island, Australia, and few off-island actors. King Island ('KI') lies off the North coast of Tasmania and is part of that state. KI has an established reputation in Australia as a provenance brand for dairy and beef. KI lobster is marketed primarily in China.

Australia does not allow for sui generis GI registration of any edible products other than wine. In that context, this case study examines how standard trade marks have become established in KI over time and perform a provenance branding function although they are owned by disparate commercial actors. Few if any studies have been undertaken contrasting the European GI model of provenance protection with the operation of ordinary (as opposed to certification or collective) trade marks in any given location, whether in Australia or elsewhere.

The study is relevant today because it is known that Australian government authorities are considering the introduction of an Australian food GI registration scheme in the context of the current FTA negotiations with the EU. If Australia offers protection to European GIs then it may make sense for it to extend the opportunity to obtain GI level protection to local Australian food producers as well. A resulting question is then how such a protection regime might ideally be designed to optimise potential benefits to Australian food producers if it were to be introduced. We address whether there is a case for such GI protection in relation to KI beef, dairy and lobster individually.

The Australian trade mark law allows for the registration of trade marks that include descriptive references to geographical origin under certain conditions of use and distinctiveness. Therefore, a multiplicity of trade marks owned by different actors, all containing reference to the same place name, is possible and is in fact the case in relation to many Australian trade marks referring to agricultural areas.

As the history of such trade marks-based branding in KI demonstrates, this means that:

- *Owners of such marks can exercise market power more effectively to deny new entrants the opportunity of establishing competing products with reference to a place of origin such as KI;*
- *Trade mark law attempts to strike a balance between the ability of such marks to identify the corporate origins of marked goods and their ability to accurately indicate their geographical origin;*
- *The trade marks law, although it has various rules and devices to do so, is only partially effective in controlling that goods with such trade marks do in fact originate in the identified area;*
- *The trade mark law never effectively determines what would amount to an accurate claim of geographical origin in relation to such trade marks, e.g., as to what the boundaries of the area exactly are or how much of the product or the production process must be local within the area;*
- *In the result the owners of such trade marks have considerable powers of de-localisation of production, in effect only controlled by the reputational risk inherent in such de-localisation.*

By contrast the sui generis GI system:

- *Offers the benefit of a priori determination of what amounts to a legally accurate claim of regional origin by clearly establishing borders and sourcing/processing requirements which limits transaction costs in the context of individual disputes;*
- *Sets a minimum standard which all actors must observe, establishing a level playing field and limiting the opportunities of free-riding on competitors' regional branding investments;*
- *Allows for a competitive dynamic between private trade mark owners for product diversifications over and above the base-line GI standard; and*
- *Ensures improved accuracy for consumers in providing at least a guarantee of base line accuracy, and with a legal model that is cheaper and simpler to enforce than rights in a trade mark or than by relying on an action for misleading and deceptive conduct.*

The study also concludes that an Australian registered GI system can effectively coexist with a trade mark registration law that allows some geographical references to be included in trade marks, as already happens for instance in relation to Australian wine GI related marks.

In terms of the lessons to be learned for the design of a putative Australian GI scheme, the study concludes that given the particular characteristics of Australian agriculture and the particular provenance branding experience on KI, such a system should:

- *Be one that has both geographical origin requirements (an issue for instance in relation to Lobster), and substantive specifications (an issue for instance in relation to KI beef);*
- *Aim at specifications that are not so restrictive as to pose problems in terms of cost and supply (for instance) while nonetheless constituting an effective provenance guarantee;*
- *Only include local processing in the specifications if that is essential (given that the focus in Australia is not on preservation of traditional production methods);*
- *Grass roots driven and give all potentially affected parties a manifest opportunity to participate in setting the standards i.e., formulating the specifications, in the interest of fairness and efficiency;*
- *Regulatory in nature (such as the existing wine-GI model) rather than vesting rights to a GI in a collective or cooperative; and*
- *Policed externally by the Australian Competition and Consumer Commission, an existing body, and internally by the State departments that currently have responsibility for food safety regulation and compliance.*

In terms of individual GIs for KI products, the study concludes that:

- *In relation to KI beef relatively straightforward specifications requiring for instance three months grass-fed on the Island before turn-off would be effective in providing the necessary baseline guarantee. This would not impose onerous additional costs;*
- *In relation to King Island dairy, the use of the terms 'King Island' as such as a GI could be restricted to dairy products of any kind that are made with a set percentage of KI milk; and*
- *In relation to KI Lobster, the demarcation zone for the legitimate use of those terms could be more clearly identified than is now the case, which would allow KI Lobster to be more effectively differentiated from Tasmanian lobster in general in China.*

The study proceeds on the basis that a local GI declaration requires sufficient support from local interested parties, and that in relation to the three KI foods, such local agreement at a base level could most likely be procured. Finally, the study also proceeds on the basis that the consumer accuracy and enforcement benefits of a GI model can be extended to overseas markets through negotiations such as with the EU, which require domestic registration in Australia.

TABLE OF CONTENTS

I.	INTRODUCTION	6
II.	METHODOLOGY AND LITERATURE OVERVIEW	7
A.	Qualitative Empirical Research – Semi-structured Interviews	7
B.	Overview of Published Sources.....	10
C.	How This Research Differs.....	12
III.	THE AUSTRALIAN TRADE MARK SYSTEM AND THE EUROPEAN GI SYSTEM	13
A.	The Australian Trade Mark System.....	13
B.	The European GI System	16
C.	Comparison Between the Two Systems.....	18
IV.	THE PROVENANCE BRANDING LANDSCAPE ON KING ISLAND – DAIRY, BEEF, LOBSTER	21
A.	General History of Agriculture on King Island.....	21
B.	The Dairy Industry on King Island from a Provenance Branding Perspective	24
C.	The Beef Industry on King Island from a Provenance Branding Perspective	28
D.	Lobster on King Island from a Provenance Branding Perspective	30
V.	OPTIMISATION BY INTEGRATION.....	31
A.	Implications of the King Island ‘Brandscape’	31
B.	Potential Advantages and Disadvantages of Australian Food GIs	34
C.	The Integration Solution: GIs and Trademarks Combined	36
VI.	EVALUATION AND DESIGN OF PUTATIVE KING ISLAND GIs For DAIRY, BEEF AND LOBSTER	38
A.	The Case for Dairy	38
B.	The Case for Beef	41
C.	The Case for Lobster.....	43
D.	Community Support for King Island GIs.....	46
VII.	CONCLUSION.....	48
A.	The Community’s Slice of the King Island Pie.....	48
B.	Broader Implications	49

I. INTRODUCTION

Not much work has been undertaken that contrasts *sui generis* geographical indication ('GI') schemes with the standard trade mark system.⁴ However, we observed that in Australia, as in other jurisdictions, despite principled objection to the registration of descriptive place names, the reality is that many trade marks incorporating geographical identifiers exist on the register.⁵ This is the case in relation to the kinds of goods and services that can and/or do emanate from the designated place. This insight resulted in our interest in undertaking a study contrasting the operation of GIs and standard trade marks in a specific location.

In Australia, a GI registration scheme for food products (other than wine) does not currently exist and therefore we have sought to contrast the standard trade mark system in operation with a *hypothetical* food GI scheme. Our aim is to understand, first, how the trade mark system works in relation to appropriation of place names and what the key differences are between it and a GI scheme, and second, the resulting implications for the design of any hypothetical GI scheme adapted to Australian conditions. This is particularly relevant in the context of the current free trade agreement ('FTA') negotiations between Australia and the European Union, where GIs are a significant issue.⁶

⁴ However, see e.g., Dev Gangjee, 'Quibbling Siblings: Conflicts Between Trademarks and Geographical Indications' (2007) 82(3) *Chicago-Kent Law Review* 1253.

⁵ See e.g., just in relation to Byron Bay: [Byron Bay Cookie Company](#); [Byron Bay Chocolate Company](#); [Byron Bay Chilli Company](#); [Byron Bay Organic Produce](#); [Byron Bay Macadamia Muesli](#); [Byron Bay Crackers](#).

⁶ The issue is not a new one for Australia, which dealt with wine GIs by way of the agreement with the EU (the original agreement was signed in 1994, but was replaced by a new agreement which entered into force in 2010 – *Agreement between the European community and Australia on trade in wine*, signed 1 December 2008 (entered into force 1 September 2010)). See also, Michael Handler, 'The EU's Geographical Indications Agenda and its Potential Impact on Australia' (2004) 15 *Australian Intellectual Property Journal* 173; William van Caenegem, 'Registered GI's: Intellectual Property, Agricultural Policy and International Trade' [2004] *European Intellectual Property Review* 170. See more generally, Kal Raustiala and Stephen R Munzer, 'The Global Struggle over Geographic Indications' (2007) 18(2) *European Journal of International Law* 337; Hazel Moir 'Geographical Indications: An Assessment of EU Treaty Demands' in Annmarie Elijah et al (eds), *Australia, the European Union and the New Trade Agenda* (ANU Press, 2017) 121.

II. METHODOLOGY AND LITERATURE OVERVIEW

A. QUALITATIVE EMPIRICAL RESEARCH – SEMI-STRUCTURED INTERVIEWS



King Island (‘KI’) presented an ideal opportunity for a case study because provenance is clearly considered an important economic asset of the island. The KI brand is widely known around Australia, and at the same time it is generally accepted as a ‘fact’ that there is a considerable amount of free-riding on that brand.⁷ Our interviews confirm that there is a pervasive local perception that proper management of the KI brand is key to the success of island agriculture; as **Respondent 2** put it: ‘I reckon probably 95% of the economy relies on the brand, so it is critical to our image’. The point was also highlighted by **Respondent 32** who emphasised the importance of the brand across *all industrial sectors* of the island economy in saying ‘King Island beef, dairy, tourism and golf, we all need to leverage off combined’.

⁷ See Susie Khamis, ‘Gourmet and Green: The Branding of King Island’ (2007) 1(2) *Shima: The International Journal of Research into Island Cultures* 14.

In the absence of a food GI registration scheme, it became apparent from our previous and preliminary research that the trade mark approach to ‘protecting’ and exploiting the KI brand,⁸ has a considerable track record on the ground. The use of standard trade marks has in large part contributed to the high level of recognition of King Island provenance around Australia across the three distinct industries – seafood, dairy and beef (in relation to seafood, the established goodwill is predominantly international, and relates to lobster in particular). Previous GI related empirical research conducted on the island had revealed the rich texture of the local provenance story but mainly in relation to beef and not across the three product sectors.⁹ We speculated that the three sectors with their very different value chains would reveal disparate data and permit useful inferences to be drawn in relation to various aspects of the trade mark/GI interface, as they all use the King Island provenance brand in their own ways.

In order to properly understand how the standard trade mark based private appropriation model has operated and allowed the current situation on King Island to develop, desktop research was insufficient so we undertook over 30 interviews with King Island stakeholders in the three industries.¹⁰ This allowed us to develop a more granular account and to incorporate background information gleaned from on-island actors, as well as data about the most recent developments. Published sources concerning the history of agriculture on the Island in the various sectors are very limited in any case, although the King Island museum holds invaluable material in both documentary and tangible form.¹¹

Conducting the empirical research also revealed information that could never be apparent from published sources, as we expected might be the case – some of this information is sensitive, finely modulated and personal. The King Island community has seen a steady decline in population in recent decades and expansion in beef cattle at the expense of the dairy herd. However, in other ways the community has remained quite stable, so that we could interview

⁸ Both by way of registered and common law marks.

⁹ William van Caenegem and Jen Cleary, *The Importance of Place: Geographical Indications as a Tool for Local and Regional Development* (Springer, 2017).

¹⁰ The qualitative research methodology by use of semi-structured interviews is fully explained and justified in William van Caenegem, Peter Drahos and Jen Cleary, ‘Provenance of Australian Food Products: Is There a Place for Geographical Indications?’ (Publication No 15/060, Rural Industries Research and Development Corporation, July 2015) 329. In line with our ethics approval, all interviewees have been de-identified and are referred to as Respondents.

¹¹ See King Island Museum at <<https://www.kingisland.org.au/excursions/>>.

actors who had long and varied experience within the various industry sectors. Some had performed multiple roles as primary producers, processors, wholesalers, brand-developers and in public functions. We used various techniques to identify targets for interview, by general internet searches, cross-referencing from published sources, suggestions from the King Island Council, and membership of the Brand Management Committee of Council and other associations such as the Beef Producers Group. We also relied on previous on-island contacts, cross-recommendations from interview targets, and sundry contacts within the various industries. We focussed not on the whole value chain (as we did in previous GI research)¹² but above all on the production side, with only a few off-island interviews conducted.

This empirical data-gathering approach allowed us to match the development of agriculture on the Island with the deployment of various devices to promote its provenance-dependent value in the rest of Australia. We were aware from previous research that the story of agricultural production on King Island was likely to be varied, involved numerous innovations and adaptations, and would also comprise of an interesting mix of local interests and off-island corporate and financial involvement. Agriculture on the Island has been sufficiently valuable to attract outside investment, and the King Island brand has amplified that interest, something of which we were already aware.

We then first matched our interview data with what we could glean from the limited King Island provenance and agriculture-related publications, and with broader scholarship on geographical indications and trade marks – some discussion of this literature follows in the next section. We then derived common themes from the data, superimposed our hypothetical GI regime on the existing trade mark landscape, and sought to generate conclusions from this exercise, keeping an integrated model in mind.

Below we first briefly consider existing scholarship and explain how our present work relates to it.

¹² See van Caenegem, Drahos and Cleary (n 10).

B. OVERVIEW OF PUBLISHED SOURCES

Geographical indications of origin are now a common topic of research.¹³ That is the case both in legal scholarship and more broadly in the social sciences, including economics, social geography, sociology, agricultural science and management.¹⁴ Many studies address the question whether registration of a place name as a sui generis GI generates a surplus for the local economy, or more specifically higher margins for farmers within the GI zone.¹⁵ A common underlying theme of such research is how isolation and challenging conditions of production of many agricultural communities can be counteracted by a GI system which emphasises the uniqueness of a product and manages to get the value message more directly to consumers. In other words, how greater control of the value chain helps disadvantaged farmers get a larger slice of the pie. This perceived promise of GIs to alleviate farmer income constraints and the ‘commodity squeeze’, is regularly investigated in relation to agriculture in developing and emerging economies, which often remains very small scale, local, inefficient and entirely unresponsive to consumer demand trends and signals in distant metropolitan markets.¹⁶

Often the focus is on individual returns to individual farmers, but also common is to place this in the broader context of the survival and flourishing of rural communities, in particular those dependent on agriculture. This is not just a matter of aggregate farm incomes, but of growth through encouragement of local processing industries, and the development of a critical mass of embedded skill, social services and employment. As **Respondent 24** put it, referring to GI protection, ‘I would love to see it here, if we could get this through in law, imagine the impact on regional Australia. You would end up with communities again because things would have to be manufactured within the geographical area. You would have communities again, you would have

¹³ For some general works on the topic see Dev Gangjee (ed), *Research Handbook on Intellectual Property and Geographical Indications* (Edward Elgar, 2016); van Caenegem and Cleary (n 9); Michael Blakeney (ed), *Geographical Indications* (Edward Elgar, Vol 1, 2015); Michael Blakeney (ed), *The Protection of Geographical Indications: Law and Practice* (Edward Elgar, 2nd ed, 2019).

¹⁴ See e.g., Daniela Benavente, *The Economics of Geographical Indications* (Graduate Institute Publications, 2013).

¹⁵ See Philip Watson et al, ‘A Method for Evaluating the Economic Contribution of a Local Food System’ (2017) 42(2) *Journal of Agricultural and Resource Economics* 180. See e.g., Leonardo Cei, Edi Defrancesco and Gianluca Stefani, ‘From Geographical Indications to Rural Development: A Review of the Economic Effects of European Union Policy’ (2018) 10(3745) *Sustainability* 1, which includes that there is a demonstrable surplus at the consumer and retailer levels while economic effects for producers are dependent on specific local conditions. See also, Dwijen Rangnekar, ‘The Socio-economics of Geographical Indications: A Review of Empirical Evidence from Europe’ (UNCTAD-ICTSD Project on IPRs and Sustainable Development, Issue Paper 8, 2004).

¹⁶ See Sarah Bowen, ‘Case Study: Tequila’ (North Carolina State University, November 2008).

kids in schools. Football teams and basketball teams. You would have the facilities, that we all struggle to maintain and keep going'.¹⁷

It would be courageous to say that such studies have un-controversially proven that GIs are a 'good thing' from that perspective. Some accounts conclude that GIs 'work' for farmers and local communities and others suggest little is gained.¹⁸ Some sceptical voices model GIs more as rent-seeking devices with anticompetitive effects.¹⁹ Whatever the correct inference may be, GI studies commonly tend to focus on the income side, while paying less heed to the hidden and augmented cost profile associated with GI-standard production as opposed to commodity supply and marketing of agricultural products.²⁰ They also tend to ignore the importance of the specific characteristics of the municipal design of the GI registration system, and of the design of the specifications of particular local products. Perhaps they therefore overestimate the extent to which we can realistically hope to generate universally valid conclusions about the GI 'system' from individual studies with data specific to a particular GI and its region.

To be more explicit, existing studies are often based on an analysis of apparent price differentials (an easy identifier for economists): that is, what higher price a GI product commands compared to a product that is sold without any reference to provenance (often it is not easy to identify the control product).²¹ Further, existing studies do not effectively address complexity: commonly a multitude of factors determine the 'success' of a GI product.²² It is invariably very difficult to isolate the causal effect of the GI as such, where specific GIs are in any case very varied in their characteristics.²³ Other relevant factors include industrial structure around a GI; the level of

¹⁷ Interview with Respondent 24.

¹⁸ See e.g., Angela Tregear, Aron Torok and Matthew Gorton, 'Geographical Indications and Upgrading of Small-scale Producers in Global Agro-food Chains: A Case Study of the Mako Onion Protected Designation of Origin' (2016) 48(2) *Environment and Planning A* 433.

¹⁹ See e.g., Chiara Landi and Gianluca Stefani, 'Rent Seeking and Political Economy of Geographical Indication Foods' (2015) 31(4) *Agribusiness* 543.

²⁰ See Oana Deselnicu et al, 'A Meta-analysis of Geographical Indication Food Valuation Studies: What Drives the Premium for Origin Based Labels' (Working Paper No 93, American Association of Wine Economists, November 2011).

²¹ See ARETÉ Research, 'Study on Assessing the Added Value of PDO/PGI Products' (Report, *European Commission*).

²² Dominique Barjolle, Jean-Marc Chappius and Martine Dufour, 'Competitive Position of Some PDO Cheeses on Their Own Reference Market: Identification of the Key Success Factors' (Seminar Paper, European Association of Agricultural Economists, 28-30 October 1999).

²³ See Sarah Bowen, 'Embedding Local Places in Global Spaces: Geographical Indications as a Territorial Development Strategy' (2010) 75(2) *Rural Sociology* 209.

detail of specifications; the collaborative structures underpinning particular GIs; whether a GI has an established reputation; the level of uniqueness and what the reputation of a GI is due to; the flexibility of GI rules over time (as far as specifications and geographical delineation are concerned); the size of a GI declared area; whether GIs are supported by government finance and enforcement regimes and to what degree; government policy in relation to underpinning the GI structure as a whole; etc. Therefore, econometric analysis might generate valid conclusions for a particular GI, without that translating into necessarily persuasive conclusions that are valid for the sui generis GI protection model as whole.

C. HOW THIS RESEARCH DIFFERS

Although the present study is empirical in nature, in the sense that the published information base is supplemented by information gleaned during on-island interviews, we do not seek to make a case for or against GIs based on an analysis of price differentials etc. Rather, we seek to document how the standard trade mark system has operated in an area with provenance value, by drawing on data gathered on the ground and from desktop research. We then hypothesise how a putative food GI system might allow value to be extracted more or less efficiently from provenance in the same place. Importantly, we do not envisage a vacuum as an alternative to a GI-populated landscape, but one where provenance brand promotion is governed by the standard trade mark system. Finally, we consider how an integrated GI/TM model could have optimal welfare effects.

This type of contextual analysis that takes note of the realities of the standard trade mark system is comparatively rare – the work by Gangjee and by Evans being notable exceptions.²⁴ However, we are not aware of any study that has attempted to address this question with an empirical element that examines the evolution over time of a trade mark-based provenance landscape. Elsewhere, we have speculated about what the effect might be of trade mark registration of place names on a particular regional agricultural economy.²⁵ Additional questions resulted from this previous research, which we here seek to answer by more focussed investigation of actual

²⁴ Gangjee (n 4). See also, G E Evans, ‘The Comparative Advantages of Geographical Indications and Community Trade Marks for the Marketing of Agricultural Products’ (2010) 29(1) *Yearbook of European Law* 224, which identifies the alternative option of groups of producers collaborating and acquiring a single standard trade mark.

²⁵ See van Caenegem, Drahos and Cleary (n 10) 43.

experience in a particular place. Inter alia we wondered whether private appropriation might have an anti-competitive effect; whether the common law and registered trade mark system is an effective tool to combat consumer deception around origin; whether private appropriation allows de-localisation of production to an extent that is detrimental to local communities; whether there is an inefficient level of coordination and collaboration where control of a provenance brand is dispersed amongst private actors; and whether provenance brand value is whittled down over time where only trade marks exist to protect it.

Building a contextual picture of what has occurred around trade marks on King Island generated answers to some if not all of these questions. Consequently, that allowed us to model what sort of hypothetical GI system might be effective to counter the detrimental effects of unmitigated private appropriation of place. By unmitigated here we mean, unrestrained by some independent (of the trade mark system) guarantee about accuracy in relation to geographical origin of marked food products.

Before we proceed to examine the realities on the ground in King Island as we found them, we describe the trade mark system as it operates at present around geographical terms.²⁶ Then we consider the European GI model and highlight how the two systems differ.

III. THE AUSTRALIAN TRADE MARK SYSTEM AND THE EUROPEAN GI SYSTEM

A. THE AUSTRALIAN TRADE MARK SYSTEM

The trade mark law allows the registration by different parties of standard trade marks that include the same geographical reference. Each thus has an individual proprietary stake in that provenance brand. The Australian trade mark law attempts to strike a balance between the distinctiveness of a mark (which can be achieved by additions and flourishes to a geographic term, and in rare cases by very extensive trade mark use),²⁷ and descriptive accuracy (inter alia by imposing conditions and limitations on the use of a mark that includes a geographical term).²⁸

²⁶ *Trade Marks Act 1995* (Cth).

²⁷ See *ibid* s 41.

²⁸ *Ibid* s 43.

By contrast, the European GI model ensures accuracy by mandating the standard that applies to the goods with which a place name is used. In the latter model, the collective of local producers is responsible for the promotion of the GI, although each member of the collective might have their own trade mark as well. In the former model, each individual trade mark owner invests in the promotion of their own trade mark, which amounts to a cumulative investment in provenance branding, since each mark contains a reference to the same place name.²⁹

The trade mark law in Australia as in other jurisdictions, permits registration of a mark only if it is capable of distinguishing goods emanating from one producer from goods of the same kind supplied by other producers.³⁰ A place name is normally not suitable for registration as a trade mark, because it is not capable of doing this in relation to goods that are of a kind that do or could come from the place so identified.³¹ They lack distinctiveness. However, if the place name is without significance or identifies a place in which such goods could not possibly originate, it can be registered as such: the famous ‘North Pole Bananas’ example.³² It can also be registered if after long use as a trade mark (or as a ‘badge of origin’), not (solely) as a designator of geographical origin, it has come to be seen as a trade mark by consumers: the ‘Bega’ Australian trade mark for cheese for instance, or the ‘King Island Dairy’ trade mark.³³ This should be a rare case – what is more common is that marks ‘get over the line’ to be sufficiently distinctive, because the place name is part of a more complex mark: for instance one that includes other ‘device’ or graphic elements, or a trade mark-like rendering of the term, or with other words, colours, fonts etc.³⁴ Of course, some trade marks are registered on the basis of such additional elements combined with evidence of actual use as a mark.

²⁹ See e.g., Erik A Borg and Karl Gratzler, ‘Collective Brand Strategy, Entrepreneurship, and Regional Growth: The Role of a Protected Designation of Origin (PDO)’ (2013) 2(3) *Journal of World Economic Research* 26, which addresses this issue in terms of entrepreneurship.

³⁰ *Trade Marks Act 1995* (Cth) s 41.

³¹ See ‘Geographical Names’, *Trade Marks Examiners Manual* (Web Page) <http://manuals.ipaustralia.gov.au/trademarks/trade_marks_examiners_manual.htm>.

³² *Glastonbury Case* (1938) 55 RPC 253; *Clark Equipment Co v Registrar of Trade Marks* (1964) 111 CLR 511; *Cantarella Bros Pty Ltd v Modena Trading Pty Ltd* (2014) 315 ALR 4.

³³ See Trade Mark 726984 ‘[Bega](#)’. Bega is a town in NSW well-known for dairy.

³⁴ For example, the King Island Council registered a trade mark combining the word ‘King Island’ with a representation of a stylised lighthouse, sun rays, water etc (for advertising services and seafood). See Trade Mark 1310128 ‘[King Island 40](#)’.

An application for a trade mark that incorporates a geographical term and additional elements or flourishes etc,³⁵ should thus normally not be rejected for being too similar to an already registered trade mark containing the same geographical term. This is because in a comparison between the marks, the geographical term will not be considered in isolation, the comparison will be between the trade marks in their entirety (i.e., with the additions and flourishes). As a result, it is possible for multiple trade mark owners to have registered trade marks that all contain a reference to the same place by name, in effect each appropriating to themselves a slice of the community pie which is the King Island provenance brand.

The trade marks law also attempts to ensure that a registered trade mark is not misleading or deceptive.³⁶ This means that where a trade mark contains a geographical term that might suggest to a consumer that marked goods actually emanate from the place identified, it is important that they actually do so. This guarantee of accuracy is in a state of tension with the distinctiveness requirement, but this tension is resolved in various ways. One common approach in Australia is for the Trade Marks Office ('TMO') to impose conditions on the use of the trade mark. For instance, in relation to the mark 'Byron Bay Pale Ale': 'It is a condition of registration that in instances where the trade mark is used on beer that is not brewed by the applicant or that is not brewed in Byron Bay the product or packaging to which the trade mark is attached will include further information specifying the place of manufacture and/or the company that brewed the beer'.³⁷

This in turn implies that the relevant trade mark owners are all located in that same area, or at least have a substantial part of their operations in that area – so substantial as to warrant indicating to consumers that the goods marked do emanate from that place. In that manner, there is multiplicity of ownership of trade marks with a reference to a single place, with the disparate owners nonetheless having some common interest in the value of the place and the provenance brand associated with it. Concretely in relation to King Island, it is legally possible (and to some extent the case – see further below Part IV B, C and D) that trade marks owned by different

³⁵ See e.g., Trade Mark 1807099 '[King 1801](#)' which includes reference to the words 'King Island' and images that depict the King Island lighthouse and two black angus cattle inter alia.

³⁶ *Trade Marks Act 1995* (Cth) s 43.

³⁷ See condition imposed on Trade Mark 1590666 '[Byron Bay Pale Ale](#)'.

commercial actors on the island in relation to the same goods (e.g., seafood, beef or dairy) coexist and each contain a reference to King Island (and the product) itself.

It might be supposed that separate actors in that position would rationally seek to collaborate to optimise the provenance value to the benefit of all; but also, that they might have interests that are not exactly aligned. Within the constraints of the trade marks law and the general prohibition on misleading conduct in trade,³⁸ each actor in reality has a large degree of autonomy concerning how they produce, process and market their goods. Cumulatively, by promoting their own marks, they contribute to the value of the goodwill of the provenance brand or place name incorporated in those marks; however, although cumulative, the promotional effort might often be less than optimally coordinated and insufficient in any case.³⁹

B. THE EUROPEAN GI SYSTEM

What we refer to here as the ‘European GI system’ is often referred to as ‘sui generis’ GI registration. This distinguishes it from the schemes found in various jurisdictions that vest rights in geographical indications by way of trade mark laws. Principally this is achieved by way of collective and certification trade marks, which are nonetheless usually subject to similar distinctiveness requirement as apply to standard trade marks. However, in a number of jurisdictions descriptive geographical terms are protected as trade marks by way of modification of the usual requirement of distinctiveness – this is for instance the case with ‘regional collective marks’ in Japan.⁴⁰

However, in reality the sui generis GI system fundamentally differs from a trade marks regime, in that terms are registered as GIs exactly because they are descriptive of origin. A registered GI identifies the geographical origin of the goods accurately and is also a term that is suggestive of

³⁸ See *Competition and Consumer Act 2010* (Cth) Sch 2 (‘*Australian Consumer Law*’) s 18.

³⁹ See GianCarlo Moschini, Luisa Menapace and Daniel Pick, ‘Geographical Indications and the Competitive Provision of Quality in Agricultural Markets’ (2008) 90(3) *American Journal of Agricultural Economics* 794.

⁴⁰ See William van Caenegem, Jen A Cleary and Lucie Tréguier, ‘Local to Global: Provenance Branding and Farmer Co-operation for High Value Export Markets’ (Publication No 16/068, Rural Industries Research and Development Corporation, October 2016). See also, William van Caenegem and Noelle Emmanuel Panlilio, ‘An Australian Anomaly? Sui Generis GIs in Australia and the Asia-Pacific Region’ (2019) 41(10) *EIPR* 628; William van Caenegem, Jen Cleary and Lucie Treguier, ‘The Protection of Origin Marks in China and Japan’ (2017) 27(3) *Australian Intellectual Property Journal* 131.

some particular quality those goods have precisely because of their regional origin. A GI can be either a place name as such, ‘Champagne’, or a place name with a product description (‘Volailles de Bresse’). The European GI system thus revolves around the notion of terroir and specificity: that the (food) products have a unique character that can be ascribed to their geographical origin with all that entails. To obtain registration as a GI, proponents must establish this connection to the satisfaction of those tasked with examining it. This qualitative connection is then guaranteed by way of specifications, or a ‘*cahier de charges*’ as it is called in France. The area that is entitled to use the term in relation to specified goods is very precisely circumscribed and gazetted. It is not uncommon that the specifications are very detailed and extensive, requiring not only regionally sourced products or ingredients, but also particular local methods of processing. Producers in the area are of course free to produce the food concerned in any way they like, but if they do not observe the specifications they are not entitled to use the registered place name in association with the product in any way. Once a GI is declared it is in principle permanent, i.e., it is not subject to ‘genericide’ or removal for non-use,⁴¹ although removal is possible for desuetude. In principle, GI rights prevail over trade mark rights.⁴²

In terms of infringement the notion of consumer deception does not enter into the equation. Use of the registered GI in relation to a product for which it is registered is *ipso facto* an infringement if the specifications and the geographical source rules have not been observed. The usual good faith defences that exist in trade marks law do not apply to GIs, disclaimers are not permissible, and the use of the protected term with ‘kind, style, type etc.’ is specifically excluded. The test of infringement is not a consumer related test. Further, the system is a public law one based on either collective ownership of the registered GI by the concerned producers of the region, or no ownership at all, in which case the system has more the character of a direct regulatory intervention (as for instance is the case with the Australian wine GI scheme). The remedies for infringement are of a public law nature.

⁴¹ As required by *Trade Marks Act 1995* (Cth) Part 9.

⁴² The registration of Geographical Indications in the European Union is explained at ‘Quality Schemes Explained’ (Web Page) <https://ec.europa.eu/info/food-farming-fisheries/food-safety-and-quality/certification/quality-labels/quality-schemes-explained_en#geographicalindications>.

C. COMPARISON BETWEEN THE TWO SYSTEMS

Although the sui generis GI and the (certification and collective, or standard) trade mark models are often portrayed as being near-substitutes, in reality they are fundamentally different in their underlying principles and structures. Whereas the trade mark system (and that includes collective and certification marks) is a private law, individual property rights-based system, the GI model is either a regulatory scheme that does not allocate ownership, or allocates rights to a collective rather than an individual or company.

Although we are here contrasting the GI system with standard trade marks, we must also highlight the certification trade mark system. A certification trade mark indicates that marked goods have been certified in accordance with rules devised by a private certifying organisation that owns the mark. A bare, descriptive geographical term cannot be registered as a certification or for that matter collective mark. If it were otherwise, a private owner of a certification trade mark would be in a position to unilaterally impose its rules on the community as a whole. In the same sense, a standard trade mark must be distinctive, rather than descriptive of geographical origin. It indicates trade connection with the particular owner of the mark (in the sense of certification by it and not some other organisation), rather than indicating origin in a particular area (as well as processing in conformity with specifications). As a consequence, a particular certification trade mark owner can only impose its standards on any person who wishes to use that exact distinctive trade mark and therefore enters into an agreement with them. Thus, a person who uses a bare geographical term in relation to their goods can neither be bound by a certification trade mark's rules or an individual standard trade mark owner's requirements. On the other hand, a GI system imposes legal rules *erga omnes* about the use of a descriptive geographic term.

Since the GI system is a public law, regulation based model, in economic terms the cost of declaring, promoting and protecting a declared GI is distributed across society as a whole.⁴³ The

⁴³ The *Wine Australia Act 2013* (Cth) for example, in Part VIB Div 2, provides for fines [and other sanctions] in relation to misuse of a GI. No private party owns and enforces the GI and in Australia there is also no collective that owns the GI and pursues infringers. That task falls to Wine Australia, a corporation established under legislation and of public law character. It operates a label integrity program. There is no reason why a putative food GI system in Australia should work in a fundamentally different manner, although at present no public organisation such as Wine

equivalent costs in relation to a standard trade mark fall exclusively on the trade mark owner. The costs of the regulatory aspects of a GI system are in reality mitigated by the fact that traceability regulations are already in place, for the purpose of food health, product liability and environmental compliance. In terms of external enforcement, the norm with GI schemes is that this task falls to a public authority and is often a matter of criminal law rather than private remedies (as is the case with the wine GI legislation in Australia),⁴⁴ whereas the trade mark system requires individual owners to invest in pursuing alleged infringers. This is often a challenging and costly task because the trade mark system is full of nuances, whereas the GI law is a ‘no excuses’-type scheme. It has certain critical characteristics: first, it is not necessary to establish consumer deception if the GI is used on food products for which it is registered – in this a GI system operates in the same manner as the trade mark system: if a mark is used without authorisation on goods for which it is registered then no consumer deception or confusion need be proven. However, in trade marks law, particularly where a mark comprises a geographical reference, a complication may arise as to whether the mark is used ‘as a mark’ or in a descriptive manner – this is not an issue in GI law. It is not possible to use the GI term on a product or in relation to a specified product and argue that it is not ‘used as a GI’ (an obvious argument might be that it is used to simply indicate that the originator’s place of business is in the relevant area). This leads to a further key difference, which is that defences that exist in the trade marks law, are not available in relation to GIs. The most important of these is ‘use in good faith’ of a mark, which can include use to indicate the nature or geographical origin of goods. GI law expressly provides that additions which render the geographical term descriptive or generic, such as ‘-kind’ or ‘-style’ are expressly excluded. Other defences that are typically found in trade marks law such as that the mark has become generic also do not exist in relation to GIs, nor can they normally be attacked for non-use. Using the GI with additions or alterations, or in translation, also cannot render its use legitimate, in relation to goods for which the GI is registered. The protection extends to non-identical representations of the registered GI in some cases.⁴⁵

Australia exists for food more generally – possible organisations that could take on such responsibility are perhaps the Food Standards Australia New Zealand, Ag Department or potentially the ACCC. In relation to internal monitoring, this task is taken up by Wine Australia in that sector. In essence, this organisation audits winemakers’ documentation on an annual basis for compliance with GI standards (a rule of origin).

⁴⁴ Ibid.

⁴⁵ *Comité Interprofessionnel des Vins Côtes de Provence v Stuart Alexander Bryce* [1996] FCA 742 (‘Côtes de Provence’ and ‘La Provence’).

As we mentioned above, the trade marks law attempts to strike a balance between distinctiveness and accuracy in relation to a trade mark that includes a geographical reference that is not fanciful. The GI system aims for accuracy simpliciter, and sets up a clear frame of reference as to what is accurate and what is not: the area boundaries are predetermined in specific detail as are the rules. In the trade mark system these matters are not resolved a priori. The ‘guarantee’ of accuracy lies in the fact that the use of any trade mark must not ‘be likely to deceive or cause confusion’ because of a connotation that the trade mark or a sign contained in the trade mark has (s 43). This means that if the geographical reference in the mark has the false ‘connotation’ (in other words it suggests to consumers that) the marked goods come from that area, the application for registration should be rejected or the mark, if registered, can be cancelled or a condition can be imposed on its use.⁴⁶ The question that is not a priori resolved as it is in relation to a registered GI, is what exactly would be a sufficient connection with the area to avoid a misleading connotation.

For instance, does the mark ‘King Island Dairy’ mean that the cheese is manufactured and packaged on King Island? Does it mean the milk used is 100% King Island? Could 10% milk or milk powder or milk solids sourced on the mainland be used and the mark still not have a misleading connotation? Does the mark suggest a uniquely and exclusively King Island style cheese etc? In terms of the trade marks law, the repercussions of using a registered mark that is misleading relate to its continued validity and presence on the register. Therefore, the incentive for the trade mark owner not to misrepresent the origins of the goods is very indirect; furthermore, what is accurate and what is not has to be determined by a court – it is not determined a priori by legislation as it is in the case of a registered GI. Naturally the trade mark owner must also comply with the law relating to misleading and deceptive conduct – if the trade mark (possibly combined with other suggestions of origin within the area, such as a map on the label as in Byron Bay Pale Lager)⁴⁷ deceptively suggests a product is made within the area but is actually made elsewhere (or substantially made elsewhere) then a remedy might lie against the trade mark owner under the Act (such as damages, or an order in relation to undertakings etc.).

⁴⁶ *Trade Marks Act 1995* (Cth) ss 43, 88.

⁴⁷ See Trade Mark 1538970 ‘[Byron Bay Pale Lager](#)’; See also, ‘ACCC Acts on Beer Labelling’ (Media Release No MR 96/14, Australian Competition and Consumer Commission, 29 April 2014) <<https://www.accc.gov.au/media-release/accc-acts-on-beer-labelling>>.

None of these complications apply in relation to a registered GI – if the term is used in relation to relevant goods that are not compliant, the law is breached – in Australia, in terms of wine GIs for instance, that results in criminal liability to a fine or imprisonment. The consequences are direct and whether or not the use is compliant is straightforward to establish.

It is also the case that a simpler system with less ‘wriggle room’ and that ultimately can result in a fine (and the attendant publicity) will operate as a more effective deterrent. Although enforcement cost may be partially shifted to society as a whole, it is also society as a whole (as all are consumers) that benefits from the improved accuracy of provenance claims, which (as ‘credence claims’) are otherwise notoriously subject to uncertainty and manipulation. In any case, consumers are today more interested in the provenance of their food products than they ever were – they have come to expect accuracy in that regard.

We now document the provenance branding landscape on King Island as it has developed in the absence of a GI system. We then go on to superimpose a hypothetical food GI model which generates some inferences and leads to our general conclusions.

IV. THE PROVENANCE BRANDING LANDSCAPE ON KING ISLAND – DAIRY, BEEF, LOBSTER

Each of the industries that we considered in detail on King Island provided relevant but very disparate insights. Here we address some history and then present the current provenance brand situation in relation to each industry in turn.

A. GENERAL HISTORY OF AGRICULTURE ON KING ISLAND

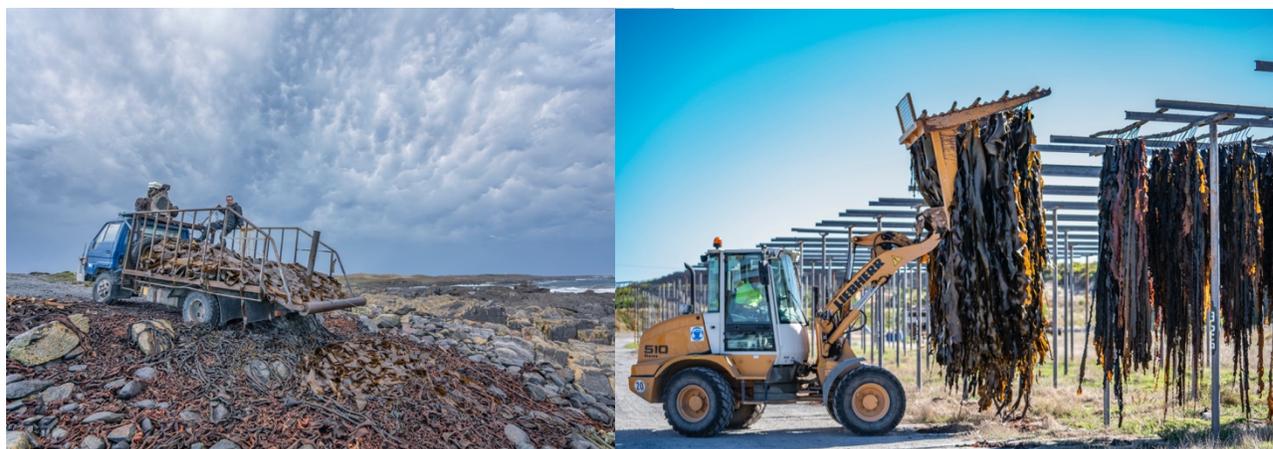
King Island is located 80km from the north-western tip of Tasmania and sits at the western entrance of the Bass Strait. The Island itself is 64km long and 26km wide and has a total area of 110,000 hectares. The current population is comprised of approximately 1,500 permanent residents.⁴⁸ The Island is situated within a wind belt known as the ‘Roaring 40s’ and is therefore

⁴⁸ See ‘2016 Census QuickStats’, *Australian Bureau of Statistics* (Web Page) <https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/LGA63410>; ‘King Island Information’, *King Island* (Web Page) <<http://www.kingisland.net.au/information>>.

constantly affected by strong winds produced over the 25,000km of unbroken ocean that extends to South America. The combination of its location, surrounded by ocean, and year-round rainfall, makes King Island ideal for agricultural purposes.⁴⁹

The dominance of the agricultural industry on King Island is partly as a result of the Soldier Settlement Schemes. Following both World War I and World War II, the government allotted parcels of land to returned soldiers, for farming, in an effort to reintegrate soldiers into society. Although the success rates of the Soldier Settlement Schemes were relatively poor,⁵⁰

Respondent 7 recalls that ‘in the late 60s and early 70s, there was [sic] 198 dairy farmers’.⁵¹ By 1979, over 70% of King Island was being used for agricultural purposes.⁵² In 1939, King Island experienced a devastating forest fire that cleared land over almost the entire island,⁵³ which is an additional historical event that has assisted the creation of such a productive agricultural landscape.



King Island also has several other economic drivers, including kelp farming, scheelite mining and tourism. Bull kelp plants are constantly cast upon the Island’s shore, predominantly on the

⁴⁹ Although, there is evidence that King Island was not always suitable for agriculture (see Richard W Barnes, Fred Duncan and Chris S Todd, ‘The Native Vegetation of King Island, Bass Strait: A Guide to the Identification, Conservation Status, and Management of the Island’s Native Vegetation and Threatened Plant Species’ (Bushcare Technical Extension, 2002) 13.

⁵⁰ Lea Coates, ‘Can Contemporary Regional Development Identify a Future for Islands? King Island: A Case Study’ (PhD, the Institute for Regional Development).

⁵¹ Interview with Respondent 7.

⁵² Barnes, Duncan and Todd (n 49) 16.

⁵³ See ‘Tasmania and King Island in Grip of Bush Fires’, *The Advocate* (31 January 1999) <<https://trove.nla.gov.au/newspaper/article/68537357>>; Interview with Respondent 27.

west coast, and kelp harvesters will hand select plants daily then transport them to the factory for drying.⁵⁴ The majority of production of the bull kelp is for overseas and involves the extraction of alginates to use in foods, drinks and cosmetics. Kelp Industries Pty Ltd, has exported over 80,000 tonnes of dried bull kelp since 1976.⁵⁵ Scheelite mining has also been part of the King Island economy periodically from the 1900s until the late 1980s,⁵⁶ when it closed due to low prices for tungsten at that time. However, King Island Scheelite Ltd has recently conducted an updated feasibility study and forecast for production to begin in 2021. Tourism is another industry that is rapidly growing on the Island. An increasing number of holiday accommodation is being built (e.g., available on Airbnb), tours made available and the Island has benefitted from the establishment of two world-class golf courses.⁵⁷ Despite these other industries, King Island's economy is still heavily driven by the beef, dairy and seafood industries.^{58,59}

However, in terms of its agricultural production, King Island does face some major disadvantages which mostly stem from its isolation. The fact that the island is entirely dependent on marine transport both for inputs (such as fodder and feed, chemicals, equipment) and for exporting produce to Tasmania and the Australian mainland, means that the cost and availability of suitable sea transport have been a central issue of contention and controversy over the years. There has never been a sufficient volume of trade to justify more than the two maritime transport services that presently exist, with all the implications inherent in such a monopoly situation.⁶⁰

⁵⁴ See 'King Island Kelp Industries Pty Ltd', *King Island* (Web Page) <<http://www.kingisland.net.au/king-island-products?pid=112&sid=128:King-Island-Kelp-Industries-Pty-Ltd>>; 'About', *Kelp Industries Pty Ltd* (Web Page) <<http://www.kelpind.com.au/default.asp?id=2>>.

⁵⁵ 'About', *Kelp Industries Pty Ltd* (Web Page) <<http://www.kelpind.com.au/default.asp?id=2>>. See also, 'History', *King Island Scheelite* (Web Page) <<https://www.kingislandscheelite.com.au/projects/dolphin/history/>>.

⁵⁶ Coates (n 50) 97-8. See also, 'History', *King Island Scheelite* (Web Page) <<https://www.kingislandscheelite.com.au/projects/dolphin/history/>>.

⁵⁷ See Ocean Dunes <<https://www.oceandunes.com.au/>> and Cape Wickham Links <<https://capewickham.com.au/>>.

⁵⁸ 'Economic Development', *King Island Council* (Web Page, 2018) <<https://kingisland.tas.gov.au/develop/economic-development/>>.

⁵⁹ Respondent 18 also indicated that there was viability in honey on the Island, which could be a potential future local economy.

⁶⁰ One of these maritime transport services is operated by the Tasmanian government (Bass Island Lines).

B. THE DAIRY INDUSTRY ON KING ISLAND FROM A PROVENANCE BRANDING PERSPECTIVE

In the beginning, the majority of farms on King Island were dairy, the herd being predominantly Jersey. A dairy cooperative was formed in 1902,⁶¹ which owned a butter factory that operated at Loorana.



At the time, there were other private cheese factories operating which were producing soft cheeses for Kraft.⁶² After facing financial difficulties in the 1970s, the dairy cooperative and butter factory were effectively taken over by an off-island entrepreneur, Bill Kirk, in 1978.⁶³ Kirk took the initial steps for marketing King Island Dairy's cheese on the mainland. As **Respondent 7** recalls, 'he used to put it in foam packages and cool it, then post it all around Australia – that is how he started marketing'.⁶⁴ He then developed the King Island Dairy brand

⁶¹ See 'King Island Dairies', *The Companion to Tasmanian History* (Web Page) <https://www.utas.edu.au/library/companion_to_tasmanian_history/K/King%20Island%20Dairies.htm>; Interview with Respondent 27; Interview with Respondent 13.

⁶² Interview with Respondent 7; Interview with Respondent 27.

⁶³ 'King Island Dairies' (n 61); Coates (n 50) 91.

⁶⁴ Interview with Respondent 7.

so that it also covered specialty cheeses and cream products. During Kirk's ownership, the King Island Dairy brand went upmarket to delicatessens in Melbourne, and its cream products became well known for their rich yellow colour.⁶⁵ The Kirks were then dispossessed of King Island Dairy in 1986, due to a debt totalling almost \$1 million to the Tasmanian Development Authority,⁶⁶ and the company was sold on to Transequity. This began a multitude of changes in ownership of King Island Dairy.



First, Transequity was acquired by Agricornp. Then, in 2002 National Foods bought King Island Dairy for \$77 million.⁶⁷ In 2007, Kirin, a Japanese conglomerate, bought National Foods for \$2.8 billion. During this time, King Island Dairy announced that it would halt its production of King Island Cream and Crème Fraiche due to a shortage of raw materials.⁶⁸ In 2009, Kirin assumed

⁶⁵ Interview with Respondent 27.

⁶⁶ Commonwealth, *Parliamentary Debates*, Senate, 11 September 1996, 3215 (Senator Murphy) <<https://www.aph.gov.au/binaries/hansard/senate/dailys/ds110996.pdf>>.

⁶⁷ John Beveridge, 'Dairy Ripe for Offer' (Herald Sun, 27 November 2001).

⁶⁸ These products were created by Bill Kirk (see 'King Island Pull the Plug on Pure Cream and Crème Fraiche', *KirkFood* (Blog Post, 5 September 2008) <<http://www.kirkfood.com.au/blog/111-king-island-pull-the-plug-on-pure-cream-and-creme-fraiche>>).

100% ownership of Lion Nathan and decided to merge it with National Foods. Throughout these changes in ownership, King Island Dairy changed its marketing strategy from specialty delicatessens to supermarkets.⁶⁹ Saputo, a Canadian multinational, has now purchased Lion Dairy and Drinks' specialty cheeses,⁷⁰ despite initial concerns by the Australian Consumer and Competition Commission ('ACCC') that the purchase would result in two conglomerates effectively owning 80% of dairy in Tasmania.⁷¹ One apprehension with the most recent purchase is the uncertainty about the future of dairy on King Island, as **Respondent 23** put it, 'could Saputo just then close this factory down and take the milk across to Burnie to make the King Island brand? They could do that'.⁷²

The changes in ownership over the years have resulted in a steady decline of the dairy herd and the number of dairy farms on the island, with many transitioning to beef. According to **Respondent 23**, 'about 23 years ago when I started, there probably were 26-27 dairy farmers, now we've got about 8 dairy farms', and of those 'two are fairly close to retiring and finishing up, and if they do not sell it on as dairy farms, and sell it on as beef farms that is another two that are gone'.⁷³

We were able to identify only two independent dairy initiatives over the years which were short-lived and effectively pushed out of competition by the dominance of King Island Dairy. There was a project for the development of a UHT plant in the late 90s, which had strong support from the dairy farmers on the Island and the King Island Council.⁷⁴ The UHT plant was seen as a positive development which would fix the issue of excess milk which could not be used for processing cheese, and revive the King Island economy.⁷⁵ The UHT plant was built in 2002,

⁶⁹ King Island Dairy products are able to be purchased from Woolworths and Coles.

⁷⁰ See 'Saputo Dairy Australia Pty Ltd – Lion Dairy and Drinks Pty Ltd's Cheese Business', *Australian Competition and Consumer Commission* (Web Page) <<https://www.accc.gov.au/public-registers/mergers-registers/public-informal-merger-reviews/saputo-dairy-australia-pty-ltd-lion-dairy-and-drinks-pty-ltds-cheese-business>>.

⁷¹ Darren Gray, 'ACCC Flags Concerns with Saputo's \$280 Million Cheese Deal' (News Article, Sydney Morning Herald, 8 August 2019) <<https://www.smh.com.au/business/companies/accc-flags-concerns-with-280-million-cheese-deal-20190808-p52f36.html>>.

⁷² Interview with Respondent 23. We approached both Lion Dairy and Drinks and Saputo for their input, however, at the time of conducting interviews the sale of the King Island Dairy business was under review by the ACCC and further both companies indicated to us that they were not prepared to offer any comments.

⁷³ Ibid.

⁷⁴ Peter Hunt, 'UHT Bid for King Island', (Weekly Times, 12 August 1998); Bruce Mounster, 'UHT Plan on Funding Knife Edge' (Tasmanian Country, 26 February 1999).

⁷⁵ 'UHT Plant to Overcome Milk Excess on King Island' (King Island Courier, 14(25), 20 May 1998).

coinciding with the takeover of King Island Dairy by National Foods. The operation was just taking off when all the dairy farmers were prevented, in their supply contracts with King Island Dairy, from selling their milk to the UHT plant.⁷⁶ The matter was litigated but reached settlement before it was to be heard before the Federal Court.⁷⁷ While the settlement agreement allowed dairy farmers to provide their excess milk to the UHT plant, the ordeal caused by King Island Dairy's strategy to maintain dominance over the name King Island as a brand in the dairy business was a contributing factor to the UHT plant's ultimate demise. There were also management issues, and as a result by 2004 the UHT plant was placed into receivership.⁷⁸ Naturally, King Island Dairy had and still has a factual monopoly over milk processing on the island; however, its monopoly power was and is considerably enhanced by its ownership of the 'King Island Dairy' trade mark. The latter has a chilling effect in terms of any potential rival's risk analysis when considering investing in competing processing capacity if the product is to be sold at a 'King Island' premium price.

Around the same time, the late 90s and early 2000s, a local cheesemaker processed cheese on a very small scale to sell with reference to its King Island origin to the local supermarkets. The cheese was entered into numerous competitions and was awarded prizes for high quality. However, the local cheesemaker's business quickly became unviable as the dairy farmers were under pressure to discontinue supplying milk or risk termination of their supply contracts with King Island Dairy.⁷⁹

As has been illustrated above, there has been very little competition in the dairy product landscape on King Island. Processing has been dominated by the single owner of relevant capacity whose position is considerably fortified by control over the inherently descriptive 'King Island Dairy' trade mark. A number of respondents have indicated that the ownership of the trade mark has not necessarily coincided with 100% of the cheese sold by King Island Dairy being manufactured on the island or exclusively with local milk.

⁷⁶ Bruce Mounster, 'Island's Milk Ready to Roll at Last' (Tasmanian Country, 5 July 2002).

⁷⁷ Ibid; 'King Island Dairy and UHT Plant Reach Milk Supply Agreement' (King Island Courier, 10 July 2002) 3.

⁷⁸ See 'King Island Milk Plant Still in the Red Despite Sale' (ABC News, 30 January 2004) <<https://www.abc.net.au/news/2004-01-30/king-island-milk-plant-still-in-the-red-despite/127732>>.

⁷⁹ Until recently an independent small dairy producer was supplying liquid milk products on-island, apparently with the tacit approval of King Island Dairy.

This mark became registered on the basis of extensive use and promotion by the succession of corporate owners (most recently, Saputo). The private ownership of such a descriptive brand has made it very difficult, as evidenced above, for any other local dairy producers to use the premium term ‘King Island’ in the branding of any of their products. Other than the King Island Dairy (Saputo) trade mark, there are no registered trade marks that include ‘King Island’ for any dairy products, and we could not identify any current common law marks in use. This is notwithstanding the fact that dairy producers might wish to use ‘King Island’ because of its premium reputation or just as an indicator of origin, and that strictly speaking the term is descriptive.

C. THE BEEF INDUSTRY ON KING ISLAND FROM A PROVENANCE BRANDING PERSPECTIVE

The initial abattoir on King Island was heavily invested in by the Tasmanian Government but had no role in the marketing or meat processed.⁸⁰ In the 1980s, the abattoir was leased to private interests (King Island Exports), and subsequently sold to RJ Gilbertson Pty Ltd (another private enterprise).⁸¹ The abattoir facilities were then upgraded during the 1990s and sold to SBA foods in 1996. SBA Foods focussed on the market in Japan, however after the abattoir was sold to the Tasman Group in 2002, a relationship with Coles was developed.⁸² During this period of ownership, **Respondent 5** recalls that ‘the Tasman Group started putting cow meat [in other words from older animals] under the King Island brand and lost a bit of traction’.⁸³ In 2008, JB Swift (JBS) – the largest meat processor globally – acquired the King Island abattoir operations and began rebuilding the brand by only using younger cattle and emphasising provenance.⁸⁴

⁸⁰ William van Caenegem and Jen Cleary, ‘Mitigating ‘One-Size-Fits-All’ Approaches to Australian Agriculture: Is There a Case to Be Made for Geographical Indications?’ in Caenegem and Cleary (n 9) 111, 132.

⁸¹ Ibid; Interview with Respondent 5.

⁸² Ibid; ‘King Island’, *Australian Abattoirs* (Web Page, 28 December 2013) <<https://australianabattoirs.com/tag/king-island-abattoir/>>.

⁸³ Interview with Respondent 5.

⁸⁴ Ibid.

However, due to ‘the high cost of doing business on a remote island, rising power prices, uncertainty of cattle numbers and transport logistics’,⁸⁵ JBS closed the abattoir in late 2012.⁸⁶

The closure of the abattoir caused distress within the King Island community and was a contributor to population decline. One of the main issues with the closure of the abattoir was that the producers could no longer tightly control the integrity of the brand because the beef had to be processed off-island. To process beef now requires live shipments, which producers believe could damage the brand reputation as the often rough sea voyage could cause ‘stress, bruising (...) and toughness of the meat’.⁸⁷ Producers are also aware of the growing concern for animal welfare and the negative image that could attach to their produce if any adverse incidents occur during transshipment.⁸⁸

Another major concern of producers was the reduction of price competition for beef. Prior to the closure of the JBS abattoir, a rival processing company was offering producers a competitive price and subsidised transport costs to off-island processing facilities.⁸⁹ Once the abattoir closed and all processing moved off-island, there was no longer an incentive to provide the subsidy.

The beef industry on King Island presents a very contrasting picture because currently, despite attempts, there is no registered ‘King Island Beef’ trade mark. However, there are several trade marks (registered and common law marks) that refer to ‘King Island’ and ‘Beef’ with additions and flourishes. The controversy on the Island in relation to beef currently concerns the construction of a new abattoir for volume cattle processing (the JBS abattoir having closed around a decade ago). The proponents of the abattoir justify the additional cost of local processing based on the price premium they believe can be commanded by maximal exploitation

⁸⁵ Sue Neales, ‘King Hit to Abattoir Leaves Island in Shock’, *The Australian* (online, 12 September 2012) <<https://www.theaustralian.com.au/news/nation/king-hit-to-abattoir-leaves-island-in-shock/news-story/05888e7eea335cd6cb0f909b7fac1319>>.

⁸⁶ William van Caenegem and Jen Cleary, ‘Mitigating ‘One-Size-Fits-All’ Approaches to Australian Agriculture: Is There a Case to Be Made for Geographical Indications?’ in Caenegem Cleary (n 9) 111, 132.

⁸⁷ Commonwealth, *Parliamentary Debates*, Senate, 26 March 2009, 10 (Mr Clemons) <https://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/11762/toc_pdf/6671-2.pdf;fileType=application%2Fpdf#search=%22committees/commsen/11762/0000%22>.

⁸⁸ Highlighted by producers in Interview with Respondent 8 and Respondent 19.

⁸⁹ Commonwealth, *Parliamentary Debates*, Senate, 26 March 2009, 15 (Mr Clemons) <https://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/11762/toc_pdf/6671-2.pdf;fileType=application%2Fpdf#search=%22committees/commsen/11762/0000%22>.

of the King Island provenance brand for beef. However, this model appears only to be viable if the owners of the processing facility can allocate to themselves exclusively the premium market price for King Island beef. Competitive forces and the limited scope of particular trade mark rights may prevent this. Some existing processors have already indicated that they will remain interested in retaining a sufficient supply of KI cattle, and other actors will want to retain sufficient supply with their own King Island branding strategy in mind.⁹⁰ As **Respondent 19** put it, ‘they have told us quite adamantly that they are not going to let the cattle down, they will continue to buy and offer a premium price’.⁹¹ In any case, it is hard to determine the extent to which the surplus generated from efficient exploitation of the brand will accrue to actors on-island.

At present, there are two major companies that process King Island beef: JBS at its abattoir in Longford, Tasmania, and Greenham who process King Island beef but sell the top cuts under their Cape Grim brand. There is also the King 1801 brand owned by the EAT group, promoters of the development of the newly planned abattoir on the island, where they intend to process KI branded meat products. The multiplicity of actors with varied strategies for KI beef, illustrates the key observation that if a GI for King Island Beef were to be declared, the most important decision would relate to the precise design of the specifications, and whether they include a requirement that the beef be processed (i.e., slaughtered, processed and packaged) on the Island. Alternatively, the specifications could require only a certain amount of time on-Island before turning off; this could still sufficiently guarantee the connection but allow processing in existing or new facilities both on and off the island. In any case it will increase the incentive to invest in on-island processing.

D. LOBSTER ON KING ISLAND FROM A PROVENANCE BRANDING PERSPECTIVE

The seafood industry on King Island revolves primarily around lobster (‘King Island Lobster’, previously rather known as ‘King Island Crayfish’). There is very little consumption of this lobster on KI or even in Australia as a whole – nearly the total catch is destined for live exports

⁹⁰ Campbell Cooney, ‘Paddock to Plate Traceability for Relaunched King Island Beef Brand: JBS’, *Farm Online National* (30 October 2019) <<https://www.farmonline.com.au/story/6465306/paddock-to-plate-traceability-for-relaunched-king-island-beef-brand-jbs/>>.

⁹¹ Interview with Respondent 19.

to China. In that market, KI Lobster has a distinct reputation (distinct from Tasmania or Australia) based on some exceptional quality traits and effective in-country wholesaler promotion. **Respondent 32** explained that one of ‘the drivers of [differences in quality] are the geographical advantages of King Island (...) all boats fish in tidal, very productive areas. Deeper waters. Lobster there have higher nutrition amount, are stronger animals in higher tidal waters, and as a result, at the importer level, we have fantastic [low] mortality rate from King Island’.⁹² The trade is primarily to high-end restaurants.

The KI lobster business on-island is concentrated in the hands of a single high-quality ‘processor’ (‘King Island Seafoods’), who first established this business and is in large part responsible for developing a reputation for KI lobster, quite distinct from that of Tasmanian lobster more generally. There is no registered trade mark for ‘King Island Lobster’. However, there was an attempt by an off-island wholesaler to register a composite mark including the terms ‘King Island Lobster’, which was opposed by the King Island Council, and subsequently did not proceed.⁹³ We found solid support amongst all interviewed stakeholders for the hypothetical registration of a ‘King Island Lobster’ GI in particular with a view to preventing private appropriation of ‘King Island Lobster’ *as such* as a registered trade mark. Further, a hypothetical GI was seen to provide a solid basis for managing the integrity of the King Island Lobster brand (e.g., in relation to very precise delineation of its zone of origin) in the context of the projected demand growth from overseas markets. This is very relevant because a GI can operate as a tool to resist downward pressure on quality in the face of expanding demand.

V. OPTIMISATION BY INTEGRATION

A. IMPLICATIONS OF THE KING ISLAND ‘BRANDSCAPE’

The history and present situation with private trade marks for food originating on King Island and incorporating that geographical term has certain observable consequences. The first relates to private appropriation of descriptive terms, the most far-reaching example being the ‘King Island Dairy’ trade mark. Although trade mark theory teaches that the terms ‘King Island’ as

⁹² Interview with Respondent 32.

⁹³ See Australian Trade Mark 1870692 ‘[King Island Lobsters](#)’ (not registered).

such are free for others to use in relation to dairy products (any products for which the mark is registered), the history of events on the Island taught us that the reality is somewhat different. The ownership of the descriptive brand in relation to a wide range of goods (dairy and not just a sub-category thereof) gives the trade mark owner considerable market power additional to its ownership of the sole processing facility.⁹⁴ Naturally the ‘King Island Dairy’ mark is registered on the basis of extensive trade mark use, which may give legitimacy to the exclusive rights vested in its owner. However, this is not to deny that it gives the trade mark owner considerable power to interdict the use of ‘King Island’ even in a purely descriptive manner by those who would develop dairy product lines without its *fiat*. This has the observable potential of disrupting the emergence of even cottage or artisan industries in the dairy field. On a final note in this regard, the trade mark owner may well argue that it and it alone is responsible for the special reputation that dairy from King Island has – after all it was the promotion by the brand owner from the Bill Kirk days onwards that put King Island on the map for Australian consumers. Nonetheless, the implications of the private appropriation of ‘King Island Dairy’ although well understood by Respondents are not necessarily regarded with sympathy. As **Respondent 9** stated ‘I don’t think anybody can actually own a place name like that, anybody on King Island is entitled to use it as King Island I mean the dairies haven’t complained about KI Holiday Villages, KI A Frames and all that, you know just because they are dairy, we should be able to use King Island for whatever we want’.⁹⁵

In other words, private appropriation has observable implications for competition. As **Respondent 14** stated ‘We did care if it was trade marked. We’ve seen what happens with other brands, they get the trade mark under the terms that they can’t stop anyone using those words, but they do, they do, pressure brought to bear, it’s a small community, it is verbal not written a lot of the times. If you supply, we will cease to do business with you’.⁹⁶ **Respondent 14** also stated:

⁹⁴ We note that the ‘King Island Dairy’ word mark is registered for goods in Class 29 (dairy products; dairy based products; milk; milk products; milk based products; UHT milk; long-life milk; cheeses; yoghurts; yoghurt-based products and beverages including drinking yoghurts; butter and creams; dairy-based desserts), however multiple sources indicated that only cheeses have been manufactured and sold under the King Island Dairy trade mark for several years now.

⁹⁵ Interview with Respondent 9.

⁹⁶ Interview with Respondent 14.

‘To me it is just anti-competition, stopping people from value-adding their own product. That is what it is to me. To me, I see trade marking as just anti-competitive, it stifles small businesses, and larger businesses can use pressure to bear to stop. It’s all anti-competition even if it’s not in competition, it’s a completely different market place. It ruins small communities. The more products we have and upsell between ourselves, even if it’s a circular economy, where it goes into the local market every fortnight, I think is amazing’.

The lobster industry illustrates how private appropriation of accurate geographical descriptors will result in jostling for rights, a race to acquire property rights in valuable provenance identifiers, or at least as big a stake as possible in them. In effect this is a rent-seeking activity, where the putative acquirer of the mark hopes to exclude all others from its use and thus allocate to itself all the available provenance-linked surplus. It is apparent that this is neither efficient nor fair where multiple actors have actually contributed and continue to contribute to the provenance brand’s value.

The implications of the trade mark landscape in the beef business are different. No single trade mark owner has appropriated the terms ‘King Island Beef’ as such. Instead a multiplicity of common law and registered marks has been and continues to be developed that include the terms ‘King Island’. This industry thus illustrates how with a sufficient level of inherent distinctiveness, achieved through flourishes and additions etc, multiple private mark owners can still benefit from the provenance reputation of King Island for beef. They are able to coexist, each with a brand that consumers can distinguish from other KI beef corporate brands, but each still deriving benefit from the KI association. The trade mark law in its own rather complex manner, also builds in some fairly low level guarantees of an actual connection with the island, through the general requirement of non-deceptiveness and the specific conditions that the Trade Mark Office can impose on the use of trade marks that incorporate a non-fanciful geographical term.⁹⁷

However, the trade mark law’s guarantees of accuracy concerning where food products originate and are processed are fairly weak. It is observable on King Island that those guarantees have foundations that are difficult to observe and not easy to enforce. The guarantee of King Island

⁹⁷ See ‘Factors to Consider When Assessing Section 43’, *Trade Marks Examiners Manual* (Web Page) <http://manuals.ipaustralia.gov.au/trademarks/trade_marks_examiners_manual.htm>.

origin in relation to cattle slaughtered and processed off-island at present depends largely on the goodwill of the involved processors, and on the standards they set for themselves with relative autonomy. The extent to which a degree of processing might occur off-island for a given product, or on-island with raw materials shipped in from elsewhere, is difficult for consumers to observe and again largely dependent on how the private operator assesses the risk of not adhering to strict or clear rules. The consequences lie rather with the market, rather than with the law. This means that the trade mark owner in reality has quite extensive powers of de-localisation of production. There are a lot of grey areas and uncertainties about geographical origin in the trade mark system, as is also the case with the general torts of unfair competition and passing off. They leave considerable scope for interpretation, and in the worst-case scenario, for deliberate subversion. The trade mark system provides no guarantee that all the ingredients and processing occur in the relevant place.

These aspects of the trade mark model of provenance brand management are countered by a sui generis GI system – indeed, to some extent, that is precisely the point of introducing such a system.

B. POTENTIAL ADVANTAGES AND DISADVANTAGES OF AUSTRALIAN FOOD GIS

As a framework for evaluating the potential of a putative GI in each of the above industries, we used the following as overriding policy considerations for any Australian GI system. We distilled these from the available literature. First, a GI exists to prevent free-riding on the provenance value established by a particular business. Provenance is a strategy used to differentiate food products and escape the commodity trap. Rivals are tempted to enjoy the benefit of established provenance value while neither carrying any of the sunk cost of promotion, nor adhering to the same production values and hence enjoying lower costs.⁹⁸ In other words, in the absence of a GI there is a disincentive for local producers to invest in differentiated non-commodity and higher cost production and market the resulting products by reference to geographical origin, since they cannot sufficiently capture the price surplus generated in the long term. Second, from a consumer perspective a GI is a useful tool to ensure accurate and consistent messaging about the origin of

⁹⁸ See Arthur Fishman et al, ‘The Economics of Collective Brands’ (Discussion Paper No 14.08, Department of Agricultural Economics and Management at the Hebrew University of Jerusalem, 15 December 2008).

particular goods and the qualities that are associated with them. Third, the certainty that the *a priori* declaration of a GI provides (e.g., about the exact coordinates of a particular region) limits transaction costs, as these matters are settled once and for all *inter omnes* and do not have to be determined time and again in the context of a particular dispute. As **Respondent 14** succinctly stated, ‘it’s there, it’s done, you can’t argue the point. It is what it is’.⁹⁹ Finally, in the case where the locality has unique advantages for production of a particular food, a fair distribution amongst locals of the benefit of place is better guaranteed by a GI than by competitive private appropriation by way of trade mark registration.

The issue with the trade marks law is that although it does require that the inclusion of a geographical term is not deceptive as per s 43 (as to the actual origin of the goods), it leaves many ambiguities. For instance, that cheese sold under the King Island Dairy trade mark is actually made on the island from 100% King Island milk is not prescribed by regulations, but it could be argued that if it is not then use of the trade mark could be deceptive and therefore, in breach of s 43 (deceptive) or s 42 (contrary to law). If a GI were declared with specifications, it would remove these ambiguities and provide a solid legal basis to ensure that the relevant terms are only used on cheese so produced. As **Respondent 10** put it for the moment, in the absence of a GI, ‘it really is a handshake deal as to whether or not they do it’.¹⁰⁰ That is one of the potential advantages of declaring a GI.

Further, the coordination problem that results from reliance only on trade marks is mitigated by the introduction of a GI, because this guarantees at least a base level of consistency among producers. To some degree, it would therefore meet the concerns expressed as follows, by **Respondent 8**, ‘there’s a lot more people starting to do their own things and the brand will go down because people are doing their own things’.¹⁰¹ A GI might assist with consistent signalling to consumers. The simpler infringement and enforcement structure of GIs also limit costs, which is significant for rural and regional businesses.

⁹⁹ Interview with Respondent 14.

¹⁰⁰ Interview with Respondent 10.

¹⁰¹ Interview with Respondent 8.

However, GIs are sometimes said to be a block on innovation and change both technologically and commercially, because they impose production methods dictated by gazetted specifications. Whether this is a negative effect depends somewhat on a person's perspective. Thus **Respondent 2** saw that the KI brand stood for 'sustainable environmentally sound practices and clean and green', and that the KI community was friendly and the lifestyle quite quaint and quiet, something that might not be compatible with new industrial developments (such as proposed industrial fish farming) and a highly dynamic economy. Interestingly from this perspective, **Respondent 16** pointed out that in their view other land uses are more economic, in particular lamb would generate higher returns than beef production. If this is the case, then a declared GI might add an additional obstacle to switching and therefore stand in the way of optimal land-use. However, other obstacles also deter switching, for example, the high cost of new infrastructure requirements and general risk averseness.¹⁰² It would be very difficult to isolate the additional path dependency effect a GI might have, since it is only a nominal block on switching.

Finally, because GI registration is product specific, it will not be a solution to all issues involving consumer perception of a King Island connection. The specifications only extend to the specific product and not use of the 'King Island' name in connection with another product. For example, the declaration of King Island Beef could not protect against the misleading use of King Island Chicken or King Island Rabbit, which has been an issue in the past.¹⁰³ For these issues, the general consumer law is the only remedy available.¹⁰⁴

C. THE INTEGRATION SOLUTION: GIS AND TRADEMARKS COMBINED

In the above we discussed standard trade marks and GIs as alternatives.¹⁰⁵ However, the reality is that coexistence is possible, and in fact does already occur in relation to wine GIs in Australia

¹⁰² Interview with Respondent 16.

¹⁰³ William van Caenegem and Jen Cleary, 'Mitigating 'One-Size-Fits-All' Approaches to Australian Agriculture: Is There a Case to Be Made for Geographical Indications?' in Caenegem and Cleary (n 9) 111, 132.

¹⁰⁴ See *Australian Consumer Law* (n 34) ss 18, 29.

¹⁰⁵ Considering standard trade marks and GIs as alternative avenues of protection which can co-exist, we depart from the usual focus on the conflict between trade marks and GIs. See for instance, Burkhart Goebel and Manuela Groeschl, 'The Long Road to Resolving Conflicts Between Trademarks and Geographical Indications' (2014) 104(4) *Trademark Reporter* 829.

(e.g., the BAROSSA HILL registered trade mark)¹⁰⁶ and food GIs in Europe (see e.g., the figurative mark including the terms ‘Feta Dionis’).¹⁰⁷

For the moment the trade mark law quite subtly mediates between descriptive accuracy and distinctiveness in various ways, and importantly through imposing conditions (as illustrated above at Part III A). However, there is no effective mechanism for ensuring that the trade mark owner actually complies with the condition (the removal from the register-provision is not in fact policed or regulated). In case of a declaration of a new GI, there would be two options in terms of dealing with pre-existing trade marks that include the Australian GI term: either the GI declaration is refused on the basis of a pre-existing trade mark/s but only if that trade mark, although consisting of a geographical term, has become entirely distinctive (a badge of origin shorn of its geographical meaning entirely). Alternatively, the GI declaration is accepted and the trade mark continues to exist but now subject to the requirement that it complies with the specifications of the GI.

We refer to the latter alternative as the integration model. The advantage of this model over reliance on the imposition of conditions on the use of registered trade marks is that the GI scheme provides a more effective enforcement mechanism to ensure the accuracy of the mark. This integration model is most in harmony with the assumptions about Australian agriculture that we describe below at Part VII B. It provides a bottom line guarantee of accuracy to consumers while still allowing trade mark owners to participate in the value of the provenance brand and promote it in their own way. It preserves the advantageous competitive dynamic between trade mark owners in the GI space.

In particular, this then leaves room for individual producers to adopt their own specifications that go beyond (above) the base level GI standard,¹⁰⁸ and communicate that to consumers by utilising their private trade mark and promotion strategy while still referring to King Island. The base line GI specification does not act as a disincentive for individual brands owners to provide an even

¹⁰⁶ See Trade Mark No 281257; this trade mark has the endorsement that ‘Registration of this trade mark shall give no right to the exclusive use of the word BAROSSA. It is a condition of registration that this mark shall be applied only to goods emanating from the Barossa Valley area of South Australia’.

¹⁰⁷ See Trade Mark 002210078 ‘Feta Dionis’ <<https://euipo.europa.eu/eSearch/#details/trademarks/002210078>>.

¹⁰⁸ See Domenico Dentoni, Davide Menozzi, Maria Giacinta Capelli, ‘Group Heterogeneity and Cooperation on the Geographical Indication Regulation: The case of the “Prosciutto di Parma” Consortium’ (2012) 37 *Food Policy* 207.

more strongly differentiated product. An illustration of this is that **Respondent 19** was considering a business model revolving around setting a much higher guarantee of provenance by only using cattle born and reared on the island and also processing in their own on-island facility, then to be sold under their specific King Island trade mark.¹⁰⁹

The value of the King Island name also cannot be entirely destroyed by other people using KI for a lesser product because the base line level GI guarantee prevents that – this increases the rationality of making a super-quality investment to set a business apart and thus the integration model has no downsides.¹¹⁰ In the absence of a base line guarantee there is a disincentive for making this super-quality investment, because there is no effective way of preventing the kind of ‘free-riding’ we refer to above at Part V B.

VI. EVALUATION AND DESIGN OF PUTATIVE KING ISLAND GIS FOR DAIRY, BEEF AND LOBSTER

We go on to formulate some tentative conclusions about the identification and specifications of potential GIs in the three industries.

A. THE CASE FOR DAIRY

There are arguably unique conditions of production of milk on King Island, due to the year-round availability of pasture, or as **Respondent 7** put it ‘we’re talking about the grass, summers are never too hot for grass to stop growing, and grass keeps growing in the winter because it’s not that cold. It means your animals are not stressed either because they have this climate that they enjoy. That means the milk tastes better because animals are happier’.¹¹¹

Respondent 23 also highlighted that ‘we get sea mist over the island [which] adds minerals to the land, and not much pollution on King Island’.¹¹² According to some perceptions, these

¹⁰⁹ Interview with Respondent 19.

¹¹⁰ See Luisa Menapace and GianCarlo Moschini, ‘Quality Certification by Geographical Indications, Trademarks and Firm Reputation’ (2012) 39(4) *European Review of Agricultural Economics* 539, where they state ‘[i]n our setting, GIs and trade-marks turn out to be complementary means for signalling quality in agricultural and food markets’.

¹¹¹ Unlike for instance is the case for the ‘Bega’ trade mark which consumers arguably don’t or no longer see as indicating that the dairy products sold under that brand originate in that place – the ‘badge of origin’ function has completely overwhelmed the indication of geographical origin function.

¹¹² Interview with Respondent 23.

unique conditions then translate into unique milk and dairy products; as **Respondent 23** put it ‘I like the milk we produce. I think King Island has very unique milk, which enables the cheese to be special. I have heard it from numerous people from afar they said that the cheese has more flavour’.¹¹³ To what extent these perceptions are backed up by scientific evidence is controversial.¹¹⁴ **Respondent 29A** explained that the soil on King Island is not homogenous; ‘there is a very strong east to west and north to south divide in terms of soil types’.¹¹⁵ In terms of the all-year grass-fed backstory and the natural surrounding ocean environment emphasised in the marketing of dairy products from King Island, the reality is much more subtle, as we also learned from **Respondent 29A** ‘coastiness is a sign of certain micronutrient deficiencies in the soil (...) which generally equates to micronutrients in the forage, which equates to deficiencies in livestock’.¹¹⁶ These deficiencies can be addressed by increasing the proportion of legumes in livestock feed because grass itself does not have the nutritional profile required. In other words, the reality is that exclusive ‘all-year grass-fed’ does not necessarily represent an ideal feed regime for cattle on the island. Furthermore, **Respondent 23** stated that ‘it’s hard to produce milk through winter without supplementing feed grain’.¹¹⁷



¹¹³ Interview with Respondent 23.

¹¹⁴ See ‘King Island Soil Quality Lacking in Some Nutrients’, *Tasmanian Country Hour* (ABC Radio, 24 April 2019).

¹¹⁵ Interview with Respondent 29A.

¹¹⁶ Interview with Respondent 29A.

¹¹⁷ Interview with Respondent 23.

However, one issue is that there is currently no specific dairy product with typical King Island characteristics. ‘King Island Dairy’ per se could not serve as a GI as ‘dairy’ covers a multitude of products. In the past, ‘King Island Cream’ was a specific product that was considered to have special qualities, which **Respondent 7** commented ‘was the most recognisable product, it was the one people used to rave about’.¹¹⁸ However, at present there is no typical cheese, yoghurt, cream, or butter product. Nonetheless, that leaves open the possibility of registering ‘King Island’ *as such* as a GI in relation to dairy products generally. It could be specified that the term ‘King Island’ could only be used in relation to any dairy product (milk, cream, cheese, ice-cream, yoghurt etc) that contains milk sourced from dairy cows on the island. Whether that should be 100% or 90% would have to be determined in the specifications as well as whether the specifications will require every stage of processing to be completed 100% on island.

If only a rule of origin is specified then this would in effect be similar to what is now required in relation to a wine GI in Australia – 85% of grapes must come from the designated region – no other requirements are prescribed. Thus, the style of the wine is not specified in any way – the term ‘Barossa’ for instance, can be used in relation to sparkling, red, white, rosé wines using any varietal and any vinification method. If a putative GI required production to be on island then it would not be possible to ship raw KI milk to a factory elsewhere for processing and still refer to the product as ‘King Island’, however the pros and cons of this requirement should be very carefully considered. A ‘King Island’ GI for dairy would be similar to a GI in the European sense except for the product category being broader than is the norm in the EU.

One consequence of the declaration of ‘King Island’ as a GI for dairy would be that the potential chilling effect (which we identify above) of the private trade mark appropriation of the highly descriptive ‘King Island Dairy’ brand on new entrants in the dairy sector on King Island would be countered. Arguably however, if an independent operator were, for instance, to sell cream branded ‘King Island Cream’, it might be that although this should not (in the absence of any additional suggestion of connection with ‘King Island Dairy’) amount to an infringement of the trade mark, it could amount to misleading and deceptive conduct, unless it is clear to consumers from all the circumstances, including packaging and labelling, that there is no connection

¹¹⁸ Interview with Respondent 7. Respondent 26 also stated that ‘a taxi driver in Melbourne said that everyone liked King Island cream’.

between the ‘King Island Cream’ brand and the ‘King Island Dairy’ company. In terms of the effect of a GI on the ‘King Island Dairy’ brand, as we maintain below, the trade mark and the GI could coexist – all that is required is that the owner of the ‘King Island Dairy’ brand adhere to the GI specifications where it uses that brand in relation to its products – something that it presumably would not have any difficulty with. In any case, the owners of ‘King Island Dairy’ would naturally have a voice in determining exactly what the specifications were to be for the use of ‘King Island’ in relation to cheese (or any other dairy product). That they are entitled to that voice is particularly true as there is no reputation that adheres to King Island separately from that generated by the corporate owners of the ‘King Island Dairy’ trade mark. All the goodwill is vested in the King Island Dairy brand which a succession of corporate owners of the cheese factory on King Island have exclusively built and promoted.

However, an argument against the declaration of ‘King Island’ as such as a GI for dairy, is that in European terms, those words do not have the level of recognition for a specific product as for instance exists for ‘Champagne’. A consumer can ask for ‘Champagne’ or even ‘a Champagne’, but could not ask for ‘King Island’ and expect that to be understood automatically as a piece of King Island cheese.

B. THE CASE FOR BEEF

In relation to beef, the picture is quite different. As long as certain conditions are adhered to, beef produced from cattle on the Island has highly sought after characteristics. However, this is in essence predicated on the cattle being grass-fed on the Island for a minimum period of time (e.g., 3 months). At present, there is no unanimity about the required period of time, but in our view agreement could quite likely be reached between the relevant local producers. However, what is agreed on in the end should be informed by basic economics and aspects of husbandry. As **Respondent 1** pointed out, ‘beyond spring, December/January (...) the weight gained (the cost of the weight gained) is higher, because feed quality is lower and the age of the animal increases. So, the efficiency of which they gain weight beyond that point is lower. (...) the cost of carrying those additional livestock for an extra 6-8 months is basically the ability to run another cow for a more efficient market’.¹¹⁹ In other words, if the specifications require too long a period of

¹¹⁹ Interview with Respondent 1.

grazing on the Island, they could inadvertently, without proper economic analysis, set in stone inherently unprofitable requirements.



Certainty about time on KI pasture alone would be a considerable advantage that establishment of a GI would offer over the present situation, where the accuracy of the message about the King Island connection depends largely on the approach adopted by each of the competing producers.

The key issue is then whether the specifications should additionally require *processing* on King Island. There is no consensus about this, and since it would require the building of an abattoir on the Island it has become a central controversy. The advantage would be additional quality assurance (supply chain integrity), but the disadvantage would be a lack of flexibility and potential under-supply to the local abattoir, since other current processors remain interested in sourcing cattle from the Island. The success of the potential GI and the success of the abattoir as a commercial venture would be inextricably linked.

It is important to keep in mind that the premium for King Island beef can only be realised from the top cuts of the animal. Other cuts are put into the commodity market and are generally not branded as King Island beef, although sometimes they have been used in other products, for example, Herbert Adam's pie 'Gourmet King Island Beef: Slow-Cooked King Island Beef in Rich Gravy'.¹²⁰ **Respondent 3** opined that 'I think to create value in the beef industry, you said the right word, you have to brand, you have to get away from the commodity'.¹²¹ Furthermore, if you have a high-value product that is produced locally, then the relative cost of transport is much reduced. In other words, transport costs would become much less of an issue. **Respondent 6** pointed out that 'once it's boxed, and put on in a refrigerator container, the efficiency is so much better in terms of freight costs. Lot better value per kilo of beef in a box, rather than live. We're also not exposing ourselves to the risk of animal welfare side of things'.¹²²

The GI for beef would theoretically be 'King Island Beef' and not 'King Island' as such for beef, for reasons addressed above, or for the broader category of meat. This is because it is not possible to have a single specification which makes sense in relation to products as diverse as for instance poultry and pork or lamb.

C. THE CASE FOR LOBSTER

In the seafood industry, it appears a 'King Island Lobster' GI would have few disadvantages and would in fact be beneficial in a number of ways. First, it would prevent 'King Island Lobster' as such being appropriated by a single commercial actor as its registered trade mark. It may be that a trade mark owner undertakes not to exercise the enforcement power that comes with a registration, however, as **Respondent 22** said in relation to one potential trade mark owner, they 'said they wouldn't do that, but that was only goodwill (...) their good word isn't much to me. Likewise, I don't see why my mate who has the [King Island product] shouldn't be able to sell' while referring to its King Island origins.

¹²⁰ See 'Slow-Cooked Chunky Beef Pies 2 Pack', *Herbert Adams* (Web Page) <<http://pattiesbrands.com.au/herbert-adams/gourmet-slow-cooked/slow-cooked-king-island-beef-in-rich-gravy>>.

¹²¹ Interview with Respondent 3.

¹²² Interview with Respondent 6.



Secondly, a GI would provide a statutory guarantee of accuracy particularly in relation to demarcation of the ‘King Island Lobster’ zone, and in relation to the practice of introducing lobster from the Tasmanian mainland for maturing around King Island. This would perhaps be the main issue that would have to be resolved in determining the specifications for King Island lobster. There are arguments that a King Island lobster properly so called has inherently unique characteristics, as **Respondent 22** explained: ‘where we are geographically located the lobsters are sort of generally large and of genuinely good quality. There is really an abundance of food and water way through the bass strait’.¹²³ **Respondent 21** supported this view in saying ‘Difference to me is maybe it’s the seabed, the quality of the abundance of food. They are scavengers, they eat just about anything. Fish if they could devour a fish, they would’.¹²⁴ However, at the same time, **Respondent 22** cautioned that ‘a really good hard red 2kg crayfish from north-west of Tasmania, could look like a good hard red crayfish from King Island too’ and then highlighted that ‘we need to define a parameter of what does constitute a King Island lobster

¹²³ Interview with Respondent 22.

¹²⁴ Interview with Respondent 21.

or crayfish and how you would – is it within a particular distance, and that’s what I mean. I think that’s why it could potentially be quite complicated. Well that is what you could sort’.¹²⁵ It seems that the delineation could be achieved through block numbers, which are already mapped out by the Tasmanian Department of Primary Industries, Parks, Water and Environment in relation to the strict quota system; ‘we put block numbers (...) 7 plus 7 miles is grid of reference, they’ve done the whole of Tasmanian water grid codes’.¹²⁶ The additional regulatory burden would be minimal, as there is already a requirement that the cray fishermen keep records of where they have fished their quota of lobster.¹²⁷



Thirdly, a putative ‘King Island Lobster’ GI illustrates a potential advantage of GI registration in Australia because it would enable reciprocal protection in existing and future overseas markets. This is especially advantageous because, as we indicated before, the vast majority of the King Island lobster goes direct to China. Therefore, if ‘King Island Lobster’ were to be on an

¹²⁵ Interview with Respondent 22.

¹²⁶ Interview with Respondent 22.

¹²⁷ Interview with Respondent 14; Interview with Respondent 22.

Australian food GI register, it could then also be included, through reciprocity negotiations, on the European GI register and the Chinese GI register.¹²⁸ Its inclusion on the EU register might then also result in ‘King Island Lobster’ being protected in countries the European Union enters into GI agreements with. This is particularly significant where products are supplied directly to very high value export markets where the risk of free-riding is the most acute. Of the three industries, King Island Lobster appears to be the best candidate for a GI declaration.

D. COMMUNITY SUPPORT FOR KING ISLAND GIS

Finally, our conclusions in relation to putative GIs for each industry are predicated on grass-roots initiative. Evidence of an adequate level of involvement, support, agreement and homogeneity amongst the relevant local producers is therefore relevant.¹²⁹ In relation to dairy, the dominance of ‘King Island Dairy’ and the relative absence of cooperation between the remaining dairy farmers are factors that may thus seem unfavourable to the process of declaring a GI.

Respondent 23 recalls that ‘when we first came into dairying, there was so many more dairy farms. There was a really good discussion group going. We were a bit of a family, whereas now it’s not so much like that’.¹³⁰ On the other hand, it would perhaps be surprising if the King Island Dairy brand owners were to oppose ‘King Island’ being declared a GI in relation to dairy products. It would of course be of crucial importance that they were properly involved in the process of settling the specifications for such a GI. Their interests would be most affected. In any case, the European GI experience and practice suggests that there is scope for some flexibility in relation to the nature of the specifications. Thus, there are two levels of GIs in Europe, ‘PDO’ and ‘PGI’. The latter allows more latitude for the inclusion of product from outside the GI area, and in relation to where processing must take place in all its stages (or otherwise). In relation to wine GIs in Australia also, the requirement is that 85% of the grapes come from the designated area, not 100%, and vinification can take place anywhere in Australia.

¹²⁸ Caenegem, Cleary, Tréguier (n 40).

¹²⁹ See William van Caenegem, Jen A Cleary and Peter Drahos, ‘Pride and Profit: Geographical Indications as Regional Development Tools in Australia’ (2014) 16(1) *Journal of Economic and Social Policy* 1. See also, Xiomara F Quinones-Ruiz et al, ‘Insights into the Black Box of Collective Efforts for the Registration of Geographical Indications’ (2016) 57 *Land Use Policy* 103. See also, Thanasis Kizos et al, ‘The Governance of Geographical Indications: Experiences of Practical Implementation of Selected Case Studies in Austria, Italy, Greece and Japan’ (2017) 119(12) *British Food Journal* 2863. See also, Dentoni, Menozzi and Capelli (n 105).

¹³⁰ Interview with Respondent 23.

In relation to beef, there is considerable cooperation (i.e., the Beef Producers Group) amongst the cattle farmers on King Island, although the issue of the abattoir has generated some division and competing initiatives. In any case, since the closure of the JBS abattoir, one of the King Island Beef Producers Group's most important interests has been the protection of the King Island beef brand. As **Respondent 6** put it, having first pointed out that the group was initially all about research and development for KI beef, 'the beef group have actually become more political and on the back of trying to protect our brand and develop some processing facility, for the benefit of the younger farmers coming through'.¹³¹ No farm actor is in a position to dominate supply channels. We also found that the respondents from the industry favoured the declaration of a GI, at least in relation to the minimum period of pasturing on the Island. The only requirement would be for all the interested parties to find agreement as to exactly what would be warranted as a minimum period on pasture on King Island prior to turn-off. Such agreement certainly seems within reach, judging by what our Respondents told us.

In relation to lobster as well, although the industry is quite concentrated, there was strong support amongst all stakeholders and Respondents for the declaration of a GI and the additional layer of certainty and accuracy it would bring. The industry is relatively immature and therefore present timing of the introduction of a GI would be optimal.

There is a general and widely expressed view that the present level of protection for the King Island provenance brand is insufficient, and from that perspective a GI approach would be desirable. As **Respondent 10** put it, 'we wouldn't want the King Island name being used if it's not coming from King Island. There is really just a gentleman's agreement, in relation to both the cheese and the beef that they will actually include KI product. [For example], beef can be moved onto the island and it's currently 3 months. If that is stopped, we have no power to actually say it's no longer a King Island product. If they own the product and bring the beef over here for a week, there is nothing legislatively protecting us'.¹³²

Respondent 26 stated 'I think it would be beneficial for us, I think the industry on the island would rely on the provenance. Whether it's water, beef, milk, fish, or lobster. The market place

¹³¹ Interview with Respondent 6.

¹³² Interview with Respondent 10.

really makes it hard, even with a branded product, to make money, because of our isolation. But there is no doubt that the King Island name does ring a bell with consumers, and if this community is to prosper, it really does need to be able to try and hold that brand close to home so to speak.’

VII. CONCLUSION

A. THE COMMUNITY’S SLICE OF THE KING ISLAND PIE

In the final analysis, although we set out to examine how the trade mark and GI legal strategies might optimise the value of a provenance brand like King Island in terms of improved farmgate returns for farmers, we learned that an overriding concern on the Island was maintaining a liveable community. This means that many individual Respondents ranked a diverse and dynamic KI economy with varied job opportunities above greater income for themselves. Naturally an overall larger fraction of the provenance value going to all on-island actors is one way of achieving that, but there was a sense that the population level of the island was either dwindling slowly or at too low a level to safely sustain rich local lives. Growth in the farm economy but also prevention of de-localisation, and enhancement of local processing is key to reversing this trend, as is diversification into new industries such as golf tourism and manuka honey production. In other words, focusing on individual farm income is not key, and in any case, it might be that it is impossible to affect farmer income levels in isolation. As **Respondent 31** pointed out ‘even if you cover costs on the day and sell the product at a premium, making it work at first, those workers, the barge operators will just up their money. Supply and demand. It’s all equilibrium’.¹³³ Since the distribution of the pie can’t be controlled, it makes sense to simply focus on aggregate returns to the local community.

This King Island case study suggests that, in ways that are varied and industry dependent, there is space for the introduction of a food GI system in King Island. This is predicated on an integration model between GIs and standard trade marks, which is already visible in the wine industry in Australia. The study illustrates that in relation to the declaration of any given GI, the design of the specifications is absolutely crucial and should favour flexibility while nonetheless

¹³³ Interview with Respondent 31.

sufficiently guaranteeing a connection with place of origin.¹³⁴ Where specifications only prescribe local sourcing the effect will still be to encourage local processing because of the reputational risk inherent in delocalisation of production and because of the comparative costs involved.

Australian agro-industrial conditions require a grass-roots approach and the legitimacy of any GI model can only be guaranteed, if not by active local collaboration, then at least by ensuring that all local producers have an adequate opportunity to participate in the process of determining the nature and extent of the declaration and specifications. Finally, we note that in relation to potential GI legislation, models around the world are many and varied and this presents Australia with the opportunity to adopt legislation that is best adapted to its particular circumstances. The trade mark/GI integration model which we envisage allows sharp competition between registered trade mark owners above a baseline guaranteed by the GI regulation. What we envisage also coincides to a great degree with what is already in place in relation to wine in Australia, with the main proviso that a food system must inevitably allow for specifications as well as rules of origin.

B. BROADER IMPLICATIONS

This King Island study has broader implications in relation to consideration of the design of potential GI legislation and the declaration of individual GIs for Australian food products. When seeking to address the implications of our KI study for Australian agriculture as a whole, we rely on some uncontroversial observations about Australian agriculture. Our first observation is that local culture, longstanding cultural and manufacturing tradition and protecting specificity are not values that are of such significance that they should stand in the way of the flexibility and capacity for innovation that has typified the Australian agricultural landscape.¹³⁵ Secondly, geographical isolation of production areas and high costs to market are prevalent in Australia, which predominantly includes transport and logistics. Thirdly, the settings of Australian agricultural policy are generally adverse to government intervention and direction. Fourthly, they

¹³⁴ See Marguerite Paus and Sophie Reviron, 'Crystallisation of Collective Action in the Emergence of a Geographical Indication System' (Seminar Paper, European Association of Agricultural Economists, 27-30 October 2010).

¹³⁵ van Caenegem, Drahos and Cleary (n 10).

favour competition over solidarity between producers, and that has been the case since the era of ‘de-regulation’.¹³⁶ This means that the hypothetical GI scheme cannot necessarily be predicated on the existence of some structured organisation (such as a cooperative or an unincorporated/incorporated producers’ association), although one might indeed exist in a given location. Finally, a substantial fraction of Australian agricultural production has been geared towards and destined for commodity markets. Adoption of a GI therefore implies at least partial conversion from a commodity to a diversification, local value-adding model.

In Australian conditions, guaranteeing uniqueness by way of GI legislation is extremely controversial and difficult.¹³⁷ What can be largely achieved, however, is that a declared area has uniformity of geographical, climatological, etc, conditions. That uniformity then serves as a proxy for particular qualities in food products emanating from that area. The success or failure of that declared GI will in part depend upon whether that uniformity of geography genuinely contributes to a truly differentiated product in the eyes of consumers.¹³⁸ Then it is up to each individual producer to take on additional costs to compete above the bottom line standard, developing their own product’s distinctive character and promote consumer understanding of its link to ‘*terroir*’. That dynamic should have the effect of giving substance to the claim of uniqueness or specificity.

A significant implication of our study is that the combination of a base line guarantee of accuracy provided by a GI registration with the competitive dynamic of individual trade mark owners above that base line offers a combination that both benefits the level playing field amongst producers and the accuracy of the message that consumers derive from geographical

¹³⁶ William van Caenegem et al, ‘Collective Bargaining in the Agricultural Sector’ (National Rural Issues No 15/055, Rural Industries Research and Development Corporation, June 2015) <<https://www.agrifutures.com.au/wp-content/uploads/publications/15-055.pdf>>. See also, confirmed by Interview with **Respondent 7** who stated ‘Most people who go farming are very independent and don’t want to be told what to do, worst people to cooperate and collaborate together, they want to be independent.’

¹³⁷ How effectively certification can guarantee uniqueness is in any case a controversial topic; see in relation to recent developments in that regards Delphine Marie-Vivien et al, ‘Are French Geographical Indications Losing Their Soul? Analyzing Recent Developments in the Governance of the Link to the Origin in France’ (2017) 98 *World Development* 25; See also Tim Jay and Madeline Taylor, ‘A Case of Champagne: A Study of Geographical Indications’ (2013) 29 *Corporate Governance eJournal* 1.

¹³⁸ See Dev S Gangjee, ‘Proving Provenance? Geographical Indications Certification and Ambiguities’ (2017) 98 *World Development* 12, which discusses the link between persuasive certification and endogenous growth.

indications. A further implication, is that the effectiveness of a GI declaration is crucially dependent on local conditions in the relevant area, including the existing trade mark landscape, the level of cooperation between producers and regional economics. Because therefore a GI will not be a universal panacea, it is optimal to leave it to grass-roots local initiatives to initiate the process of agreeing on specifications and declaring a local GI. The study additionally confirms that in agricultural industries as a whole the existing level of regulations and norms of traceability already in place render the task of monitoring internal compliance less onerous than might be thought. In all agricultural industries, we found that there were already such compliance requirements that the declaration of a GI would not be too onerous. The internal compliance could be monitored by the State departments that currently have responsibility for food safety regulation and compliance.

As for external compliance, it seems that it would be practicable for the ACCC, which already polices credence claims, to take on the responsibility of policing false GI claims. It should be noted that to identify infringement is a much simpler task in GI law than it is in relation to trade marks law and consumer law. Basically, it would come down to the ACCC, where a potential case is flagged, requesting paperwork from the retailer that establishes the origins of the product concerned. The consequences of non-compliance would be as described in Part III C. The GI system has a real potential to reallocate the surpluses that are at present obtained by free-riders, because of the weak enforcement structure around trade marks, to local communities in potential GI areas. Furthermore, the certainty and stability that results from the base line guarantees provided by a GI declaration should provide an incentive for investment both from local producers and from externally, at the same time mitigating the risk of de-localisation of production facilities.

These broader implications are particularly significant as consumers are becoming more invested in provenance,¹³⁹ and as a result industry is also increasingly focused on branding around geographical origin and interested in traceability and legal protection of accuracy. As **Respondent 22** put it ‘general public conception seems to be that they’d rather not have trawled fish or net fish, pot and pulled, paddock to plate, pot to plate, boat to plate. That sort of thing

¹³⁹ See Rangnekar (n 15) 2.

seems to be catching on more and I think in the future there will potentially be opportunity there'.¹⁴⁰ **Respondent 3** stated 'telling the story is one thing, and proving it is another thing' and 'from the farm to the plate, it is easy to say, but difficult to prove', highlighting the importance of accuracy in using provenance as a marketing tool. Producers are also becoming more aware of the potential of value-adding and provenance branding. Traditionally, as **Respondent 6** said, 'farmers are notoriously bad for getting on their front foot and educating the people in the cities of all the things they are doing to protect their environment and their quality', however they also added that 'things will change eventually'.¹⁴¹ Arguably that change is already happening.

¹⁴⁰ Interview with Respondent 22.

¹⁴¹ Interview with Respondent 6.