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QUALITY LOCAL FOOD PRODUCTS – SOME ASPECTS OF TRADEMARKS LAW AND GIs

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There is little doubt that consumers today are more interested in the geographical origins of their food, and how and by whom it was produced. Marketers capitalise on this interest through 'provenance branding'. Provenance branding is a form of 'credence marketing' which suggests certain qualities to consumers that are not really testable in an objective or empirical fashion. Provenance branding suggests that the product concerned has certain qualities that result from its particular geographical origin. Closely connected is the concept encapsulated in the French term 'terroir'; unique geographical conditions that determine the particular taste and other characteristics of locally produced food or beverages. We are very familiar with talk of terroir in the wine industry,¹ but it is an emerging concept in relation to other foodstuffs.

IMPORTANCE OF ORIGIN OF FOOD PRODUCTS

Consumer interest in the origin of food is driven by a move towards localism, rooted in a vague sense of community with regional farmers, and re-establishment of trust in food by closer exposure of consumers to farmers' practices and identity.² Concern for the environment is now also expressed in terms of limiting 'food miles' in an effort to limit carbon emissions ('carbon footprints') so as to develop sustainable food production and processing practices.³ This further enhances localism, the popularity of farmers' markets and specialist provedores that emphasise local sourcing.

The cooking and dining experience is also being re-evaluated, to which the rise of popular cooking shows is testament. This renewed interest in food includes food movements like 'slow food',⁴ 'bistronomie',⁵ and other popular tendencies in gastronomy and food production. Farmers markets (that generally offer a majority of locally sourced produce) have proliferated and are popular with a segment of the consuming public attracted by the direct contact with the farmer and food producer, and better information about the origin of food products. Food festivals also proliferate. For example, every November the Tweed region in northern New South Wales hosts the Foodie Fest, which attracts over 1,000 local residents and food producers.

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¹ Cornelis van Leeuwen, Nicholas Seguin, 'The Concept of Terroir in Viticulture', *Journal of Wine Research* Vol 17, Iss 1, 1-10 (2006).

² Samantha B Meyer, John Coveney, Julie Henderson, Paul R Ward, Anne W Taylor, 'Reconnecting Australian consumers and producers: Identifying problems of distrust', *Food Policy*, Volume 37, Issue 6, December 2012, Pages 634–640.

³ Vicki Waye, 'Carbon Footprints, Food Miles and the Australian Wine Industry', 9 *Melbourne J Int'l L* 271 (2008).

⁴ Andrews, Geoff, *The Slow Food Story: Politics and Pleasure*. London: Pluto Press (2008).

⁵ Chemla, Guy 'Du bistrot des chefs à la "bistronomie" ou le renouveau des bistrots parisiens.' *Les établissements de restauration dans le monde* (2012): 127.

Producers and regulators have also demonstrated interest in country of origin labelling, and generally consider that the present standards are too lax, causing consumers to overestimate the Australian content of food products. The disparate standards that apply in foreign sourced foodstuffs are not made sufficiently clear to consumers. Australian consumers do not understand that the same strict regulatory standards do not apply in most other jurisdictions. The House of Representatives Standing Committee on Agriculture and Industry undertook a Food Labelling Inquiry, for instance, which produced a Report, 'A clearer message for consumers', on 27 October 2014.⁶ Other inquiries and initiatives proliferate in this particular field, as there is a general mistrust of the present country origin labelling system. In particular, in relation to fish products consumers, representative organisations and governments have been agitated recently and calls for more accurate consumer information has come from different quarters. For instance, the independent Senator for South Australia, Nick Xenophon, has called for legislation to be adopted to reserve the name 'barramundi' for fish caught or farmed in Australia.⁷ The Northern Territory Seafood Council wants the name 'barramundi' to be used exclusively for the Australian product, claiming that Australian barramundi is subject to strict production regulations. It wants overseas importers to use the name 'Asian sea-bass' or 'Asian perch'⁸ instead.

The ACCC has prosecuted and publicised cases in this sphere of late – for instance, Byron Bay Pale Lager beer,⁹ a Maggie Beer Barossa Valley product,¹⁰ and King Island meat.¹¹ The ACCC's concern emanates from its consumer protection function. It appears that a substantial segment of the Australian consumer market is prepared to pay more for food products that have the credence characteristics promised by geographical origin. Such consumers should be accurately informed about the origin of goods for which such claims are made – whether expressly, or by the use of geographical terms in branding, trademarking and labelling of goods. Rod Sims, the ACCC Chairman has said: 'Consumers are often willing to pay premium prices for local products

⁶ The Committee recommended that the Australian Government implement a new set of origin labelling safe harbours, these being: 1 'Grown in' – 100 per cent content from the country specified; 2 'Product of' – 90 per cent content from the country specified; 3 'Made in [country] from [country] ingredients' – 90 per cent content from the country specified; 4 'Made in [country] from mostly local ingredients' – more than 50 per cent Australian content; 5 'Made in [country] from mostly imported ingredients' – less than 50 per cent Australian content; Commonwealth of Australia (2014).

⁷ Barramundi: calls to restrict the name to Australian fish, ABC News 19 December 2014, see <http://www.abc.net.au/news/2014-12-19/barramundi-calls-to-restrict-the-name-to/5980460>.

⁸ Chairman Rob Fish says 'barramundi' is an indigenous word from Australia and something needs to be done to stop foreign operators 'free-riding' on the strong barramundi reputation Australia has developed. 'Fishing industry calls for exclusive 'barramundi' labelling on Australian-grown fish': <http://www.abc.net.au/news/2014-09-11/barra-name/5736992>.

⁹ ACCC, 'ACCC acts on beer labelling', 29 April 2014, <http://www.accc.gov.au/media-release/accc-acts-on-beer-labelling>.

¹⁰ ACCC, Maggie Beer Products acknowledges labelling likely to be misleading, 19 August 2014, see <http://www.accc.gov.au/media-release/maggie-beer-products-acknowledges-labelling-likely-to-be-misleading>.

¹¹ *Australian Competition and Consumer Commission v Kingsland Meatworks and Cellars Pty Ltd* [2012] FCA 859 (14 August 2012).

and businesses are following consumer demand by stocking local goods. Protecting the integrity of credence claims made about food products is a priority enforcement area of the ACCC'.¹²

DETERRING 'FREE RIDING' ON SUCCESSFUL PROVENANCE BRANDING

Provenance branding is not simply about accurately identifying the geographical source of goods. The concept of 'Provenance branding' implies that the geographical name suggests certain qualities and characteristics for the goods and the manner in which they are grown and produced. These are qualities that are derived from the use of food staples that are genuinely produced in the area concerned, harvested and processed by local producers, or in accordance with local traditions. Consumers have learned to expect such characteristics for goods emanating from a particular place, either because of their own previous testing and tasting of the food, or through advertising and promotion. In some cases, the place name becomes so closely representative of a style of product that its geographical significance is partly, or entirely lost. Thus, for instance to some consumers the term 'Champagne' might simply represent sparkling wine, rather than such wine emanating from the Champagne region of France.¹³

The other side of this coin is the additional investment that producers in a particular place have made in producing food products with special quality characteristics and in promoting these characteristics to the consumer. Producers might continue to use traditional methods, often small-scale and intensive; use non-staple low volume local ingredients; or implement more expensive production methods (such as high quality feed regimes) that result in a more flavoursome and/or attractive product.

Producing typical local products with distinct characteristics that imply the use of non-standard techniques, and on a small scale, is generally more expensive than mass production. The difficulty that results is 'free-riding' on the goodwill or reputation that is generated amongst consumers by this investment in typical local production.¹⁴ Producers will be deterred from making the additional investment in locally branded products because others will simply adopt the same name but produce the product concerned more cheaply, without observing the quality characteristics or standards that have resulted in the high standing with consumers in the first place. This is a standard free-riding problem. The free riders might be located within the relevant geographical boundary, and might in fact, be accurately identifying the physical origin if not the credence character of the goods. Or the free riders might be producers located outside the relevant area who simply adopt the place name in relation to their goods in a false and misleading manner.

¹² Maggie Beer Products acknowledges labelling likely to be misleading, 19 August 2014, see <https://www.accc.gov.au/media-release/maggie-beer-products-acknowledges-labelling-likely-to-be-misleading>.

¹³ *Re Comité Interprofessionnel Du Vin De Champagne and Charles Barker Australia Pty Limited v N L Burton Pty Limited T/As Freixenet Spanish Champagne Distributors and Garland Farvagi & Partners Pty Limited* [1981] FCA 196; (1981) 57 FLR 434 (7 December 1981); and Tim Jay and Madeline Taylor, 'A case of Champagne: a study of geographical indications', *Corporate Governance eJournal* 29, see <http://epublications.bond.edu.au/cgej/29/>.

¹⁴ Free riding is the copying by competitors of products or brands, which allows them to avoid the cost of R&D or product development and promotion and thus to undercut the originator. Intellectual property laws generally aim to deter free riding: see Mark A Lemley, 'Property, Intellectual Property, and Free Riding' 83 Tex L Rev 1031 (2004-2005).

The policy goals behind legal protection against this type of free riding is therefore, the encouragement of higher cost, low volume local sourcing and production. This mitigates the risk of free riding and protects consumer interest in accurate credence claims concerning food products for which such consumers are generally prepared to pay above-market prices.

I consider two main options here for such legal protection: registration of a trademark incorporating a place name, and registering a Geographical Indication of Origin, or GI. The latter is an existing option in Australia in relation to wine, but not in relation to other food products or beverages in Australia. By contrast, in many other countries GIs can be registered and protected for all sorts of food stuffs and agricultural products, be they processed (like cheese and ham) or raw (like Idaho potatoes or Tasmanian onions). A third option is registration of a certification trademark. Certification trademark registration is possible but very few such marks for geographical terms for food products are, in fact, registered in Australia. The main difficulty is that a certification trademark is a privately owned mark, and therefore generally a term that is descriptive of geographical origin will not normally be registrable by private interests. This is a policy constraint that should ordinarily apply also to standard trademarks consisting of, or incorporating place names. Traditionally, place names are difficult to register as standard trademarks because they are considered descriptive rather than distinctive terms. However, the reality, as described below, is that trademarks incorporating real place names are commonly registered by individuals and companies in Australia (for instance, Gippsland Dairy, Bega cheese, or Baramba organics).

TRADEMARKS INCORPORATING PLACE NAMES IN AUSTRALIA

The main issue in relation to registration of trademarks incorporating place names is the statutory requirement of distinctiveness.¹⁵ A new trademark statute was adopted by the Commonwealth Parliament in 1995, in accordance with its WTO/TRIPS obligations. Prior to 1995, (under the 1955 *Trade Marks Act*) a place name *per se* could in principle not be registered as a trademark because of lack of distinctiveness. A number of decisions confirmed this position: in relation to the name ‘Michigan’ for heavy equipment,¹⁶ and in relation to ‘Oxford’ for reading and viewing material,¹⁷ for instance. The governing principle was that a place name *per se* could not be registered if it was a name that other traders in the ordinary course of their business and without any improper motive were likely to desire to use in connection with their goods. Thus, Michigan might well be the source of heavy equipment produced by other companies, as it is an industrial state. Further, Oxford is an obvious place for other academic publishers who might wish to indicate their publications originate in that illustrious university town.

However, it was understood that because of the category of goods for which the registration was sought, or some other circumstance, a place name may be saved from carrying its ‘prima facie geographical signification’ and therefore be able to be registered as a trademark. The fictional example, famously supplied by Kitto J in the High Court’s Michigan decision was ‘North Pole Bananas’.¹⁸

¹⁵ Section 41 of the *Trade Marks Act* 1995 (Cth).

¹⁶ *Clark Equipment Co v Registrar of Trade Marks* [1964] HCA 55; (1964) 111 CLR 511 (8 October 1964).

¹⁷ *Re Chancellor, Masters and Scholars of the University of Oxford T/A Oxford University Press v the Registrar of Trade Marks* [1990] FCA 175; 24 FCR 1 (1 June 1990).

¹⁸ *Clark Equipment Co v Registrar of Trade Marks* [1964] HCA 55; (1964) 111 CLR 511 (8 October 1964), at 6 per Kitto J.

Further, whereas the exclusion might have applied to place names *per se*, the outcome might have been different if the name was represented in a particular manner, with additional terms or surrounded by ‘device elements’¹⁹, etc. Thus ‘Gippsland’ might have been impossible to register as a trademark for cheese, but ‘Gippsland Dairy’ incorporated in a graphic of a coloured medallion might be permitted for registration.

Regulations changed with the introduction of the *Trade Marks Act 1995*, and in particular Section 41, which allows registration of a mark with no inherent adaptation to distinguish at all – in other words, on the basis of acquired or actual distinctiveness alone. Thus ‘Oregon’ could be registered for power tool accessories because of its extensive use and recognition amongst the trade.²⁰ But, ‘Fiji’ could not be registered for water,²¹ and ‘Colorado’ could not be registered for backpacks, bags, wallets, purses, shoes and other accessories.²² The terms were not ‘inherently fanciful’ taking into account the nature of the goods for which registration was sought, and there was not sufficient acquired distinctiveness (ie actual consumer recognition of those terms as ‘badges’ of origin). Most importantly, in the new legislative environment, the question of whether others might want to use the place name in the legitimate pursuit of their own business is no longer determinative of registration of any trade mark, including place names *per se*.

However, the threshold for registration of geographical terms that have no inherent capacity to distinguish is relatively high. The Trade Mark Office Manual provides in Part 15.1: ‘The following geographical names have no inherent adaptation to distinguish: geographical names with some obvious or potential connection with the goods or services. This would include big cities where the likelihood of a connection with most goods or services is high but also tourist destinations with very small populations where the goods or services relate to tourism’. In the case of such names, the applicant will have to supply sufficient evidence of actual reputation or goodwill existing amongst consumers. Thus, the term ‘Harbin’ rendered in Gothic script was refused for beer in the absence of sufficient proof,²³ but a label mark including the term ‘Bavaria’, a common source of German beer, registered for a beer brewed in Holland, was confirmed as valid by the Federal Court.²⁴

The result is that in the present circumstances, it has become easier to obtain registration for place names as trademarks, even in cases where others might wish to use these names in a legitimate way in relation to their own goods. This is possible either by proving sufficient exclusive trademark use, by a slight variation or addition from the geographical term *per se*, or by the simple addition of a term such as ‘dairy’ or ‘manufacturing company’.

However, another policy concern underlying the trademarks legislation is that the mark be accurate in the sense that it does not have a false connotation that is inherent in some aspect, or term of the mark. The governing provision is found in section 43 of the *Trade Marks Act*: ‘An application for the registration of a trademark in respect of particular goods or services must be rejected if, because of some connotation that the trademark or a sign contained in the trademark has, the use of the trademark in relation to those goods or services would be likely to deceive or cause confusion’. The Bavaria case is a good example of this prohibition of inherently confusing

¹⁹ Ie graphics, drawings, labels or other decorative elements or embellishments.

²⁰ *Blount Inc v Registrar of Trade Marks* [1998] FCA 440 (1 May 1998).

²¹ *Paramount International Export, Ltd* [2009] ATMO 94 (23 November 2009).

²² *Colorado Group Limited v Strandbags Group Pty Limited* [2007] FCAFC 184 (28 November 2007).

²³ *Harbin Brewing Co Ltd* [2012] ATMO 48.

²⁴ *Bavaria NV v Bayerischer Brauerbund eV* [2009] FCA 428.

and deceptive marks at work. In relation to the term 'Bavaria', whose inclusion in the label brand might give the wrong impression that the beer was brewed in that German state rather than in Holland, the Court held that a premium beer drinker is brand savvy, attentive and particular, and would see the other elements in the label mark, *inter alia* the words 'Holland Beer' in smaller script in a surrounding scroll. Further, according to the Court the consumer would simply see the beer as European, and be indifferent to whether it originated in Holland or Bavaria. The court said; 'I am not satisfied that the consumer would associate the trademark with the state in Germany [or that it has] characteristics attributable to a Bavarian origin'.²⁵

Thus, a trademark that incorporates a term that suggests geographical origin in a certain place to consumers should not be registered. However, if it does not convey that the goods originate in a particular place (for instance because the word is totally unknown as a place name to consumers), it can obtain registration. A further device used in relation to trademarks incorporating a place name, is an endorsement. Take for instance the place name Byron Bay, a well-recognised tourist destination with which many consumers in Australia would be generally familiar. It might well be advantageous to be able to register a trademark including this place name, as it has a useful consumer recognition factor and also a generally positive association, to some degree at least for 'clean', 'green' and genuinely local. There appear to be at least 62 registrations for trademarks related to food that incorporates the name 'Byron Bay'.²⁶ However, in relation to these trademarks the following endorsement appears in the register: 'it is a condition of registration that in instances where the trade mark is used on beer or cider that is not made by the applicant or that is not made 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 made the beer or cider.'²⁷ The endorsement is required because these trademarks inherently suggest that the beer or cider is brewed in Byron Bay.²⁸ The trademarks in this case are simple word marks, and there are no other elements to the mark that may themselves dispel the impression that the goods were made in Byron Bay. Thus, by means of the endorsement a condition is imposed on the owner of the mark, to use it only in relation to beer or cider that is indeed produced – or produced to a sufficient extent not to mislead the consumer – in Byron Bay. It may be that an endorsement is not required because the trademark as a whole does not suggest origin in that place (as for instance in the case of Bavaria beer), such as in relation to 'Byron Bay Rum', terms used in a device mark showing a sailing ship and mountains; or 'Byron Bay Coffee Company Est 1989' as a device and label. The judgment call required is whether the typical or average consumer seeing the trademark used for the particular goods for which it is registered, would gain the impression that the goods actually originated in the place mentioned.

This is a relatively subtle judgment and therefore many trademarks incorporating place names escape what might otherwise appear to be a justifiable application of the section 43 standard. Trademarks law here intersects with consumer law (in effect section 18 of The Consumer Law) in a somewhat tense symbiosis. Although consumer law aims at accuracy, and in particular, in relation to credence claims which consumers cannot readily verify, the trademarks law allows the registration of trademarks incorporating place names quite readily, on the basis of fairly sparse evidence of acquired distinctiveness, and by a rather subtle reading and application of section 43. This interpretation allows that the place name might create a certain impression as to origin,

²⁵ Ibid at [108].

²⁶ Eg Byron Bay Pale Lager; Byron Bay Blonde Ale, etc.

²⁷ Registered trade mark number 1538970.

²⁸ In reality this was not the case: see the abovementioned case.

which other elements of the mark as actually registered, then dispel. It is to be questioned whether the consumer mind in reality operates in such a subtle fashion, and is not simply pushed in one direction by the most recognisable and striking part of the mark – which is commonly the (well-known) place name that is included. To some degree the two areas of law (consumer law and trademarks law) seem to pull in opposite directions.

However, although there are drawbacks to the privatisation of place names by way of standard trademark registration, the ability to register a trademark incorporating a place name does give a local business the opportunity to acquire some legal protection for the goodwill accumulated in its locally produced food product. A business with a unique product, which refers to the place of production in advertising and promotion, or to build a ‘back-story’, can deter free-riders from misleading references to its own registered trademark which would otherwise allow them to ride on its coat tails.

The privatisation problem (first comers restricting the right of late adopters to use the place name to some extent even in an accurate identification of real origin) is somewhat mitigated by the rules that apply to trademark infringement. Various defences apply to the use of a registered trademark in a good faith manner – that is, to identify the place of origin of goods. Also, the scope of the trademark monopoly is limited to what is actually registered, and not some particular aspect (for example, a geographical term as such) of the registered mark. And finally, it is only if the registered mark is used ‘as a mark’ that there is any possibility of trademark infringement.²⁹ Arguably, use of a geographical term that is incorporated in a registered trademark, by a different trader to do no more than identify where the goods come from, is not evidence of the use of a mark as a ‘mark’, that is, as a badge of origin.

GEOGRAPHICAL INDICATIONS OF ORIGIN

The main alternative to private trademark registration of place names is the collective management and ownership of geographical terms that is enabled by registration as a GI. As indicated above, such registration is enabled by statute for wines but not for any other food or beverage products in Australia.³⁰ GI registration is secured by the collective action of producers of the relevant product in the locality, rather than privately by one or another business or individual producer active in a specific region. GIs are a very different policy tool, because they require local producers to agree and take the initiative to obtain registration of the GI. In the case of wine GIs in Australia, the main issue that must be determined is the geographical boundaries of the area concerned,³¹ as the system does not allow for the gazetting of additional conditions, such as varietal identification, or planting or production methods, as exists in Europe³² both in relation to wine and in relation to other food products.

²⁹ See *Shell Company of Australia Ltd v Esso Standard Oil (Australia) Ltd* [1963] HCA 66; (1963) 109 CLR 407 (26 July 1963).

³⁰ See the *Australian Grape and Wine Authority Act* 2013 (Cth).

³¹ An issue that only occasionally has given rise to real difficulty: see Edmond, Gary --- "Disorder with Law Determining the Geographical Indication for the Coonawarra Wine Region" [2006] *AdelLawRw* 2; (2006) 27(1) *Adelaide Law Review* 59.

³² Commission Implementing Regulation (EU) No 670/2011 of 12 July 2011 amending Regulation (EC) No 607/2009 laying down certain detailed rules for the implementation of Council Regulation (EC) No 479/2008 as regards protected designations of origin and geographical indications, traditional terms, labelling and presentation of certain wine sector products.

Registration of a GI is not dependent at all on establishing distinctiveness, as under section 41 of the *Trade Marks Act 1995* (Cth) for standard trademarks. On the contrary, a GI is an accurate representation of an actual fact, originating within a very carefully delineated space. A GI is descriptive in that sense, although it also suggests more subtly that origination within that place carries with it certain product characteristics or qualities – the term does not only have primary meaning. To what extent a GI has secondary meaning – stands for a certain quality or character determined by ‘terroir’ – depends on the registration model adopted. For Australian wines, only origin within the particular area concerned is required – so that the wine can vary very widely in quality, from red to white to mixed varietals to pure vintages and other wine blending combinations. In the European model, where the product must also comply with certain specifications – a particular varietal for wine, or a particular production and storage term for cheese – the quality is more closely determined by the GI registration. There can be a greater level of consumer expectation of consistency of product, although within certain tolerances variation is still possible – think of the different styles and qualities of Champagnes from France, for instance.

GIs, once registered, benefit from a much stricter compliance and protection regime than trademarks. They cannot become generic as ordinary trademarks can, nor can they be removed from the register for non-use. There is no requirement to prove misrepresentation (as would be required for a common law mark protected in passing off) or ‘trademark use’ of the term. Nor do any of the trademark defences such as good faith representation of actual place of origin, apply to GIs. Any use of the GI on a product that does not emanate from the designated area, and/or does not comply with the particular specification, is *ipso facto* an infringement. Thus, for instance where ‘Cotes de Provence’ became a registered wine GI in Australia, by way of the Australia-EU Wine Treaty list of protected names, a Tasmanian winery was prohibited from using its established name ‘La Provence’ in relation to its wines. Take as a hypothetical example relating to food, the inclusion of ‘Bangalow’ or ‘Bangalow pork’ as a GI in a putative Australian food-GI register, for pork produced in Bangalow (a small town in northern NSW) with a gazetted requirement that the pigs should be given only certain feeds. Using the word ‘Bangalow’ in relation to pork produced outside the designated area of Bangalow or produced within that area but using non-compliant feed, would then *ipso facto* amount to an infringement and be open to the grant of a remedy. Further, no company or person would be able to obtain trademark registration for a mark incorporating the term ‘Bangalow’ for any goods or services concerned with pork.

CONCLUSION

GI registration thus very strongly deters free riding on premium provenance brands/place names. A local group of producers that obtain and control the GI is protected against free riding. The effect is that in the presence of grass-roots initiation and collaboration, additional investment in a distinct quality local product, which is then promoted by way of its geographical origin, is encouraged.³³ However, the regulatory burden is increased, as adherence to the origin requirement and additional specifications must be effectively policed. In the absence of an adequate enforcement mechanism, the regulatory framework is not justifiable.

³³ See Van Caenegem, William; Cleary, Jen A; and Drahos, Peter (2014) "Pride and Profit: Geographical Indications as Regional Development Tools in Australia," *Journal of Economic and Social Policy*: Volume 16: Iss 1, Article 5.

Given the increased interest of consumers in provenance branding, local origin, and reliable information concerning who produced the local food and where it was made, it may be justifiable for producer communities to make the additional investment that is required in a regulatory and policing model that would be new for foods other than wine. In the wine industry the model seems to have operated quite effectively without a great additional cost burden.³⁴

³⁴ Abel Duarte Alonso, Jeremy Northcote, (2009) "Wine, history, landscape: origin branding in Western Australia", *British Food Journal*, Vol 111 Iss 11, pp 1248 - 1259.