OPUS WINE:

AN OPTIMUM FRAMEWORK FOR THE WINE INDUSTRY WITHIN A SUPPLY CHAIN

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ABSTRACT

The wine industry presents a complex supply chain from the vine to the glass. This is accompanied by a complex legal framework covering land use, Geographical Indication, grape variety, water and other environmental factors, winemaking techniques, sales and distribution, marketing and trade marks, labelling issues, tourism, licensing and more. This dissertation posits an optimal legal framework for the supply chains of wine produced in Victoria Australia and Virginia USA. It compares the regimes in France and Italy and evaluates how they have shaped the wine regulatory framework of these New World jurisdictions. In particular, the dissertation examines taxation and intellectual property issues in both a theoretical and a practical context.

Chapter 1 is a Literature Review and conceptualisation of wine law. Chapter 2 sets out a conceptual regulatory framework of the wine industry, drawing on normative legal theory. Chapter 3 describes the legal regimes and regulatory frameworks for wine of Italy and France. Chapter 4 describes the legal regimes and regulatory frameworks for wine in Victoria and Virginia. Chapter 5 analyses taxation of the wine industry. Chapter 6 analyses intellectual property in the wine industry, especially Geographical Indications and Trade Marks, also the economics of a wine regulatory framework. Chapter 7 takes an overarching approach to an optimum wine law framework.

Student Declaration

Doctor of Philosophy Declaration

I, Sarah Aranka Hinchliffe, declare that the PhD thesis entitled OPUS WINE: AN OPTIMUM FRAMEWORK FOR THE WINE INDUSTRY WITHIN A SUPPLY CHAIN, is no more than 100,000 words in length including quotes and exclusive of tables, figures, appendices, bibliography, references and footnotes. This thesis contains no material that has been submitted previously, in whole or in part, for the award of any other academic degree or diploma. Except where otherwise indicated, this thesis is my own work.

Signature  Date 9/11/2017

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CHAPTER I
LITERATURE REVIEW AND INDUSTRY OBJECTIVES

Chapter I sets the scene for what the term "wine regulatory frameworks"[1] refers to, the reason for selecting the jurisdictions discussed in this dissertation, the nature of a rather complex regulatory "wine law" framework, gaps in existing literature that this dissertation addresses, and why there is a need to address them.[2] The purpose of this dissertation is to identify factors that comprise an optimum regulatory framework for the wine industry in the New World, and with a focus on Virginia and Victoria.

First, a brief explanation of why these jurisdictions were chosen. Second, since deficiencies also strengths in existing scholarship form the basis of discussion in this dissertation,[3] a literature review[4] of the challenges in existing literature with regards to "wine law" is undertaken.[5] The third section articulates components of an "optimum regulatory framework" and defines the term "optimum." Articulating the components of an optimum regulatory framework is a preliminary necessary to understand the context of a "wine regulatory framework". This comprises distinguishing between the terms: "wine law", "legal systems", and "legal framework", with a historical, social and political account of regulation of the wine industry in two Old-World jurisdictions, namely Italy and France, also Victoria and Virginia being the two New World jurisdictions selected for the purpose of this dissertation.[6] Common misconceptions about the motivation behind regulating the wine industry in these jurisdictions – in particular, those in the Old-World[7] – are discussed.

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[1] Reference to "wine regulatory framework" and "wine law regulatory framework" are used interchangeably unless otherwise specified. These terms are distinguished from "legal regimes" and "wine law", discussed below in section 1.3.

[2] For the purpose of this dissertation, it is to be noted that the literature is limited to that written in English. It is to be noted that the present chapter focusses on a literature review of existing scholarship, and while it identifies some normative themes, these are reserved for Chapter II.

[3] Reference to "factors" or "elements" in this dissertation is broadly defined unless otherwise specified and may be used interchangeable with the term "norm". Factors referred to in Chapter I are limited to social, political, cultural and, to a lesser extent, environmental factors that have influenced laws referred to presently in literature as "wine laws": see section 1.3.2, below.

[4] As noted above, literature analysed in this dissertation is either written in or available translated to English.

[5] Wine law is also referred to as a collective of "wine laws", being legislation regulating various aspects of production and sales of wine. See, Jancis Robinson (ed), *The Oxford Companion to Wine* (Oxford University Press, 3rd ed., 2006).

[6] See also Roberta Rabellotti, Andrea Morrison and Lucia Cusmano, 'Catching-Up Trajectories in the Wine Sector: A Comparative Study of Chile, Italy and South Africa' (2010) *AAWE* 34, 35 (acknowledging that New World countries include the USA and Australia).

[7] In this dissertation, an analysis of the Old-World is limited to France and Italy, being two of the more established regulatory frameworks in the Old-World: See generally Carol Robertson, *The Little Red Book of Wine Law: A Case*

Fourth, stakeholders of the wine industry are identified, the role that they play within a supply chain framework discussed,[8] and what they seek to achieve within this framework. Key stakeholders include: the consumer, wineries (also, wine producers or vineyards),[9] and the government (and, the broader societal and health goals that they may seek to achieve in regulating the wine industry). This section discusses the relevance of wine oenology,[10] and importance of sustainability is outlined. While this is fundamentally a law dissertation, the nature of regulation of the wine industry inevitably requires drawing on other disciplines to discuss economic factors,[11]

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of Legal Issues (ABA, 2008) (providing a historical account of wine making in California and France's influence). See also Paul Lukacs, *American Vintage: The Rise of American Wine* (Houghton Mifflin Co., 2000); Thomas Pinney, *A History of Wine in America: From the Beginnings to Prohibition* (Univ. of California Press, 1980); Paul Lukacs, 'The Rise of American Wine' (1996) 47(8) *American Heritage.Com* 17, 17-8; Vincent Carosso, *The California Wine Industry, 1830-1895: A Study of the Formative Years* (University of California Press, 1951); John Manfreda and Richard Mendelson, *U.S. Wine Law: Wine and Wine Making* (1998); Paul Edwin Rogers, *Australian Wine Law* (Paul Rogers Consulting Pty Ltd, 2007); J. Patrick Henderson and Dellie Rex, *About Wine* (Cengage, 2nd ed., 2012); Kevin H. Josel, 'New Wine in Old Bottles: The Protection of France's Wine Classification System Beyond Its Borders' (1994) 12 *Boston University International Law Journal* 471, 473. Regarding Geographical Indications, see generally, Paul Lukacs and Bernard O'Connor, *The Law of Geographical Indications* (Cameron May, 2004); Jim Chen, 'A Sober Second Look at Appellations of Origin: How the United States Will Crash France's Wine and Cheese Party' (1996) 5 *Minnesota. Journal of Global Trade* 29, 37; Harun Kaxmi, 'Does it make a Difference Where that Chablis Comes From? Geographical Indications in TRIPS and NAFTA' (2001) 12 *Journal of Contemporary Legal Issues* 470; Irene Calboli, 'Expanding the Protections of Geographical Indications of Original under TRIPS: "Old" Debate or "New" Opportunity?' (2006) 10 *Marquette Intellectual Property Law Review* 81; McMahon & Cardwell (eds), "Revearch Handbook on EU Agricultural Law" (Elgar, 2015); Lindsay A. Zahn, 'Australia Corked Its Champagne and So Should We: Enforcing Stricter Protection for Semi-Generic Wines in the United States' (2012-2013) 21 *Transnational Law and Contemporary Problems* 477; John Beeston, *A Concise History of Australian Wine* (1994); Paul Lukacs, *American Vintage: The Rise of American Wine* (2000) 100-2; Richard McGowan, *Government Regulation of the Alcohol Industry* (1997) 37. Regarding oenology and legal frameworks, see: Lisa Barriger, 'Global Warming and Viticulture: The Ability of Wine Regions to Adapt in Differing Regulatory Schemes' (2011) 19 *Pennsylvania State Environmental Law Review* 311. Regarding labelling, see: Angela Huisingh, 'I Like Cabernet and Merlot but I'm Not Drinking Bordeaux: Certified Confusion' (2013-2014) 13 *John Marshall Review of Intellectual Property Law* [vi]. See further, Monica Mohan, 'Out with the Old, in with the New: An Analysis of Economic Trends beyond New World Wine Innovation' (2016) 39 *Suffolk Transnational Law Review*, 81 (comparing characteristics of Old-World and New World producers and noting marketing strategies). Up to the end of the 1980s, European countries, and particularly France and Italy, dominated the international market for wine: See ibid, Roberta Rabellotti et al, at 34. Since the beginning of the 1990s, their supremacy has been under attack due to the spectacular performance in terms of both exported volumes and values, of new international players. For details about countries that comprise the Old-World and the New World: see generally Richard P. Mendelson, *From Demon to Darling: A Legal History of Wine in America* (University of California Press, 2009).

[8] For a discussion of the elements of the wine supply-chain, see 1.3.1, below.

[9] Unless otherwise specified (e.g. for the purposes of taxation law in Chapter V), these terms may be used interchangeably.

[10] For a discussion of oenology, see section 1.5, below.

[11] This refers to wine as a commodity within a supply chain, also the relevance of economic theories in precipitating the need to refresh the present governance of and framework within which the wine industry operates: see Chapter VII, 1.1-1.3.

scientific (chemistry),[12] marketing and normative themes that stem from or that are relevant to regulation of the wine industry.

1.1 Who?

There are numerous New World and Old-World wine jurisdictions but, for the purposes of this dissertation, four jurisdictions are discussed, namely: Virginia, Victoria, France and Italy.

1.1.1 Victoria

Victoria, which is recognised as one of the most "diverse and interesting wine producing states in Australia",[13] has 22 unique regions and range of climates, which are expressed each vintage by in excess of 600 winemakers.[14] This positions Victoria with an advantage to produce a wide range of wine styles and varieties from wines that are rare, distinctive, on the one hand, to readily consumable on the other. Yet, Victoria presently has less than a 1 percent share of the global export wine market.[15]

It has been recognised that while Victorian wines are "on-trend with consumer preferences domestically and overseas", export markets "do not always know the full story behind Victorian wines."[16] Exploring reasons behind this, and how to assist the industry given the recent Wine Strategy, makes Victoria and intriguing case study. Consumer preference is an important consideration for wineries.[17] When faced with a comparable product from France or Victoria, a consumer (uninformed about the latter product) may be more inclined to select the product from the place with a reputation for that product. What then drives consumer preference of wine where there is a comparably priced product? Is their perception of reputation linked to culture or history or other factors? And, how well does the law facilitate or inhibit this for the benefit of the wine industry?

[12] See section 1.3, below.
[13] The Department of Economic Development, *2017-2021 Victorian Wine Industry Development Strategy* (19 April 2017) 1 <http://www.agriculture.vic.gov.au> ('Victorian Wine Industry Strategy').
[14] Ibid, 4.
[15] Ibid.
[16] Ibid.
[17] See section 7.4.1.

1.1.2 Virginia

It is posited that history and culture play an important part in the wine industry regulatory framework.[18] In addition to the Old-World, this aspect makes one of the United States' oldest wine producing jurisdictions, Virginia, an interesting comparable case study. Virginia was selected for the following reasons:

(i) The Virginian wine industry is the oldest in the United States, dating back to the 1600s.[19] In 1619, for example, Jamestown law required each male settler to plant and tend at least ten grape vines.[20] The California wine industry, by comparison, was founded in the 1800s.[21] Planting of the first commercial vines, and other than for religious purposes (which occurred in 1779),[22] was undertaken in 1836 by George Calvert Young in Napa.[23]

(ii) Virginia also boasts a colourful statutory history governing the wine industry, but which has had very limited academic coverage. Following the Prohibition, especially, Virginia has paved significant ground in a rebirth and new interest in its wine industry which presents valuable academic inquiry.[24] This has included progressive statutory law, such the 1975 Virginia Farm Winery Act – which was designed to stimulate the growth of the industry by providing tax incentives for

[18] See section 1.3.2. See also Rod Phillips, *French Wine: A History* (2016) (providing the first synthetic history of wine in France, as well as examining a range of influences on the wine industry, wine trade, and wine itself, the book explores religion, economics, politics, revolution, and war, as well as climate and vine diseases. France remains one of the world's leading wine producers by volume and enjoys unrivalled cultural recognition for its wine); Ian D'Agata, *Native Wine Grapes of Italy* (2014) (providing an account of Italy's terroir, and noting that Italy is the most diverse country in the world of wine and amounts to more than a quarter of the world's commercial wine grape types. D'Agata provides details about how wine grapes are identified and classified, what clones are available, which soils are ideal, and what genetic evidence tells us about a variety's parentage. He gives historical and anecdotal accounts of each grape variety and describes the characteristics of wines). See also Kerin O'Keefe, Barolo and Barbaresco, *The King and Queen of Italian Wine* (2014) (providing a comprehensive overview of the stunning side-by-side growing areas of these two world-class wines that are separated only by the city of Alba and profiles a number of the fiercely individualistic winemakers who create structured yet elegant and complex wines of remarkable depth from Italy's most noble grape, Nebbiolo. For the purpose of this dissertation, this book provides an understanding of practical factors impacting viticulture and oenology in the Langhe region, including climate change, destructive use of harsh chemicals in the vineyards versus the gentler treatments used for centuries, the various schools of thought regarding vinification and aging, and expansion and zoning of vineyard areas.)

[19] See Virginia Wine Board, *Overview of the Wine Industry* (27 February 2019) <http://virginiawine.org>

[20] Ibid.

[21] Jeff Leve, *All about California Wines, Winemakers, Wineries, Grapes Soil, History* (27 February 2019) <**Error! Hyperlink reference not valid.**.

[22] Jeff Leve, *The Complete Napa Valley California Wine History from Early 1800s to Today* (27 February 2019) <**Error! Hyperlink reference not valid.**.

[23] Ibid.

[24] Ibid.

wineries making wine from Virginia grapes and establishing a monetary fund for research, education, and promotion of Virginia wines.[25] This dissertation identifies possible gaps in the regulatory framework that could be seen as hindering the Virginian wine industry, and contrary to an optimum regulatory framework governing the wine industry.

(iii) Despite founding the country's oldest wine industry, Virginia is classed as the fifth-largest wine grape producer in the United States (California being the first). Recent economic impact studies of the Virginian wine industry undertaken in 2010 and 2015, respectively, indicate continued growth and sustainability of the wine industry in Virginia.[26] While *Vision 2020 – Blueprint for Virginia*[27] outlines that continued growth and sustainability is a goal, it does not suggest how this can be achieved.

(iv) Wine has Following Governor Mark R. Warner's 2004 Wine Study Work Group, the wine industry in Virginia has had a sharp positive economic impact on state revenue and economic impact.[28] An economic impact study commissioned by the Virginia Wine Board in 2010, for example, highlighted a 106 percent growth in state revenue from the wine industry (comprising state tax revenue from wineries, wine sales of Virginian wine and wine tourism) between 2005 and 2010.[29] This positive trend continued and has been notable increase in the number of full-time jobs at wineries and vineyards between 2010 and 2015 – from 4,753 to 8,218.[30] The number of people visiting wineries grew by 39 percent, from 1.6 million visitors in 2010 to 2.25 million visitors in 2015.[31] At the same time, wine-related tourism expenditures grew dramatically from $131 million to $188 million, a significant 43 percent increase. The "2015 Economic Impact Study of Wine and Wine Grapes on the Commonwealth of Virginia" highlighted that the Virginian wine industry contributed more than $1.37 billion annually to the state's economy – an increase of 82 percent

[25] See Chapter III.
[26] See Frank, Rimmerman + Co, *2015 Economic Impact Study of Wine and Wine Grapes on the Commonwealth of Virginia* (Dec 2015), and Frank, Rimmerman + Co, *2010 Economic Impact Study of Wine and Wine Grapes on the Commonwealth of Virginia* (Nov 2010).
[27] See Virginia Wine Board, *Overview of the Wine Industry Strategy 2020* (19 March 2017) <http://virginiawine.org> ('Virginia Wine Industry Strategy')
[28] See Virginia Wine Board (27 February 2019) <http://virginiawine.org>
[29] Frank, Rimmerman & Co, *2010 Economic Impact Study of Wine and Wine Grapes on the Commonwealth of Virginia* (Nov 2015) 32. Ibid.
[30] Frank, Rimmerman & Co, *2015 Economic Impact Study of Wine and Wine Grapes on the Commonwealth of Virginia* (Dec 2015) 37.
[31] Ibid. See also Virginia Wine Board (27 February 2019) <https://www.virginiawine.org>.

from the 2010 economic impact study.[32] The number of grape-bearing acres in Virginia also increased to 3,300 in 2015 – a 22 percent increase from 2010.[33]

(v) It is surprising, given these economic impact studies and the *Vision 2020 – Blueprint for VA Wine*,[34] that there is limited research on the role of the law, legal regimes and regulatory frameworks on positive and sustainable growth of the Virginian wine industry. Research to-date has instead focussed on the wine industry in states such as California. Using these identified trends, this dissertation offers a further insight into what components of a regulatory regime facilitate or inhibit positive and sustainable growth of the Virginian wine industry. In so doing, this dissertation seeks to identify the relationship between state industry strategies, stakeholder roles, and positive-growth of the Virginian wine industry.

(vi) This dissertation fills this void by identifying what components of the regulatory framework are viewed as assisting or hindering sustainable growth of the Virginian wine industry.

1.1.3 France and Italy

France and Italy were selected in this dissertation due primarily to their market share in production in the Old-World market, and consumption. For example, during the period 1981 to 1985, global production of wine reached a peak of 33.4 billion liters,[35] followed by a low point of 25.9 billion liters in 2008.[36] More recently, global wine production totalled around 27 billion litres in 2012,[37] which increased to 31 billion litres in 2016 (see Diagram 1). While approximately 70 countries report commercial wine production each year,[38] the top 10 wine producing countries are illustrated in Diagram 2. The EU, at present, continues to dominate global wine production, accounting for nearly 60% of the world's wine produced in 2016 (see Diagram 3).[39] France, Italy,

[32] Frank, Rimmerman + Co, *2015 Economic Impact Study of Wine and Wine Grapes on the Commonwealth of Virginia* (Dec 2015) 34-5.
[33] Ibid.
[34] Virginia Wine Industry Strategy, above fn 27.
[35] Wine Institute, *International Trade Barriers Report for U.S. Wines* (2012) <http://www.wineinstitute.org/resources/statistics>
[36] This was mostly due to adverse weather conditions in Australia, Argentina, and parts of Europe: see ibid.
[37] Ibid.
[38] United Nations, *Food and Agriculture Organization* (FAO), FAOSTAT (18 December 2016) <http://faostat.fao.org/>.
[39] Giancarlo Moschini, et al, 'Geographical Indications and the Competitive Provision of Quality in Agricultural Markets' (2008) 90 *American Journal of Agricultural Economics* 794, 800-1.

and Spain are the three-principal wine-producing countries in the EU, accounting for more than 70% of the EU's wine production.[40]

Looking at this on a broader scale, the European Union (EU) comprised 58% of the production market, out of a total production of 26.7 billion liters in 2016.[41] The remaining 30% of global wine production comprised several nontraditional wine-producing countries – some of which have emerged as major producers, and following significant investment and growth in their wine sectors since the 1990s.[42] For example, a number of New World countries in the Southern Hemisphere — Argentina (5.8% global production share), Australia (4.1%), Chile (3.9%), and South Africa (3.7%) — have emerged as important wine producers and exporters.[43]

The above jurisdictions identify an important part of this dissertation, namely that wine is a global commodity that exists in a competitive environment. Given the impetus of New World producers in this competitive market, analyzing existing regulatory frameworks governing the wine industry against competing factors in a rapidly changing global environment, is therefore timely.

1.2 What?

This section outlines existing wine law research, identifies gaps and sets out the research questions addressed in this dissertation.

1.2.1 Literature Study

Leading wine law scholars, including Vicki Waye[44] and Richard Mendelson,[45] have provided a historical account of the evolution of the wine industry in the 'Old-World', generally, as well as New World jurisdictions, such as the United States. It is therefore unnecessary to reiterate the normative essence of their scholarship. Taken as a backdrop against recent industry studies carried out with regards to the Virginian and Victoria wine industries, a method for how

[40] Global Agricultural Information Network, *EU-28 Wine Annual Report and Statistics*, USDA, GAIN Report No. IT1414 (23 February 2014) (GAIN Report 2014).
[41] Ibid.
[42] See section 6.2.1.
[43] Ibid.
[44] See Vicki Waye and Matthew Harvey, 'Introduction and Overview' in Vicki Waye and Matthew Harvey (eds), *Global Wine Regulation* (Thompson Reuters, 2013).
[45] See Mendelson above fn 7.

best to regulate and classify wine regions in the best interests of that jurisdiction, producers and consumers, becomes possible.

This literature, viewed in combination, reveals that objectives of and environment within which the wine industry operates has evolved.[46] Consumers, as external stakeholders,[47] have access to global wine products. Commercial vineyards and wineries are balancing sustainability and environmental concerns,[48] with delivering a product the meets expectations of a consumer, whilst taking price and quality into account.[49] The Government has a key role in preserving local industry in line with international obligations, including bilateral and/or multilateral treaties, as the case may be.[50] As part of their regulatory role, legislatures and governments, in their capacity as policy makers, play a balancing act between societal expectations,[51] preservation of health,[52] facilitating international commercial trade,[53] and facilitating the needs of local industries.[54] All of these factors inevitably point to an increasingly complex network of regulatory frameworks. By highlighting key objectives of stakeholders, this dissertation identifies gaps in two existing regulatory frameworks that impact the wine industry – taxation and intellectual property – and what, given identified objectives, needs to change to facilitate new opportunities for the industry.

The desire to grasp new opportunities from a rapidly changing environment, with a view to "achieve lasting, positive change in [a]*sic* wine industry"[55] and amongst stakeholders, strums at the heart of the industry and chimes at several observations:

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[46] See section 2.1.2 (legal system); section 6.3.2 (economic and operating environment).
[47] See section 1.3.4.
[48] See Victorian Wine Industry Strategy, above fn 13, 2.
[49] Ibid.
[50] There is an extensive literature on the political economy of government regulations and public policy: see, e.g., Anthony Downs, 'An Economic Theory of Political Action in a Democracy' in Anthony Downs (ed) *An Economic Theory of Democracy* (Harper & Bros, 1957); Mancur Olson, *The logic of Collective Action* (Harvard University Press, 1965); George Stigler, 'The Theory of Economic Regulation' (1971) 2(1) *The Bell Journal of Economics and Management Science* 3, 10-14; Gary Becker, 'A Theory of Competition Among Pressure Groups for Political Influence' (1983) 98(3) *Quarterly Journal of Economics* 371. For a review of recent contributions, see Gordon Rausser et al. *Political Power and Economic Policy: Theory, Analysis, and Empirical Applications* (Annual Reviews Inc., 2011). For applications to food policy and EU agricultural policy: see Johan Swinnen, 'The political economy of agricultural policy' (2002) in *Handbook of agricultural economics* 1893, 1901-6.
[51] See section 1.3.
[52] See section 1.3.1.
[53] See section 1.3.3.
[54] See section 1.3.2.
[55] Victorian Wine Industry Strategy, above fn 13, 2.

- Wine is a regulated commodity;[56]
- Legal frameworks that regulate the wine industry within a jurisdiction have evolved, but requires further articulating long-term objectives of the wine industry,[57] and an understanding of the global environment within which the industry operates;
- There are differences between legal regimes in Old-World and New World jurisdictions that regulate the production of wine, endorse the interests of consumers, and protect the rights of those that comprise the wine industry;[58]
- The wine industry is part of a global supply chain,[59] and so drawing on economic and some marketing literature to present practical options for the industry is necessary;
- There are differences amongst consumers in what they seek from wine,[60] that endorses the importance of oenology of wine,[61] by placing it in a legal context.

[56] See above fn 13, 12.
[57] See Victorian Wine Industry Strategy, above fn 13, and Virginian Wine Industry Strategy, above fn 27.
[58] See e.g., Tomer Broude, 'Taking Trade and Culture Seriously: Geographical Indications and Cultural Protection in WTO Law' (2005) 26 *Univerity of Pennsylvania Journal of International Economic Law* 623 (discussing the cultural backdrop to GIs); Sarah Hinchliffe, *EU Wine Law* (Masters of Law Dissertation, University of New England, 2008) 12-14 (identifying the wine regulatory framework in France and Italy within the Old-World); Richard P. Mendelson, *Wine in America: Law and Policy* (Wolters Kluwer, 2011) (discussing the federal, state, and local statutes and case law governing wine production, distribution, and sales in the United States); Richard P. Mendelson, *From Demon to Darling*, above fn 7, 4-5 (juxtaposing the laws and regulations that have either prohibited wine or promoted the development of vineyards and viticulture throughout the unique liquor history of the United States); Bernard O'Connor, *The Law of Geographical Indications* (Cameron May, 2004) (discussing and comparing legislation governing geographical indications in Old-World and New World countries); Dev Gangjee, *Relocating the Law on Geographical Indications* (Cambridge University Press, 2012) (discussing the role of origin in wine regulation); Alex Tallon, *Les Appellations d'Origine* (Editions Larcier, 2016) (arguing that the law must not only protect the origin but also the characteristics and quality of wine); Jean Marie Auby and Robert Plaisant, *Les Droits des Appellations d'Origine* (Libraries Technique, 1974) (analysing the laws regulating the wine industry in France); and Felice Adinolfi, Marcello De Rosa and Ferrucio Trabalzi, 'Dedicated and Generic Marketing Strategies: The Disconnection between Geographical Indications and Consumer Behaviour in Italy' (2011) 113(3) *British Food Journal* 419-435 (analysing the public perception of regional wines with designations of origin and demonstrating that the emphasis on designations of origin is not always justified). But see, e.g., Mendelson, *From Demon to Darling*, ibid, 149 (providing a descriptive analysis of wine law in several US States).
[59] See section 1.1.3.
[60] See section 6.3.2 (discussing the consumer's perception of price, quality, proximity, and information of wine, and why any understanding of this is important for the wine industry, generally).
[61] See, e.g., Pascal Ribéreau-Gayon, P. et al, *Handbook of Enology: Volume 1. The Microbiology of Wine and Vinifications* (John Wiley & Sons Ltd, 2006); Amparo Querol et al, 'Molecular monitoring of wine fermentations conducted by active dry yeast strains' (1992) 58 *Applied Environment Microbiology* 2948, 2950–1; Igor Pretorius and Frederick Bauer, 'Meeting the consumer challenge through genetically customised wine yeast strains' (2002) 20 *Trends Biotechnol* 426,429–432.; Peter Romano et al, 'Function of yeast species and strains in wine flavour' (2003) 86 *International Journal of Food Microbiology* 169, 178–80. See also Peter Romano et al, 'Impact of yeast starter formulations on the production of volatile compounds during wine fermentation' (2014) 32 *Yeast* 245, 252–56.

These observations are discussed throughout this chapter and dissertation. The next section outlines the research questions addressed in this dissertation and which provide context to key terms that are referred to in this chapter.

1.2.2 Research Questions

The objective of this dissertation is to provide a practical means for government entities and internal stakeholders of the wine industry to assess whether a regulatory framework regulating the wine industry is able and/or capable of supporting a sustainable wine industry. In so doing, it articulates the factors that comprise an "optimal regulatory framework" for the wine industry, and addresses the following research questions:

- How is an optimum regulatory framework defined?
- Is there presently an optimum regulatory framework for the wine industry?
- Should an optimum regulatory framework exist for the wine industry generally and can it, or does and should such a framework differ from jurisdiction to jurisdiction?
- If the latter, then is there an objective measure that can determine whether a jurisdiction's regulatory framework is optimal?
- From whose perspective is a regulatory framework that optimally regulates the wine industry viewed to be optimal?
- Is there a relationship between the wine supply chain and regulation of the wine industry, and why is this relevant?

The Oxford English dictionary defines the term 'optimum' as the "most conducive to a favourable outcome, best…" The legal regimes or laws are the glue that holds together a regulatory framework within a legal system. An optimum wine law framework should therefore eliminate uncertainty about the application of legal regimes and laws, with a view to promote the creation of effective institutions that address key interests of stakeholders.[62] This is addressed in greater detail, including in sections 1.3 also 7.1, below.

[62] Dimitri Demekas, *Building Peace in South East Europe: Macroeconomic Policies and Structural Reforms Since the Kosovo Conflict* (World Bank Publications, 2002) 21.

Articulating the components of an optimum regulatory framework required at first instance to understand the context of a "wine regulatory framework". Chapter I explores the extent to which regulatory models used in Old-World jurisdictions – France and Italy – and New-World jurisdictions – Victoria and Virginia – vary? To answer this research question, it is necessary to identify what regulatory model is currently used to regulate the wine industry in these jurisdictions? Who are the stakeholders within, who impact or are impacted by, the framework? And, whether it is possible to strike a balance between stakeholder interests from a health and sustainability perspective, taking into accounting a jurisdiction's history and culture, to achieve regulatory uniformity. By undertaking a preliminary investigation of economic, environmental and cultural factors, regulatory uniformity within a jurisdiction may be possible but difficult to achieve between jurisdictions. To test this hypothesis, further investigation of the regulatory framework of two Old-World jurisdictions (i.e. France and Italy), and two under-explored New-World jurisdictions (i.e. Victoria and Virginia) is undertaken. The reason for selecting these jurisdictions is also outlined. The setting for testing this hypothesis was from the perspective of wine industry stakeholders (i.e. producer, consumer and regulator) within the supply chain of wine as a product.

Chapter II brings into focus the relevance of legal theories also normative factors in proposing an optimum wine law regulatory framework, and which are relevant to wine laws that form part of that framework. The goal of this chapter is to clarify whether laws can be borrowed or transplanted into another legal system using a single unified regulatory framework to achieve a common goal for the wine industry going forward. Drawing on existing research, it is first necessary to identify whether there is a nexus between international instruments, constitutions and domestic law, and the operative mechanics between laws within a legal system? Whether there is a difference between 'law' and 'order'? Whether 'norms' shape a law and regulatory framework? To what extent does the role that society, culture, politics and the economy play in shaping a legal system? Discussed was the purpose of regulation (or law)[63] within a [valid] legal system that encompasses an identifiable legal framework[64] as a means of designing and deploying the appropriate tools for implementing policies issued at the local, government, and supranational levels. The rationale

[63] This refers to what rights and interests and present in that particular framework.
[64] This is to be distinguished from the 'practical' need of an optimum regulatory framework for wine law, discussed in Chapter I. The focus in the present chapter is normative to justify why a particular legal framework exists in the first place, its scope of operation, function, and objectives. This lays the foundation for whether there is need, acceptance and indeed scope for change to or within that legal framework. For this reason, this section refers to "the *importance* of an optimum regualtory framework for the wine industry".

provided is that 'norms' play a central role in shaping a law also a jurisdiction's regulatory framework, and therein a strong nexus between cultural / historical factors, politics and the economy in shaping a legal system. Chapter II concludes by identifying that uniformity is in the objectives of the industry, which may require a different regulatory framework to be adopted in one jurisdiction to another.

Chapters III and IV explore regulatory frameworks governing the wine industry in France and Italy, followed by Victoria and Virginia – primarily from a descriptive perspective. These two chapters illustrate the normative themes discussed in Chapter II, and address questions including: whether there is a nexus between international instruments, constitutions and domestic law? What legal regimes exist within the current regulatory model, and are these laws direct or indirect? And, what are the operative mechanics between laws within each of these respective jurisdictions? The overarching objective of these chapters is to identify the status of the current wine regulatory framework, and what the laws also legal regimes aim to do. Chapters III and IV set out the current law of these jurisdictions, what has benefited (considering factors discussed in section 1.4 of this dissertation) stakeholders – with a focus on the wine industry – and room for improvement in a jurisdiction's legal framework and legal regimes. In so doing, it challenges the limitations of regulatory uniformity, and suggests how such limitations can be addressed.

To better articulate the present and ongoing relevance of on the one hand innovation within the wine industry and, on the other, sustainability (both economic and environmental) and growth of the industry, chapter V unveils what and the extent to which tax regimes impact the wine industry. Chapter VI explores these factors from the perspective of intellectual property law and regimes.

The reason for selecting these regimes from the numerous legal regimes that form part of the wine regulatory framework is identified at the beginning of each chapter. Chapter VI incorporates a case study of consumer preference of wine products, with Ethics Approval sought from the College of William and Mary in 2015.[65] The purpose of this survey is to identify what a consumer pays most attention to when purchasing a wine product. In other words, what factors (such as information on a label, price or word-of-mouth) influences their decision to purchase. This inquiry is important for the purposes of the present dissertation because the greater the reliance on certain information, including

[65] See Diagram 3, Appendix VI.

the way it is portrayed, by consumers the greater the incentive for clear guidelines in regulatory frameworks to balance stakeholder rights and interests. At the same time, the findings provide additional support for how a regulatory framework should balance stakeholder rights and interests.

1.3 Key Terms and Definitions

A legal system is not the same as a legal regime, nor is it the same as a legal framework. The term "legal system" in this dissertation is broad in scope, and therefore is a "general concept". Within each legal system, however, there are various frameworks – i.e. legal or regulatory frameworks.[66] The regulatory framework that governs the wine industry comprises legal regimes, which may [collectively] be referred to as "wine law". The term "wine law" refers to regulations affecting or imposed on the wine industry,[67] and exists in two contexts:

- **Winery level**,[68] comprising governing legislation of growth and production of a wine product; and
- **Distribution and sale** to consumers as an extension of a supply chain, whether that be domestic sales or international export/import of wine products;

While both contexts are governed by state, national, and influenced by international treaties, this dissertation focusses primarily on the former.[69] At the winery level, regulation may be divided into the following three (3) categories:

- Regulation of the winery itself, being laws regulating property (e.g. property laws, by water laws, environmental laws, and zoning);[70]
- Regulation of chattels (such as grapes) or personal property (e.g. trade marks or entitlement to use a GI), including: labelling laws, and intellectual property;[71]

[66] For example, Chapter V discusses Taxation of the wine industry. Taxation comprises many tax regimes, but – in and of itself – is referred to as a "Tax regulatory framework".
[67] There are both direct and indirect wine laws: see section 2.2, below. See also, Waye and Harvey, above fn 44, 1-2.
[68] See, e.g. Virginia Wine Industry Strategy, above fn 27, 4 (distinguishing between a "vineyard" and "winery"). Although there is a distinction between a vineyard – comprising land use regulations (e.g. water law, environmental also property laws) – and a winery (comprising production and sale of wine), reference to "winery level", "wine farms" or "firm level" in this chapter is broadly case, unless otherwise stated.
[69] See section 1.3.1 (discussing why this is needed).
[70] See section 6.1.2.
[71] Ibid.

- Methods of wine production, which is more specific to the European Union (EU).[72]

Regarding the aforementioned, in producing wine, a winery or producer may be governed by certain product or food standards laws, labelling laws, and consumer protection legislation.[73] In 2011, Mendelson skilfully explained the federal, state, and local laws that govern wine production, taxation, marketing, distribution, and sales.[74] His book, "Wine Law in America: Law and Policy" exemplifies and sheds light on Commerce Clause and twenty-first Amendment issues,[75] as well as matters of public health and social responsibility in the United States.

There may also be more remote legal regimes, including those within the realm of employment law, the law of torts and contract laws, that apply to the wine industry.[76] This dissertation focusses on the former list. Drawing on the aforementioned three (3) categories, the distinction between a chattel and real property, for example, is important in the context of the tax system, since this context can be drawn upon to analyse how tax laws affect the wine industry.[77] It can also be used to shed light on the most appropriate IP regime that should govern the production of a wine product. These aspects are discussed in later chapters.[78]

[72] See section 3.1.2.
[73] See sections 3.3, 3.4 and 4.2.
[74] See above fn 58 (although, his focus is primarily on California).
[75] See also Brannon P. Denning, 'Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine' (2005) 94 *Kentucky Law Journal* 37, 39-40 (outlining that the central purpose of the Constitution is to protect the free flow of goods among the states in the United States). See also Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 231 (1824) (Johnson, J.) (stating that "If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints.") This dissertation does not describe the 21st Amendment of the U.S. Constitution, as this has already been addressed by Mendelson in his literature. See above fn 58.
[76] See sections 3.2, 3.3 and 3.4 below.
[77] See section 5.2.2.
[78] See Chapters V (Taxation) and VI (Intellectual Property).

1.3.1 Supply Chain

As previously stated, the objective of this dissertation is to provide a practical means for government entities and internal stakeholders of the wine industry to assess whether a regulatory framework regulating the wine industry is able and/or capable of supporting a sustainable wine industry. This requires acknowledging the practical regulatory context, which is set against the backdrop of the wine supply chain.

It is accepted that the wine supply chain forms part of the broader agri-food supply chain,[79] which has already received considerable attention from operational researchers.[80] Moccia, for example, discusses operational research contributions, and explores the broader issue of environmental impacts of the wine supply chain, identifying that they have been considered as pertaining to the strategic evaluation of the wine supply chain. Moccia also identifies that such an issue requires larger interdisciplinary assessments, which the present dissertation builds on. Therein, and notwithstanding the operational research contributions to operational, tactical, and strategic planning of the wine supply chain – literature which has been comprehensively reviewed[81] – existing research does not specify that there is a link between the wine supply chain and the regulatory framework of the wine industry.

Acknowledging that there is a connection between the regulatory framework of the wine industry and the supply chain is first necessary. This dissertation does not, however, purport to regulate the supply chain. Rather, this dissertation explores different facets of existing regulation and regulatory framework of wine as a commercial product and sets this against the backdrop of the wine supply chain. This facilitates articulating of the factors that comprise an "optimal regulatory framework" for the wine industry.

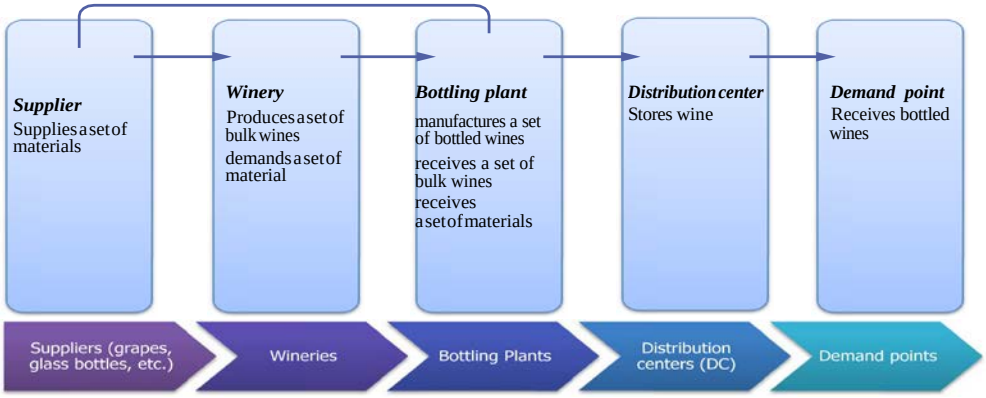
Since wine is a global product,[82] it is necessary to look further than a descriptive discussion of wine laws in a single jurisdiction to articulate what an optimum regulatory framework governing

[79] Luigi Moccia, 'Operational Research in the Wine Supply Chain' (2013) 51(2) *INFOR* 53, 53-4.
[80] See ibid, 53-63.
[81] See ibid.
[82] See OIV, *State of the Vitiviniculture World Market 2015* (1 March 2017) <https://en.vinex.market/articles>. See also Australian Productivity Commission (2008) *Performance Benchmarking of Australian Business Regulation: Quantity and Quality* 32 (noting the large number of regulatory instruments implemented in Australia); Canadian

the wine industry should look like. This is undertaken by utilising the context of the supply chain to better illustrate wine as a global product that should be regulated. A commercial firm that supplies goods and/or services inevitably forms part of a "supply chain". Accordingly, proposing an optimum regulatory framework for such a diverse yet unique industry requires looking beyond pure black-letter law,[83] to legal theories, also economics and marketing theories.

Depicted in Figure 1, a typical wine supply chain may include suppliers (e.g. grape growers, glass bottles), wineries, bottling plants, distribution centres and demand points.[84]

Figure 1 Wine Supply Chain



This dissertation focusses on the growth and production (i.e. supplier and winery) stages depicted in Figure 1. Therein, it is noted that while there are distinguishing features between a vineyard (classified as a 'supplier' in a narrow sense), and a winery, these terms may (unless otherwise specified) be used interchangeably in this dissertation.[85] Some finer distinguishing features draw on extraneous dimensions of a wine supply chain, and within that a wine production system. Vine planted areas, which may or may not (depending on labelling and IP laws) comprise primarily vineyards or a mix of vineyards and wineries, within themselves comprise a mix of grape producing vine planted areas, and areas that are not yet producing grapes.

Federation of Independent Business, *Canada's Red Tape Report with US Comparisons* (3rd ed. 2013) (studying the cost of excessive regulation). See further Mark Thatcher, *European Regulation* in *European Union: Power and policy-making* (Jeremy Richardson & Sonia Mazey eds, 4th ed., Routledge, 2015) (mapping the increase in volume and scope of EU regulation).

[83] See section 2.4.6.

[84] Fernanda Garcia et al, 'A framework for measuring logistics performance in the wine industry' (2012) 135 (1) *International Journal of Production Economics* 284, 298.

[85] Unless otherwise specified, this dissertation refers also to the terms: "winery", "vineyard", "firm" and "wine farm" interchangeably.

This level of inquiry is beyond the scope of this dissertation. Such an inquiry could, however, be relevant to assess what stakeholders within a national wine sector show the greatest weakness in terms of bargaining power because, for example of the size of their farms and the permissible nature (because of the impact of regulatory frameworks on stakeholders in the wine supply chain) of the product.[86] An explanation for this may be because a wine production system can be characterised by a strong fragmentation of both the vine planted area and the farms. For example, Italy comprised almost 390,000 farms which had vine planted area in 2014, with an average vine area of only 1.7 ha.[87] Further, 29% of the vine area was managed by 69% of the farms, which count less than 5 hectares.[88] The farms with more than 20 hectares comprised only 7% of the total, but manage 33% of the national vine area.[89] The small size of the farms, their limited volumes and the difficulties they might encounter in what may be described as downward verticalization of the supply chain production process. This is because the wine production system consists of very dissimilar farms typologies in terms of entrepreneurship, size, environmental conditions and relationships with the market. Of those farms with a smaller vine area, it is recognised that wine production would be for personal rather than commercial sale.

Contextualising wine as falling within a supply chain raises some interesting issues, including:

- What is the difference between jurisdictions' approach to regulating farm practices regarding where a vineyard be planted, what vines can grow?
- Are there mandated labelling requirements for wine products? [90]
- Are there limitations on how a wine product is sold – e.g., cellar door, through a cooperative arrangement, through a state governed body, and/or through a liquor store?[91]
- Do fiscal measures such as taxation impact the wine industry?[92]

[86] See e.g. ibid, 75.
[87] Carlotta Gori and Veronia Sottini, 'The role of the Consortia in the Italian wine production system and the impact of EU and national legislation' (2014) 3 *Wine Economics and Policy* 62, 63.
[88] See ibid.
[89] Ibid.
[90] See section 5.2.3.
[91] See section 4.3.1.
[92] See section 5.3.1.

- Are obligations under international instruments effectively translated into domestic laws?[93]

Analysing each of these opens dimensions of wine regulatory framework and provides an insight into what changes may be needed, required, or discretionary. Different legal regimes and laws are relevant along all stages of the wine supply chain. For example, the sale or supply of wine from a winery to the public directly or to retailers/wholesalers may draw on export/import laws, direct and indirect taxes, intellectual property, health laws, contract law, and potentially maritime law. The scope of 'wine industry' for the purpose of this dissertation is limited to discussion of the winery.[94]

Mendelson's broad definition of 'wine law' created an opportunity to categorise laws that regulate the wine industry as "direct" or 'indirect'.[95] This allows for clearer insight into addressing questions, including: (i) what laws work well for the wine industry – from an economic perspective; (ii) what rights and interests, from a property rights' analysis, exist for stakeholders;[96] and (iii) how best to classify it in particular regions of a jurisdiction in the best interests of the jurisdiction, producers and consumers. Still, one shortcoming of scholarship is that it focusses on one jurisdiction, rather than a comparative analysis of legal frameworks that regulate the wine industry.

What may be classified as an 'indirect' law to a consumer (e.g. Sales Tax), may be a 'direct' law for a retailer or winery.[97] While Mendelson has described wine law as "the system of laws controlling the production, marketing, distribution, and sale of wine…",[98] present literature does not define what a direct or an indirect wine law is. In defining these terms, a less expansive approach than Mendelson's definition of wine law is taken in this dissertation – the focus being on the growth and production of wine, not "regulations that govern all aspects of the wine business".[99]

[93] See section 3.1.1.
[94] See fn 85, above (use of terms).
[95] See section 2.1.
[96] See section 6.1.1.
[97] See section 5.3.1.
[98] See generally, Mendelson, above fn 58, Ch. 1 (Although Mendelson defines this in the context of the US, it equally applies in other jurisdictions).
[99] Ibid. For this reason, the present dissertation refers to the "wine industry".

The test adopted is that: looking at the context, does the law immediately regulate or prohibit actions or conduct of the entity?[100] If so, then it would be classified as a direct law. For example, regimes (plural) or laws (singular) that are indirect (as they apply to the production of wine) comprise: taxation (e.g. income tax regime, excise tax regimes, sales tax etc.), and consumer protection. Whereas, direct laws in this context may include: intellectual property (e.g. trade mark regime, patent regime, or GI regime), water law, contract law, and labelling laws.

As such, direct wine laws are categorised, in this dissertation, as being those that focus on regulating viticulture and wine production.[101] Statutes may cover aspects ranging from how grapes are grown, to when and where wine may be consumed. Because of this complexity, only those aspects dealing with geographical origin and style are discussed.[102] These aspects are of more general interest because they affect labelling, consumer preference, and reflect cultural differences in what are considered to be the origins of wine quality.[103] "Indirect" laws, on the other hand, are classified as those with a secondary purpose – such as water laws,[104] torts, health laws, contract, property laws, tax law and trade mark law.[105]

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[100] This is a variation of the nexus requirement. See, e.g., Burger King v. Rudzewicz, 471 U.S. 462, 472 (1985).

[101] The laws here are to be distinguished from the regulatory framework in which they operate. The latter is discussed below, at 3.2. Since wine is both a product and a commodity, extraneous processes linked to sales and distribution are also considered to fall within the ambit of direct wine law. For example, Mendelson describes (in addition to viticulture and wine production), marketing, distribution and sales as activities that "are central to the wine business": Mendelson, *From Demon to Darling*, above fn 7, 6.

[102] See further section 5.2.3.

[103] See sections 1.4.5 (wine oenology), and 6.2.1.

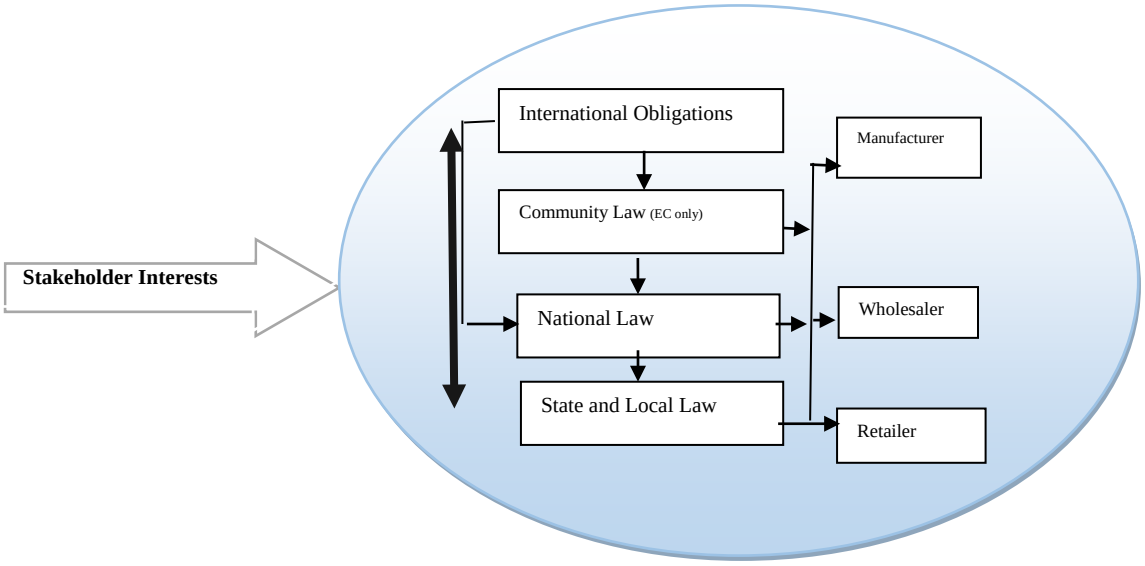
[104] *Water Resources Act 2007* (ACT) (water catchment management is one of the specific matters to which the Environment Protection Authority must have regard in exercising its functions under this Act: ibid s 64(2)); *Local Land Services Act 2013* (NSW); *Sydney Water Catchment Management Act 1998* (NSW); *Wild Rivers Act 2005* (QLD) s 3(3)(c) (purpose of the Act achieved by treating a wild river and its catchment as a single entity); *Natural Resources Management Act 2004* (SA) s 7(1)(c) (objects of legislation include protection of catchments); *Water Management Act 1999* (TAS) s 167(2)(a) (creation of whole or part of catchment areas of watercourses and lakes as water districts); *Catchment and Land Protection Act 1994* (VIC) (sets up a framework for the integrated management and protection of catchments: ibid s 1 (purposes)); *Metropolitan Water Supply, Sewerage, and Drainage Act 1909* (WA) (establishment of catchment areas: ibid Pt IV); *Conservation and Land Management Act 1984* (WA) s 55(1a)(d) (setting aside of State forest and timber reserves for water catchment protection). At common law, flowing water is a public right common to all who have access to it; *Rugby Joint Water Board v Walters* [1967] Ch 397; [1966] 3 All ER 497; [1966] 3 WLR 934; *Mason v Hill* (1833) 5 B & Ad 1; 110 ER 692; *Embrey v Owen* (1851) 6 Exch 353; 155 ER 579; *Chasemore v Richards* (1859) 7 HL Cas 349; 11 ER 140. Water itself is not capable of being the subject of property or of being granted: *Wright v Howard* (1823) 1 Sim & St 190; 57 ER 76; *Williams v Morland* (1824) 2 B & C 910 at 917; 107 ER 620; *Race v Ward* (1855) 4 El & Bl 702 at 709; 119 ER 259. The common law right to groundwater is based on the absolute right of the overlying landowner to extract resources from the land. Generally, common law rights have been supplanted by statute-based disposition of water resources: *Water Resources Act 2007* (ACT); *Water Act 1992* (NT); *Water Management Act 2000* (NSW); *Water Act 2000* (QLD); *Natural Resources Management Act 2004* (SA); *Water Management Act 1999* (TAS); *Water Act 1989* (VIC); *Rights in Water and Irrigation Act 1914* (WA). Native title rights in water have been

1.3.2 Regulatory Frameworks – The Starting Line

Acknowledging that wine is a global commodity[106] that relies on an efficient supply chain process, requires looking beyond merely one jurisdiction. The jurisdictions selected allow a comparative analysis of select New World and representative Old-World jurisdictions.

What works well within a regulatory framework requires an approach that comprises first identifying existing laws and legal regimes, the national regulatory frameworks and legal system within which they operate, also international obligations. In other words, a bottom-up approach within the context of the wine industry. Complementing the bottom-up approach adopted in this dissertation is scholarship by Clare Abel, Partner, Burch and Cracchiolo PA,[107] who identify a "practically focused" three-tier system for regulation of the wine industry. Emerging from this amalgamation is a model approach adopted in this dissertation that identifies stakeholder interests and discusses these using the bottom-up approach in the context of a three-tier simplified supply chain system.

Figure 2 Summary Model of a Wine Regulatory Framework



recognised. In the Northern Territory, there is no express catchment management legislation. See also *Aboriginal Heritage Act 2006* (Vic).

[105] See section 2.1.2, and chapter 7.2.1.

[106] See above, fn 13, 12.

[107] See, Clare Abel et al (eds), *Wine and Beer Law: Leading Lawyers on Navigating the Three-Tier System and Other Regulations on Alcoholic Beverages* (Thomson Reuters, 2016)

The comparative analysis in this dissertation draws on these tiers but, since it discusses regulatory frameworks in the context of an identified supply chain network, it has both a scholarly, and practical focus. Therein, within a supply chain, there is a three-tier system that these authors describe as: the manufacturer (or producer) level, the wholesaler level, and the retailer level. This dissertation similarly separates producers from the end users,[108] and focuses on the producer level. At the same time, such analysis also requires an understanding of the expectation of the regulator and consumer – both being stakeholders.[109]

With regards to national and state laws, the present dissertation focusses on the wine industry, its regions, and wine as a regulated product, rather than the beverage industry generally. The latter is discussed by Mendelson,[110] also Zahn in her article "Navigating the Challenges of a Regulated Industry" provides an overview of the types of "beverage" laws that impact the industry.[111] Zahn's focus on beer and wine presents a practical perspective of the challenges facing the beverage industry generally and is broader than Mendelson's focus on wine law and, to a lesser degree, spirit law.

Zahn focusses on the timeframe since the Prohibition ended, which allows her to take a pragmatic approach to go about identifying recent changes, trends and compliance issues in a regulatory system. Zahn's work does not, however, address whether laws negatively impact the wine industry. Her analysis of historical aspects of the Prohibition provide a contextual setting that assist in justifying why certain laws came about in the United States. Coupled with the author's concentrated focus on class action lawsuits involving alcohol beverage products, in particular beverage labels,[112] aids discussion as to why some legal regimes (e.g. trade mark regime) trump a formal GI system. This is necessary to identify ingredients that work well or that may not in a framework that regulates the wine industry.

[108] Ibid, 8.
[109] See section 2.3.2.
[110] See above fn 58.
[111] Lindsey A. Zahn (Esq.), 'Navigating the Challenges of a Regulated Industry' in Clare Abel et al (eds), *Wine and Beer Law: Leading Lawyers on Navigating the Three-Tier System and Other Regulations on Alcoholic Beverages* (Thomson Reuters, 2016) 7 (noting that there "are no key differences in the laws governing the production, distribution, and sales of wine versus beer or liquor").
[112] See, e.g. Pom Wonderful v Coca-Cola 679 F.3d 1170 (2012).

The parallel arrow depicts that, functionally, international obligations will have a bearing on the regulatory regimes and implicitly the regulatory framework governing the wine industry. However, it is hypothesised that because of the culture of a legal system, legal norms, also interests and rights of stakeholders within a jurisdiction, the shape of legal regimes and how a regulatory framework should cater to these facets, warrants a more holistic approach as suggested above.[113]

Acknowledging that wine is a global commodity that relies on an efficient supply chain process, requires looking beyond merely one jurisdiction. But, it does not purport there should necessarily be regulatory uniformity.[114] Challenged is the suitability of regulatory uniformity, proposed by scholars, such as Waye,[115] and methodology (i.e. a top-down approach) adopted.

Waye's recent scholarship acknowledges that wine is a global product,[116] but casts her research from the perspective of the need to establish a level of regulatory uniformity. Such a call requires a balanced view of whether: (i) the industry requires this; (ii) external stakeholders, particularly consumers, seek this; (iii) whether existing legal regulatory infrastructure can support changes. This dissertation addresses these points and builds an optimum regulatory framework for the wine industry from the ground up.[117] She observes that "tentative steps hav[ing]*sic* already been undertaken through the APEC Wine Regulatory Forum[118] to exchange and collate information about regulatory divergence, to build regulatory capacity throughout the region, and to examine means to simplify and harmonize wine regulation."

As a global commodity, it would seem logical to recommend a uniform approach to regulatory coherence of the wine industry. But, some general insights on the political economy of government regulations yielded in this dissertation outlines why this is not possible.[119] Therein, to

[113] See section 1.1.2.
[114] See section 1.2.
[115] Above fn 27, 209
[116] See above, fn 13, 14.
[117] See chapters VIII, where building "from the ground up" does not refer to totally overhauling the present regulatory framework in Victoria and Virginia. But, rather, seeing what has worked well, what can be improved and why, in light of recent industry submissions (see n10, above) how it should be improved for the benefit of the industry and other external stakeholders.
[118] See APEC Wine Regulatory Forum (1 February 2017) <http://wineregulatoryforum.blogspot.sg>
[119] There is an extensive literature on the political economy of government regulations and public policy: see, e.g., Anthony Downs, 'An Economic Theory of Political Action in a Democracy' in Anthony Downs (ed) *An Economic Theory of Democracy* (Harper & Bros, 1957); Mancur Olson, *The logic of Collective Action* (Harvard University Press, 1965); Stigler, above fn 50, 10-14; Gary Becker, 'A Theory of Competition Among Pressure Groups for

understand the existing set of quantity and quality regulations, it is crucial to look at the interactions of political and economic aspects of the regulations.[120] Despite the above, Waye misses an imperative step required to justify or invalidate a "broader" regulatory coherence movement for regulating the wine industry, which this dissertation seeks to address by clarifying the reasons for the lack of regulatory incoherence, and provide a more rounded method for predicting a "prognosis…of the potential trajectory for a global wine law….".[121] In so doing, and therein articulating an optimum regulatory framework to regulate the wine industry – with a focus on Virginia and Victoria – it is necessary to consider current and ongoing motivations to protect various rights and interests, not present in existing wine law scholarship.

While existing scholarship acknowledges the presence of the ingredients of a regulatory framework,[122] it falls short of defining what an *optimum* wine law regulatory framework looks like.[123] Given this, Waye missed an imperative step required to justify or invalidate a "broader" regulatory coherence movement for regulating the wine industry, which this dissertation seeks to address by clarifying the reasons for the lack of regulatory incoherence, and provide a more rounded method for predicting a "prognosis…of the potential trajectory for a global wine law….".[124] An optimum regulatory framework requires an understanding of stakeholder interests[125] and ongoing motivations within jurisdictions that form part of the regulatory environment.

1.3.3 The Consumer

In addition to economic forces and trends, consumers – as external stakeholders – play a key role for the wine industry, and therefore in shaping the wine regulatory framework. This may be due to a number of factors, including that the wine industry represents unique cultural aspects inherent in a region.[126] Consumers may expect wine from a particular region to possess unique qualities that

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Political Influence' (1983) 98(3) *Quarterly Journal of Economics* 371. For a review of recent contributions, see Gordon Rausser et al. *Political Power and Economic Policy: Theory, Analysis, and Empirical Applications* (Annual Reviews Inc., 2011). For applications to food policy and EU agricultural policy: see Johan Swinnen, 'The political economy of agricultural policy' (2002) *Handbook of agricultural economics* 1893, 1901-6

[120] See further section 3.2.1.

[121] Ibid.

[122] See above fn 2.

[123] See section 8.1.1 (defining "optimum" regulatory framework).

[124] Ibid.

[125] See sections 1.2.2, 1.2.3 and 1.3.1.

[126] See 6.2.3.

differentiate it from other wines of the same varietal from other regions.[127] It is purported that origin of a product becomes increasingly important to consumers in an environment where there is a supply of a global product.

Wine's attraction, however, relies not merely on bold consistent flavours, but upon a subtle array of shifting sensations that make its charm difficult to define.[128] Wine producers, on this practical view, are selling a sensory experience to the consumer.[129] So, regardless of the region in which the wine is produced or the economic status of the consumer, all wines are expected to be pleasant experiences for the imbiber.[130] This does not necessarily assert that wine law should protect taste *per se*. This seems too subjective a notion to regulate.[131] Although, legal regimes can and do protect the reputation of a region, and therefore methods, the region and practices associated with products from that region.

The way that legal regimes regulate and protect the origin of wine and processes of production, varies from jurisdiction to jurisdiction.[132] For example, the French concept of *terroir* states that the composition of grapes produced in a specific growing region will be influenced by the local environment, which will carry through to the wines of the area.[133] This concept also includes as an element minimal intervention in modification of the growing environment so that the *terroir* may be evident. Thus, in contrast to other agricultural commodities, wine is marketed by the geographical location of production, and quality is associated with minimal vineyard inputs or manipulation.[134]

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[127] See Vijay Ramaswamy and Sarma Namakumari, *Marketing Management: Planning, Control* (MacMillan, 1990) 45-7 (discussing the Nicosia model, which tries to establish the link between a firm and its customers, how the activities of the firm influences the consumer and results in the buying decision); Piere Laville, 'Le terroir, un concept indispensable a l'elaboration et á la protection des appellations d'origine comme a la gestation des vignobles: le cas de la France' (1990) *Bulletin of the OIV* 709, 710.
[128] Laville, ibid, 709.
[129] See 6.1 (discussing the economics of information and reputation).
[130] See section 6.1.1 (qualifying this observation through analysis undertaken). See also Tony Smith, 'Muslim impoverishment in colonial Algeria' (1974) 17 *Revue de l'Occident Musulman et de la Méditerranée* 139, 142 (noting that, leaving aside religious beliefs, wine consumers in developed nations are typically prosperous, but wine is also consumed in impoverished areas where it is still safer to drink than the local water supply). See further, Antonio Stanziani, 'Wine reputation and quality controls: The origin of the AOCs in 19th century France' (2004) 18(2) *European Journal of Law and Economics* 149, 156-7.
[131] See further section 3.2.1 (discussing how quality is regulated in the Old-World). See also Stanziani, ibid.
[132] See Chapter II.
[133] Laville, above fn 107.
[134] Ibid.

The most successful wine producers it would appear are those who grasped market forces of supply and demand, and whose products met a prevailing definition of "quality".[135] In past generations, the definition of quality was the preserve of the wine producer, and consumers who did not like a particular style of wine were often made to feel uncultured.[136] The intrinsic sensory aspect of wine taste and aroma are only one component in the modern consumer definition of quality which may or may not be the same as "product value".[137]

Extrinsic factors such as bottle and label design, and the perceived artistic talents of the winemaker are equally important motivators of human preference in wine selection.[138] But, these do not necessarily mean that a wine is "quality". This tugs at an important issue amongst commercial wineries, namely that they need to distinguish their product in a competitive globalised marketplace. Success as a wine producer in the twenty-first century, it is hypothesised, requires an appreciation of human behaviour and product choice within market segments.[139]

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[135] Ibid.

[136] See above fn 107, 46; ibid, 157.

[137] See William Stanton et al, *Fundamentals of Marketing* (McMillan, 1994) ch. 2 (discussing that the product related attributes such as quality, durability, price, and design, influence the buying decision of a consumer. A way to narrow down the products in the choice set is to pick an attribute and then exclude all products in the set that does not possess that attribute. See also, Charles Lamb and Carl McDaniel, *Principles of Marketing* (South-Western Publishing, 1992) 72-9.

[138] Ibid. See also Philip Kotler, *Marketing Management* (Pearson, 11th ed., 2003) ch. 4 (outlining that there are five roles people play during a purchase. They are (i) Initiator: It is the person who gives the idea of buying the product or service. (ii) Influencer: It is the person who reviews or influences the decision. (iii) Decider: It is the person who makes the buying decision: what to buy, how to buy, when to buy and where to buy. (iv) Buyer: It is the person who actually makes the purchase. (v) User: It is the person who consumes or uses the product or service); Leon Schiffman and Lesslie Kanuk, *Consumer Behaviour* (Prentice Hall, 9th ed., 2007) (noting that country-of-origin perceptions and expectations lead to cognitions. It also puts significance on particular products and marketing attributes. These were considered as the factors that could bring affect to the people in the country of where the product or services were market).

[139] Gordon Becker, Morris DeGroot, and Jacob Marschak, 'Measuring Utility by a Single- Response Sequential Method' (1964) 9 *Behavioral Science* 226, 229-30; Peter Bohm et al, 'Eliciting reservation prices: Becker-DeGroot-Marschak mechanisms vs. markets' (1997) 107, *The Economic Journal* 1079, 1082-3; Ilenia Bregoli et al, 'Challenges in Italian wine routes: managing stakeholder networks' (2016) 19(2) *Qualitative Market Research Journal* 204, 218; Molla-Bauza Brugarolas et al, 'Determination of the surplus that consumers are willing to pay for an organic wine' (2005) 3(1) *Spanish Journal of Agricultural Research* 43, 48-9; Peter Combris et al, 'Food choices: What do we learn from combining sensory and economic experiments?' (2009) 20(8) *Food Quality and Preference* 550, 555-7; Teresa Garcia et al, 'The wine consumption preferences of young people: a Spanish case study' (2014) 25(2) *International Journal of Wine Business Research* 94, 100.

1.3.4 The Industry

Wineries are major actors in the wine industry, as they are producers who have the capacity within their own farms to control everything connected with wine quality, taste, vintage, and flavour. Wineries have many responsibilities and duties ranging from ordering supplies and winery equipment, hiring winemakers and staff, planting vineyards to determining target market and managing sales.[140] Because of the broad factors requiring balancing, who should regulate the industry? Should it be a government body? Or is there room for it to be self-regulating?

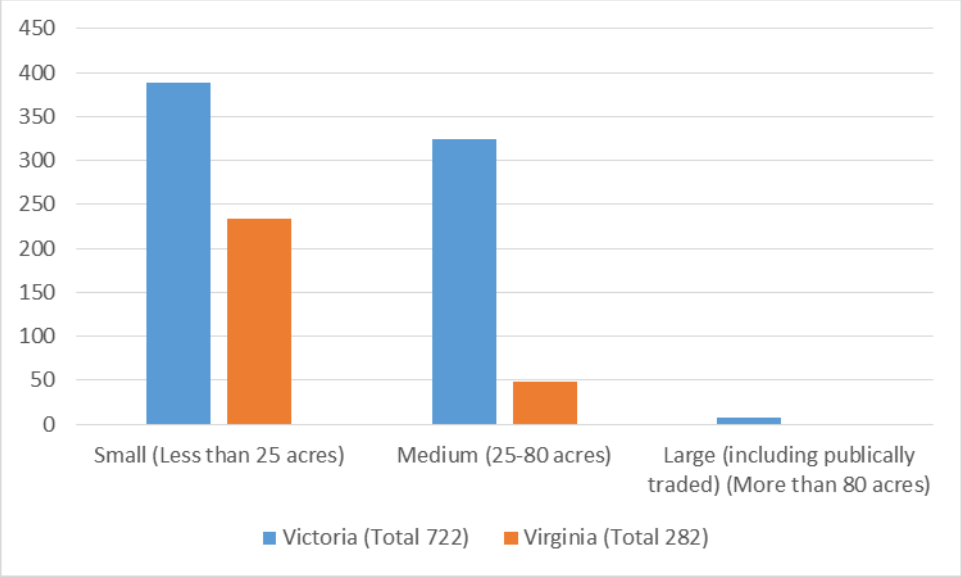
The precise demographics of what is regarded to be a boutique, small, medium or large winery is a subjective assessment for each jurisdiction. It may either be assessed based on production (in wine cases), or hectares of grape producing farms. Such analysis requires capturing the demographics of a jurisdiction at a particular point in time. Based on data gathered about Virginia and Victoria, it was possible to articulate these demographics based on hectare size of grape production for the purposes of producing wine. A comparative account of demographics could, however, be achieved by considering each winery and vineyard (factoring into account limitations, such as grape production capacity for a particular vintage), and broader economic factors, including GDP and regulatory requirements specifying the components of a particular wine from a region. While the findings in this dissertation pave the way for such discussion, analysis in the present context is beyond the scope of this dissertation.

Based on farm size and the actual grape production for the purposes of making a wine product, a small, medium and large winery is outlined in Table 1 (Appendix I).[141] The reason that acres of farms resulting in actual grape production was selected, instead of total production in gallons or litres, was because of the difference in requirements in Virginia and Victoria for laying claim to a wine as being sources from a particular demographic.[142] Classification ranges (expressed in acres) were wide to take into account variations in results of grape producing vines to total acres of vine planted. A small winery was classified as a farm that had functional vines (and therefore produced

[140] See section 1.1.3, above.
[141] See Wine Australia <http://www.wineaustralia.gov.au>; Virginia Governor Terry McAuliffe, Policy Priorities: Natural Resources <http://www.governor.gov>.
[142] See Wine Australia, general statistics <http://www.wineaustralia.gov.au>; Virginia Wine Board, general statistics <https://www.virginiawine.org>. See also US Department of Agriculture, National Agriculture Statistics, *Virginia Commercial Grape Reports.*

grapes for wine production) of less than 25 acres. Medium farms were those between 26 and 80 acres; and large (including whether the winery was publicly traded) was 81 acres or more. Such classification permitted a broader reference to 'farms', which included both vineyards and wineries.

Figure 3 Comparison of Size of Firms in Victoria and Virginia as at 10 November 2016



Source: Wine Australia; Virginia Wine Board

Data was gathered at first instance from statistics available on the Wine Australia website, and the Virginia Wine website. Total acres by variety were not relevant for this exercise. For present purposes, the above shows a concentration of small- to medium- wineries (i.e. firms) in both New World jurisdictions (see Figure 3).

Another limitation of data in the above table is that it does not specify the proportion of total wineries in each category in each county or wine region.[143] Such an inquiry would be relevant to examine the effect of regulatory changes on a particular aspect of the wine sector and require an ongoing undertaking of field search. Such analysis would also require factoring into account broader economic consideration including the effect of GDP and currency exchanges – factors beyond the scope of this dissertation.

[143] See further section 6.4.1.

While there is a perception that all wineries are commercial enterprises, many small wineries (and therein small-scale entrepreneurs) may, in reality, be either unaware of long-term financial costs of running a winery or a vineyard, or may focus more on personal satisfaction, 'passion', or particular rural lifestyle.[144] Lack of such awareness can be a contributing factor to closures of wineries.[145] In the absence of regulatory intervention, it is hypothesised that these entities have little chance to succeed even when they produce high-end wine, mainly because they do not necessarily contribute to the overall development of the industry and cannot be competitive in the national and global markets.[146]

1.3.5 Practical Reality

These demographics are alluded to in both the 2017-2021 Victorian Wine Industry Development Strategy and the Vision 2020 – Blueprint for VA Wine. Both also provide a starting point for identifying present needs of the wine industry in these jurisdictions. In Virginia, for example, these objectives include:

- To increase the amount of vineyard acreage to meet market demand by 2020 with a goal of 100% Virginia grapes being used in all Virginia Farm Winery license production
- Reduce the financial risk of grape growing by reducing cost of growing wine grapes and improving profitability of vineyards and wineries
- Relationships with local and state government
- Drive sales through marketing strategies.

The importance of tourism to the Victorian wine industry is also noted in the Wine Industry Strategy since the industry directly contributes $7.6 billion to the Victorian economy and provides 12,995 direct jobs (including wine tourism).[147]

[144] See Steve Charters and David Menival, *A typology of small producers in the champagne industry – An explorative study* (Research Paper, Academy of Wine Business, 1 May 2008) http://academyofwinebuisness.com (discussing business motivation, market orientation, and categories of vignerons in the Champagne region).
[145] See further section 6.4.1.
[146] Ernst Walker and Annette Brown, 'How Do Owners of Small Businesses Measure Their Success?' (2004) 22(6) *International Small Business Journal* 573, 574.
[147] Above fn 7, 3.

The wine industry in both Victoria and Virginia, however, face challenges including an unpredictable global market, planned domestic tax reform, as well as climate and biosecurity challenges to production. Considering the recognised need to adapt in response to changes in its operating environment, is it the place of governments to intervene? And, if so, then for what purpose?

Addressing these interests also requires an understanding of what issues motivate regulatory intervention.

1.4 A Balancing Act between Stakeholder Interests

An "optimum" regulatory framework should recognise interests of external stakeholders and balance these with the rights of internal stakeholders. One method of undertaking this is to identify the needs of stakeholder groups, the underlying objectives of legal regimes and laws, and see whether that legal regime's scope can facilitate a balance of interests.

There are several stakeholders in the wine industry and wine supply chain. Internal stakeholders include the producers (i.e. vineyards and wineries). External stakeholders include consumers, and the government. With regards to the latter's role, is it necessary for the government or legislature to balance stakeholder interests in the context of issues presented, or should such issues be left to the wine industry to self-regulate or control? Factors discussed in this dissertation include: health, sustainability, commerce, and culture.

1.4.1 Health

Existing literature shows a positive correlation between health benefits of a product, and consumer preference for that product.[148] For example, when compared purely for 'health' benefits to beer (and assuming that both products are comparably priced), consumers have opted for red wine over the former.[149] In 1991, for example, a study by Serge Renaud coined the term 'French paradox'

[148] See ibid. See also Louis Pasteur, Etuders sur le Vin (Imprimerie Imperial. Paris, 1866), Vol 1, xx. See generally Vicki Waye, 'Wine and Health' in Vicki Waye and Matthew Harvey (eds), *Global Wine Regulation* (Thompson Reuters, 2013).
[149] See Chapter V.

to describe the relationship between the high intake of fats in the French diet and the low incidence of coronary heart disease.[150] This well-turned phrase galvanised the attention of the media, the public and other scientists.[151] The benefits of antioxidants are more pronounced in red wines as these wines contain a higher phenolic content, but white wines also offer some benefit to the consumer.[152]

Alcohol has been regarded as "not an ordinary commodity", but "an important health determinant".[153] Leaving aside the WHO's report on alcohol and health,[154] studies undertaken in the 1980s in the US and Germany, for example, identified the effect of alcohol by pregnant mothers on their foetus'.[155] The toxic effects of alcohol (i.e. ethyl alcohol, ethanol or OH-) can cause a wide range of diseases and acute as well as chronic disorders.[156] Recognising these risks, in addition to statutory minimum drinking age, a number of jurisdictions introduced compulsory health warning labels on alcohol products.[157]

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[150] S Renaud and M De Lorgeril, 'Wine, alcohol, platelets and the French paradox for coronary heart disease' (1992) 339 *Lancet* 1523, 1524.

[151] Morten Grønbæk et al, 'Type of alcohol consumed and mortality from all causes, coronary heart disease, and cancer' (2000) 133 *Annals of Internal Medicine* 411, 415.

[152] Mark Marmot et al, 'Alcohol and mortality: A U-shaped curve' (1981) I *Lancet* 580, 582 (explaining that there is scientific evidence that moderate wine consumption protects against the incidence of many diseases of modern society — cardiovascular disease, dietary cancers, ischaemic stroke, peripheral vascular disease, diabetes, hypertension, peptic ulcers, kidney stones and macular degeneration — in addition to stimulating resistance to infection and retention of bone density); J.E. Kinsella et al, 'Possible mechanisms for the protective role of antioxidants in wine and plant foods' (1993) 47 *Food Technology* 85, 86-7.

[153] World Health Organization, *Global Status Report on Alcohol and Health* (World Heath Organizatyion, Geneva, 2011) v (mentioning also that the WHO has been actively involved in documenting and reporting on alcohol-related health issues and problems since 1974). See Waye above fn 148, 171 and 174 (suggesting that "prohibiting the sale of alcohol, except via a government body, is another means employed to control hazardous consumption", and mentioning that "alcohol consumption by minors raises numerous health concerns). See also Andrew Dyer et al, 'Alcohol consumption, cardiovascular risk factors and mortality in two Chicago epidemiological studies' (1977) 56 *Circulation* 1067, 1070-2; Thomas Gordon and William Kannel, 'Drinking and mortality: the Framingham Heart Study' (1984) 120 *American Journal of Epidemiology* 97, 100-1; JT Salonen et al, 'Intake of spirits and beer and risk of myocardial infarction to health-a longitudinal study in Eastern Finland' (1983) 36 *Journal of Chronic Diseases* 535, 538 (outlining that the costs covering the consequences of harmful alcohol consumption are estimated to be 125 billion Euros per year. 7.4% of all disability and premature death in the European Union are linked to alcohol).

[154] Ibid, x.

[155] See Streissguth, A., Barr, H., Kogan, J., Bookstein, F. (August, 1996). Understanding the occurrence of secondary disabilities in clients with fetal alcohol syndrome (FAS) and fetal alcohol effects (FAE). Final report to the Centers for Disease Control and Prevention (CDC), Seattle: WA, Fetal Alcohol and Drug Unit, Tech. Rep. No. 96-06 (because a foetus develops certain areas at certain times during pregnancy, the disorders that can occur with alcohol exposure also vary depending on when the exposure took place. The authors review the impact of alcohol on the foetus expressed in weeks of development).

[156] Daniel Steinberg, 'Modified forms of low-density lipoprotein and atherosclerosis' (1993) 233 *Journal of Internal Medicine* 227, 230.

[157] See Waye above fn 148, 173 (restrictions on hours of sale), 174 (prohibiting sale to minors), 175 (pricing and taxation), 178 (restrictions on advertising), 179 (restrictions on packaging). See, e.g., Anti-Drug Abuse Act of 1988, Pub.L. 100–690, 102 Stat. 4181, enacted November 18, 1988, H.R. 5210 (United States federal law requiring

In an optimum framework regulating the wine industry, although consumers require proper information about the health consequences of alcohol consumption, placing a negative message on a wine product may in a consumer's mind cause negative association with that product, rather than their behaviour.[158] The question, moving forward, is whether this should continue to be the case? Should statutory regimes provide information or regulate a good where there is conflicting scientific opinion about the health benefits of wine. If so, then is it necessary to separate the good (i.e. wine) from the production practices, for the purposes of regulation?

1.4.2 Sustainability

The wine industry is also no stranger to the issue of sustainability, and environmental factors.[159] Global climate change and the accelerating depletion of natural resources have similarly led to an increase in the discussions about the role of business in reversing negative environmental trends.[160] For example, the Black Saturday bushfires in Victoria in February 2009 caused (although not comparable to the human tragedies) tinging of grapes used to produce wines in various Victorian wine regions that vintage year. Virginia is fortunate in having a moderate climate and generally ample fresh-water resources, but vineyards in northern regions are vulnerable to frost.

Caraccioli has recognised a need for the wine industry to have a greater focus on economic, environmental and social value creation, as opposed strictly profit maximization,[161] which is easier

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that (among other provisions) the labels of alcoholic beverages carry a government warning); EU Alcohol Strategy (which supports such demand by stressing the necessity to inform, to educate and to raise awareness on the impact of hazardous and harmful alcohol consumption: European Commission, 2006); EU Directive 2000/13/EC (European Union 2007) (dealing with product information (e.g. product name), information on ingredients and warning statements relating to specific ingredients (e.g. sulphite)). Labelling of alcoholic beverages is governed by the EU Directive 87/250/EEC (European Union, 1987). France is the only EU Member State which introduced legal regulations on labelling alcoholic beverages with health information. In France, labels on alcoholic beverages are mandatory to warn pregnant women about the risks to the fetus when drinking alcohol during pregnancy. It can be presented as a text or a pictogram

[158] See section 7.2.1.

[159] See above fn 127.

[160] F Caracciolo et al, 'Human values and preferences for cleaner livestock production' (2016) 112 *Journal of Clean Production* 121, 128-30.

[161] Ibid; Luigi Cembalo et al, 'Determinants of individual attitudes toward animal welfare-friendly food products' (2016) *Journal of Agriculture and Environmental Ethics* (2016) 1, 7-9; Guiseppina Migliore et al, 'Are farmers in alternative food networks social entrepreneurs? Evidence from a behavioural approach' (2014) 28(5) *Journal of Agriculture and Environmental Ethics* 885, 888-9; Alessia Lombardi et al, 'Are "good guys" more likely to participate in local agriculture?' (2015) 45 *Food Quality Preference* 158, 160-2; Kai Hockerts and Rolf

said than done for much of the wine industry. In jurisdictions such as Victoria, ongoing issues of drought, possible plant disease, or other natural events, in addition to high tax rates imposed on wineries with limited rebates or tax benefits, negatively impact the industry. Whether and how a regulatory framework should for example mandate sustainability practices for all wineries and vineyards, despite their size, and to what degree is of relevance in this dissertation.

Research on sustainable entrepreneurship has evolved from two independent research streams on social and environmental entrepreneurship,[162] both of which are discussed in Chapter V. Social entrepreneurship is defined as an activity whose main objective is not only the obtainment of a profit, but also the creation of social values, recognizing the new opportunities that have emerged because of the increased importance of social issues.[163] The concept of environmental entrepreneurship exists in the same vein as social entrepreneurship, and its main goal is to combine existing resources to solve environmental problems also leverage new economic opportunities.[164] Sustainable entrepreneurship is viewed as the driving force of sustainable development, in which economic, social and environmental goals are combined within a firm's organizational logic, and is of importance to the wine industry going forward.[165]

Supply chains in various industries have increasingly faced stakeholders' pressures as well as the commercial and reputational risks relating their social performance.[166] This might have contributed to introducing broadly-adopted sustainability standards and reporting frameworks such as the Global Reporting Initiative which encompass the social dimension, in addition to the

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Wüstenhagen, 'Greening Goliaths versus emerging Davids-Theorizing about the role of incumbents and new entrants in sustainable entrepreneurship' (2010) 25(5) *Journal of Business Venture* 481, 485-6.

[162] Guiseppina Migliore et al, 'Farmers' participation in civic agriculture: the effect of social embeddedness' (2014) 36(2) *Culture Agriculture and Food Environment* 105, 108.

[163] Sophie Bacq and Frank Janssen, 'The multiple faces of social entrepreneurship: a review of definitional issues based on geographical and thematic criteria' (2011) 23(5-6) *Entrepreneurship Regulatory Development* 373, 380-3; Johanna Mair and Ignasi Marti, 'Social entrepreneurship research: a source of explanation, prediction, and delight' (2006) 41 (1) *Journal of World Business* 36, 38; F Tilley and W Young, 'Sustainability entrepreneurs-could they be the true wealth generators of the future?' (2009) 55 *Greener Management International* 79, 80-2; Emanuele Schimmenti et al, 'The role of information and communication technologies and logistics organisation in the economic performance of Sicilian fruit and vegetable enterprises' (2013) 10(2) *International Journal of Business Globalisation* 185, 188-9; Emanuele Schimmenti et al, 'Agriculture in a Sicilian inland area: strategies and motivations of conversion towards multifunctional activities' (2016) 17(15) *Qualitative Access Success* 87, 90-1.

[164] Boyd Cohen, 'Sustainable valley entrepreneurial ecosystems' (2006) 15(1) *Business Strategy Environment* 1, 5-6.

[165] Bradley Parrish, 'Sustainability-driven entrepreneurship: principles of organization design' (2010) 25(5) *Journal of Business Venture* 510, 514-5.

[166] Mohsen Varsei et al, 'Framing sustainability performance of supply chains with multidimensional indicators' (2014) 19 (3) *Supply Chain Management: An International Journal* 242, 257. See also section 6.3.1.

environmental and economic aspects, at the bottom and supply chain levels.[167] Firms may need to incorporate the social performance indicators in decision-making in order to mitigate the risk and/or gain financial benefits.[168]

Despite this need, few scholars have tried to address the social dimension of supply chain network design, and to consider all three dimensions,[169] with some notable recent exceptions. For example, Varsei et al.[170] proposed a generic framework for sustainable supply chain network design.[171] Ramos et al.[172] modeled drivers' working hours as the social objective, however, their model addressed only operational logistics decisions. This dissertation acknowledges the three sustainability aspects of supply chain network design in the context of the wine industry in proposing an optimum regulatory framework. In so doing, it gives rise to one of the primary objectives of this dissertation being to provide a practical utilisation by the industry and governmental entities with a view to support a sustainable wine industry, and other stakeholders.

It is acknowledged that research in the links between the wine industry, sustainability and supply chain management is still in its infancy,[173] particularly in terms of supply chain modeling and optimization. Soosay et al.[174] conducted value chain and life cycle analyses to identify misalignment between consumer preferences and resource allocation. Garcia et al.[175] proposed a framework for measuring wine logistics performance in terms of quality, timeliness, cost and productivity based on

[167] Ibid, 258.
[168] Ibid.
[169] Miemczyk Eskandarpour et al, 'Sustainable supply chain network design: An optimization-oriented review' (2015) 54 *Omega* 11, 32.
[170] Mohsen Varsei et al, 'Framing sustainability performance of supply chains with multidimensional indicators' (2014) 19(3) *Supply Chain Management: An International Journal* 242, 257.
[171] See ibid. While they explained how to incorporate the social dimension into the model using a set of the Global Reporting Initiative's four primary social categories (i.e. labour practices and decent work conditions, human rights, society, and product responsibility), they did not propose any specific mathematical model. A discussion of this is beyond the scope of this dissertation.
[172] Tania Ramos et al, 'Planning a sustainable reverse logistics system: Balancing costs with environmental and social concerns' (2014) 48 *Omega* 60, 74.
[173] Ginon Szolnoki, 'A cross-national comparison of sustainability in the wine industry' (2013) *Journal of Cleaner Production* 243, 251. See also, Roberta Capitello and Lucie Sirieix, *What does 'sustainable wine' mean to consumers? An exploratory study in France and Italy* (2017) Academy of Wine Business, 9 <http://www.academyofwinebuinsess.com> .
[174] Claudine Soosay, et al, 'Sustainable value chain analysis a case study of oxford landing from vine to dine' (2012) 17(1) *Supply Chain Management: An International Journal* 68, 77.
[175] Fernanda Garcia, et al, 'A framework for measuring logistics performance in the wine industry' (2012) 135(1) *International Journal of Production Economics* 284, 298.

a benchmarking study in Argentina. Bohle et al.[176] introduced a mathematical model and optimization approach to address a scheduling problem in the wine grape harvesting. Christ and Burritt[177] recently raised the importance of water management in the wine supply chain.

Despite these efforts, to the best of my knowledge, there is no published modeling study on the wine supply chain design given its specific operational process in a regulatory context.

1.4.3 Commerce and Supply

Governments have historically been gatekeepers of international trade and commerce relations. They have, in theory, the ability to monopolise a market segment or break down trade barriers.

During the last third of the twentieth century, the world wine market became significantly more competitive.[178] Consumption declined in the traditional wine producing and consuming countries, while competition emerged from New World nations as the US and Australia, and prosperous consumers chose quality rather than quantity in consumption.[179] In 2001, France, Italy and Spain combined to produce slightly more than half of all the world's wine, but in the past 30 years their own per capita consumption has fallen 40–50%, leading to an oversupply of Old-World wine.[180] In the same period, wine consumption nearly doubled per capital in the US, showing a positive association between consumer preference for quality and choice of a more expensive wine.[181]

New World producers have been quick to respond to global perceptions of quality and, as has been observed:

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[176] Carlos Bohle and Vera Maturana, 'A robust optimization approach to wine grape harvesting scheduling' (2010) 200(1) *European Journal of Operational Research* 245, 252.
[177] Katherine Christ and Roger Burritt, 'Critical environmental concerns in wine production: an integrative review' (2013) 53 *Journal of Cleaner Production* 232, 242.
[178] See section 5.2.1.
[179] See 1.3.2, above (discussing regulation of 'quality'), 7.4.1 (how to protect 'quality').
[180] Unknown Author, 'The state of viticulture in the world and the statistical information for 2001' (2002) 20 *Bulletin of the OIV* 20, 25.
[181] Ibid. Compare, however, Chapter VI.

> "…have gained significant market share in the past 20 years, moving from 2 to 15% of the world export market, largely at the expense of the European producers."[182]

To most consumers, pricing of the end product has been important.[183] In the context of the wine industry, scholarship does not pinpoint what in legal regimes or regulatory frameworks work to facilitate national or international commerce in the wine industry to achieve long term sustainability.

What is known is that price does influence consumers' preference,[184] which when coupled with the broader notion of economic theory of supply and demand,[185] may explain why in the US at least 70% of the market is comprised of "economy wines" – those that retail for less than US$7 per 750-ml bottle.[186] This dissertation revisits the relationship between consumer expectations and product quality in different price categories.[187]

[182] Linda Bisson et al, 'The Present and Future of the International Wine Industry' (2002) 418(8) *Insight Progress* 696, 696.
[183] Ibid. See also section 7.2.1 (case study of consumer behaviour).
[184] See section 6.3.1.
[185] Kenneth Arrow and Frederick Hahn, *General Competitive Analysis* (New York, 1991); Joseph Schumpeter, *History of Economic Analysis* (Oxford University Press, 1994).
[186] See Bisson et al, above fn 146, 697.
[187] See Chapter VII.

1.4.4 History and Culture

Wine is regarded as an integral component of the culture of many countries,[188] a form of entertainment in others, and a libation of choice for advocates of its health benefits.[189] This implies two often competing factors: that there are health considerations, as well as social or cultural expectations.

It is, however, an overly broad assumption to say that the culture of the Old-World is deeply engrained in wine regulation.[190] As a global commodity, it is near impossible to disregard commerce. While regulatory frameworks reflect historical aspects of the legal system in which they operate. Existing literature acknowledges wine as "a special agricultural commodity that has been characterised as a symphony of romance, civilization, culture and rural artisanship."[191] History, which reflects cultural evolution over time, therefore plays a[n] [ongoing] role in how the wine industry of a particular jurisdiction is regulated. And, not only *a* jurisdiction viewed broadly, but also regions.[192]

History and culture in this dissertation is explored in different contexts. For example, culture as it shapes the recognition of rights and interests in intellectual property law, and economic culture of the industry – which draws on extraneous fiscal and political factors. Regarding the latter, literature describing certain economic factors that have impacted the wine industry since the entry

[188] See generally Salvatore Lucia, *A History of Wine as Therapy* (Lippincott, 1963) (outlining that the discovery of the healthful benefits of wine, now largely attributed to the antimicrobial activity of ethanol) 12.
[189] See Michael Costanigro et al, 'The wine headache: consumer perceptions of sulfites and willingness to pay for non-sulfited wines' (2014) 31 *Food Quality and Preference, 31* 81, 86-7; Michael D'Amico et al, 'Exploring environmental consciousness and consumer preferences for organic wines without sulfites' (2016) 120 *Journal of Cleaner Production* 64, 69-70; Robert East et al, 'Decision making and habit in shopping times'(1994) 28(4) *European Journal of Marketing* 56, 65-7; Christos Fotopoulos et al, 'Wine produced by organic grapes in Greece: Using means-end chain analysis to reveal organic buyers' purchasing motives in comparison to the non-buyers' (2003) 14 *Food Quality and Preference* 549, 557-8. See also Mario Amato et al, 'Exploring consumers' perception and willingness to pay for "Non-Added Sulphite" wines through experimental auctions: a case study in Italy and Spain' *Wine Economics and Policy* (forthcoming, 2017) (explaining that price is one of the dominating factors when it comes to making a purchase decision. It generally plays a vital role in determining consumer's brand choice while selecting a product. Consumers look into the price while taking a buying decision and check whether it is within their affordable limits. This helps them to maximize their immediate utility that they gain from the purchase. The consumers give relative importance to both price and quality, so while choosing a brand they make a choice consistent with the relative importance attached to both attributes).
[190] See Chapter II.
[191] See generally Waye and Harvey, above fn 44, 2.
[192] See Chapters III to VII.

into a bilateral treaty arrangement, exists. Vicki Waye,[193] for example, frames historical issues affecting the wine industry since the revised Australia – EC Wine Trade Agreement,[194] also the reform of the EU wine marks. Waye discusses the impact of global competitiveness (i.e. global culture) on the wine industry in Australia.[195] In addition to fluctuating exchange rates, and increased labour costs, she goes onto explain that environmental factors, such as water supply and demand, is a constraining factor resulting in increased water costs, also potentially higher costs imposed under, at the time of writing her article, a proposed carbon emissions trading plan.[196]

How should a regulatory framework address the evolving culture of the wine industry first requires identifying what the current definition of culture is, and whether a legal framework or some other option is most suited.

1.4.5 Oenology in the twenty-first century

Leaving regulation aside for a moment,[197] the diversity of preferences has been both a blessing and a bane to the wine industry. Producers must develop a clear style by which to distinguish their product from competitors but know that not all consumers or critics may find that style appealing. In contrast to other commodities, the region of production, the artistic reputation of the producer, and the conditions of production are important factors in the perceived value of wine[198] For these reasons, it is important that the complex interplay of physiological, genetic and

[193] Vicki Waye, 'Wine Market Reform: a Tale of Two Markets and their Legal Interaction' (2010) 29(2) *University of Queensland Law Journal* 211, 213-4.
[194] [1994] ATS 6. The Agreement was completed in 1993 and came into force on 1 March 1994. The Agreement was implemented in legislative form by the *Australian Wine and Brandy Corporation Amendment Act 1993* (Cth) which came into force on 16 December 1993.
[195] Above fn 193, 211 (where Waye also discusses formerly proposed reforms designed to achieve greater efficiency and transparency in the auditing of Australian wine provenance).
[196] Hon Penny Wong, Minister for Climate Change, Energy Efficiency and Water, *Carbon Pollution Reduction Scheme Delay* <http://climiatechange.gov.au>.
[197] See 1.2.2.
[198] Patricia Yegge and Marion Noble in *Proc. ASEV 50th Anniv. Annu. Meet.* (American Society for Enology and Viticulture, Davis, 2000); Philip Kotler, 'Evaluating competitive marketing strategies through computer simulation' in Peter Bennett (ed) *Marketing and economic growth* (Chicago American Marketing Association, 1966) 338, 347-8. (outlining that brands today play a number of important roles that improve consumers' lives and enhance the financial value of firms); David Aaker, 'Measuring brand equity across product and markets' (1996) 38(3) *California Management Review* 102, 110-2 (providing that brand awareness and brand perceived quality as the significant factors to create and maintain brand equity. There is positive relationship among brand awareness, perceive quality and brand equity. The marketing program has effect to improve the perceive quality of brand for different customers.)

environmental factors that underpin human choice and preference be understood – a challenge to scientists and producers in the twenty-first century.

The completion of the human genome project together with advances made in the field of neurobiology of behaviour are providing crucial information based on preference and the subjective definition of quality. It has been estimated that roughly 2% of the human genome is devoted to olfactory receptors.[199] Olfactory receptors, also known as odorant receptors, are expressed in the cell membranes of olfactory receptor neurons and are responsible for the detection of odorants (i.e., compounds that have an odour) which give rise to the sense of smell.[200] Studies have suggested that many of these genes (60–70%) are non-functional or pseudogenes (i.e. genomic DNA sequences similar to normal genes but non-functional) in humans, but this still leaves hundreds of functional receptors. Although the neurobiology of olfaction and taste is less well studied than the non-chemical senses (e.g. pricing, winemaker reputation and label information, as opposed to the chemical senses are the senses of smell (olfaction) and taste (gustation)) interesting findings have emerged. For example, there is a strong connection between perception of an odour and emotion, be it pleasant or unpleasant.[201] In addition to genetic factors, perception is also clearly influenced by prior experiences and expectations.[202]

In fact, since 1980, the field of sensory science has made critical contributions to an understanding of the variables that influence and contribute to the sensory perception of foods and beverages.[203] Initially, sensory analysis was used simply as a component of quality control — to make certain that a product did not contain any objectionable odours or flavours that would make it unpalatable to most, if not all, consumers. The field has developed into a sophisticated endeavour relying on the use of human tasters as analytical tools.[204] This poses significant challenges given the diversity of human experiences and therefore of preferences for various aromas, and the complex aroma profiles comprising wide arrays of detectable scents and odours.

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[199] Samual Firestein, 'How the olfactory system makes sense of scents' (2001) 413 *Nature* 211, 214-5.
[200] Ibid.
[201] Sylvie Rouquier et al, 'The olfactory receptor gene repertoire in primates and mouse: evidence for reduction of the functional fraction in primates' (2000) 97 *Proc. National Academy of Science USA* 2870, 7870-3.
[202] Alex Sosinsky et al, 'The genomic structure of human olfactory genes' (2000) 70 *Genomics* 49, 52-3 (Genetic factors such as variation in the aldehyde dehydrogenase 2 genotype in humans, which leads to adverse reactions to alcoholic beverages, have been shown to influence acquired preferences).
[203] See S.E. Ebeler in R Teranishi, E.L. Wick and I Horstein (eds) *Flavor Chemistry: 30 Years of Progress* (Kluwer Academic/Plenum, 1999) 409–421.
[204] Ibid.

Like sensory analysis, it has been observed, chemical analysis was limited initially to detection of defect compounds present in high concentrations.[205] However, sampling procedures and analytical tools that can detect trace compounds present at nanomolar concentrations, now make it possible to understand the subtle nuances associated with varietal wine flavour.[206] There is also growing recognition that the volatility and release of flavour compounds can be altered by interaction with the presence of sugar, ethanol, lipids and polyphenols.[207] These studies reinforce the idea that flavour perception is dynamic and the result of a complex pattern of chemical and physical interactions in the food and in the mouth, which trigger the brain's response to gustatory, trigeminal and olfactory stimuli. Statistical tools of multivariate analysis and artificial neural networks are being used to relate the chemical and sensory information to the subjective preference responses of consumers. While descriptive analysis is used to characterise wine flavour quantitatively.[208] Using this technique, it is possible to identify sensory attributes that differentiate among a group of wines and then evaluate the wines for the intensity of each individual attribute.[209]

Science, unlike the legal realm,[210] is capable of defining what a person (depending on their olfactory receptors and pseudogenes) may consider to be a 'quality' wine. And, accordingly, legal regimes should not pose a bar to this endeavour. A legal regime, in the absence of such a regime

[205] Ibid.
[206] Susan Ebeler in R Teranishi, E.L Wick and I Horstein (eds) *Flavor Chemistry: 30 Years of Progress* (Kluwer Academic/Plenum, 1999) 409–421. Understanding the chemical composition of wine is insufficient in the prediction of human preference, and recent efforts of flavour chemists have been focused on linking chemical and sensory measurements of flavour. See also Thomas Acree, 'GC with a sense of smell' (1997) 69 *Anals of Chemistry* 170A, 173A–175A (Their study comprised a trained human subject sniffing the effluent from a gas chromatogram. As the compounds elute from the column, the qualitative and quantitative responses of the sniffer are recorded and related to the signal provided by a chemical detector. By incorporating the human sense of smell in the analytical process, gas chromatography–olfactometry can link the detection and quantification of odorants to their sensory impact in wine. See also Alan Guth, 'Identification of character impact odorants of different wine varieties' (1997) 45 *Journal of Agriculture and Food Chemistry* 3022, 2023 (explaining that complex chromatograms can be reduced to a small subset of compounds that have significant odour impact. When the subset of compounds is recombined, the aroma properties of the mixture will closely mimic the properties of the original wine).
[207] Alan Guth, 'Quantitation and sensory studies of character impact odorants of different white wine varieties' (1997) 45 *Journal of Agriculture and Food Chemistry* 3027, 3029-32.
[208] Alan Guth in A.L. Waterhouse and S.E. Ebeler (eds) *Chemistry of Wine Flavor* (American Chemistry Society, Washington DC, 1998) 39–52.
[209] Andrew Waterhouse and Susan Ebeler (eds) *Chemistry of Wine Flavor* (American Chemistry Society, Washington DC, 1998) 217–229 (Flavour profiles as depicted in their paper can then be drawn that visually compare the differences in wines).
[210] Ibid.

being able to objectively define the term 'quality' wine, could instead as its objective to facilitate stakeholder interests.[211]

1.5 Summary

An optimum wine regulatory framework is one that operates both efficiently (to the extent that there conflicts between legal regimes are limited, or extinguished) and effectively (i.e. because they represent stakeholder interests, and are appropriately administered), the components of a wine regulatory framework may differ from one jurisdiction to another.

This chapter sets the scene for what the term "wine regulatory framework"[212] refers to, the reason for selecting the jurisdictions discussed in this dissertation, the nature of a rather complex regulatory "wine law' framework, gaps in existing literature that this dissertation addresses, and why there is a need to address them.[213] A brief explanation of why these jurisdictions were chosen was first outlined, followed by an incorporated literature review[214] of the facets of "wine law".[215] Discussed also was that the motivation for regulating the wine industry in these jurisdictions has evolved, and protects more than a narrow concept of "culture".[216] It was noted that scholarship presently does not address what culture [of the wine industry in a particular jurisdiction] is, nor how the wine industry should be regulated in light of motivating factors.[217] Other deficiencies identified were the absence of comparative analysis of a global commodity, and an understanding of the motivations of the wine industry, nexus with consumers, also economic trends.

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[211] Ibid.
[212] Reference to "wine regulatory framework" and "wine law regulatory framework" are used interchangeably unless otherwise specified: see above fn 64. These terms are distinguished from "legal regimes" and "wine law", discussed below.
[213] For the purpose of this dissertation, it is to be noted that the literature is limited to that written in English. It is to be noted that the present chapter focusses on a literature review of existing scholarship, and while it identifies some normative themes, these are reserved for Chapter III. "Critical" analysis of literature affirms, pinpoints, or disproves legal regimes that would comprise an optimum wine law regulatory framework that is proposed in Chapter VI.
[214] As noted above, literature analysed in this dissertation is either written in or available translated to English.
[215] Wine law is also referred to as a collective of "wine laws", being legislation regulating various aspects of production and sales of wine. See, Robinson above fn 5.
[216] Ibid.
[217] Ibid.

The second section identified the entities or stakeholders of the wine industry, including the consumer, the wineries (referred also to farms, wine producers, and vineyards in this chapter),[218] the government (and the broader societal and health goals that they may seek to achieve in regulating the wine industry). Their roles and objectives, from a normative legal theory also economic analysis, are discussed in later chapters. It is the intermingling of dynamics that shapes the regulatory framework governing the wine industry.

While this is a law dissertation, the nature of regulation of the wine industry inevitably requires broader consideration of economic factors, scientific (in particular, chemistry), marketing and normative legal theories, as they apply or stem from regulation of the wine industry in the select jurisdictions.

Accordingly, a related, but separately governed issue, is wine oenology. Wine oenology, due to its bearing on scientific developments, is best left to the realm of science. Regulatory frameworks governing the wine industry – particularly in the New World – should not regulate wine oenology. Rather, legal regimes that operate within a regulatory framework can opt to endorse scientific developments to better recognise or protect stakeholder interests or rights, Alternatively, legal regimes can (for example, in the context of informing consumers about a product) disallow information channels (e.g. labelling and labelling laws) about wine oenology to be expressly available to consumers. In this regard, the role that non-sensory characteristics such as pricing, winemaker reputation and label information play in influencing consumer preferences can be related to the chemical and sensory models developed.[219] Therein, not only is there an enormous complexity of individual perceptions and preferences,[220] but also the complexity of the tools that will be needed in the future to understand the relationships among chemistry, marketing, perception, preference and behaviour.

[218] Unless otherwise specified (e.g. for the purposes of taxation law in Chapter V), these terms may be used interchangeably.
[219] Ibid. See Sarah Hinchliffe, 'The Wine Sector and Corporate Drivers – An Interdisciplinary Study Examining the Intercept between Economics and Science' (Brown Bag Presentation, University of Akron July 2017). See section 6.3.1.
[220] See Yegge and Noble, above fn 177; see also Ebler, above fn 185, 412.

In addition to a product that is enjoyable in all sensory aspects, there are also sustainability concerns for both consumers and the wine industry.[221] For example, consumers expect wines to be healthful and produced in an environmentally sustainable manner.[222] The wine industry is concerned about their long-term viability, and drivers of profitability.[223] Such issues are complex, requiring producers to understand the latest developments in wide-ranging disciplines of science and technology – a comprehensive discussion of which is beyond the scope of this dissertation. The present-day wine industry is focused on optimizing the attractiveness of the product within the bottle.[224] Consumers are looking for 'value' in the product of choice.[225] This dissertation outlines key issues in addressing these stakeholder objectives and, in so doing, the elements of an optimum regulatory framework governing the wine industry focussing on Virginia and Victoria as primary case studies.

[221] Ebler, ibid, 412.
[222] See Ramaswamy and Namakumari, above fn 106, 43-6 (outlining the Psychoanalytical Model. According to this model the individual consumer has a complex set of deep stated motives that drive him towards certain buying decisions. The buyer has a private world with all his hidden fears, suppressed desires and totally subjective longings. His buying action can be influenced by appealing to these desires and longings).
[223] See Hinchliffe, above fn 219.
[224] William Stanton et al, *Fundamentals of Marketing* (McGraw Hill, 1994) 56-7 (stating that consumers are complex in nature and keep changing constantly. So, it is a must for the marketers to constantly improve their understanding of consumers and understand what influences the needs of the consumer). In short, the understanding of the buying behaviour of existing and potential customers is imperative for marketers: see Geoffrey Lancaster and Lester Massingham, *Marketing Management* (McGraw Hill, 1998) 45-6. See further Charles Lamb, Joseph Hair and Carl McDaniel, *Principles of Marketing* (South-Western Publishing, 1992).
[225] Stanton, ibid, 58.

CHAPTER II

A CONCEPTUAL REGULATORY FRAMEWORK OF THE WINE INDUSTRY

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CHAPTER II
A CONCEPTUAL REGULATORY FRAMEWORK OF THE WINE INDUSTRY

Chapter I highlighted that a wine regulatory framework is multi-dimensional insofar as its setting is within a supply chain setting, which embodies a number of stakeholder interests. Regarding the latter, regulatory measures ideally should balance industry needs, consumer needs, also health and broader societal interests (which may manifest themselves in the form of political interests).

The purpose of Chapter II is, through identifying relevant normative theories, articulate what is worthwhile protecting and regulating as a 'wine law' within a wine regulatory framework.[226] The scope of a legal system is first defined, that a legal system comprises themes of law and order, and the rationale for protecting wine laws are discussed.

Law, for example, may be part of a more formal legal system, whereas order may comprise guiding rules that are not formerly part of a legal system's institutionalised framework. This speaks to whether an industry should self-regulate (in which case, the institutionalised framework is the industry), or be subject to statutory requirement, which are centrally regulated at either national or state level.[227]

The relationship between international instruments, constitutions[228] and domestic law is explained by drawing on the concept of monism and dualism,[229] legal transplantation theory, and the

[226] This chapter discusses what is meant by "wine law regulation" and "wine law". These terms are used interchangeably in Chapters I and III: see above fn 64. An understanding of the composition of these terms are necessary to identify what is considered an "optimum" wine regulatory framework.
[227] See section 1.3.
[228] See, Mark Tushnet, *The New Constitutional Order* (Princeton University Press, 2010) 8 (defining Constitutional Order as combines novel guiding principles with distinctive institutional arrangements). See, c.f. Richard Davis Parker, 'The Past of Constitutional Theory – And Its Future' (1981) 42 *Ohio State Law Journal* 223, 224 (discussing Constitutional Theory which, by comparison, is an area of constitutional law that focuses on the underpinnings of constitutional government. It overlaps with legal theory, constitutionalism, philosophy of law and democratic theory, and is not limited by country or jurisdiction. Parker goes onto mention that in constitutional theory, Burkeans and common-law constitutionalists emphasize the role of traditions in giving content to constitutional norms, understanding traditions to include both general social and political traditions, on the one hand, and narrower judicial traditions or precedents, on the other hand.). See also Thomas W. Merrill, 'Bark v. Burke' (1996) 19 *Harvard Journal of Law and Public Policy* 509, 511-12, 515-19 (identifying differences among originalism, normativism, and conventionalism); David A. Strauss, 'Common Law Constitutional Interpretation' (1996) 63 *University of Chi Law Review* 877, 884-904 (detailing a precedent-based theory of the development of constitutional law).; Ernest Young, 'Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation' (1994) 72 *North Carolina Law Review*, 619, 701 (evaluating the case for traditionalism in

need to effective administration of legal regimes within a wine regulatory framework. It is hypothesised that, because of these normative theories, a wine regulatory framework that operates both efficiently (to the extent that there conflicts between legal regimes are limited, or extinguished) and effectively (i.e. because they represent stakeholder interests, and are appropriately administered), the components of a wine regulatory framework may differ from one jurisdiction to another. A blanket approach to such a framework, is ill advised.

The final section outlines factors that identify a legal system's norms, history and culture (i.e. that concepts of a legal system's culture is different to another's, and that cultural norms of a society within a legal system are therefore interrelated). Norms that have developed include health, politics, environment and economic sustainability. Pointed out is the difference between 'norms' in the present chapter is that they can shape a law and regulatory framework.[230] Whereas, 'stakeholder interests' are recognised by a regulatory framework. Stakeholder interest are subject to change and require re-evaluating norms to assess what changes to a law and/or regulatory framework can and should be made.

2.1 Reflections of a Legal System

A valid law and recognisable legal system are key ingredients in defining components of an optimum regulatory framework.[231] It is posited, in this regard, that if 'membership in the legal system' is understood as 'membership in the system of valid law',[232] then the definition proposed will be burdened with the *idem per idem* fallacy,[233] depriving it of any cognitive value and practical utility. This statement is central to the way in which the wine industry is regulated, that being

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constitutional interpretation. The claim for tradition is that the way things are and have been itself serves as a direct source of norms, potentially bridging the gap between fact and value. The appeal to tradition remains the most theoretically critical attempt to leverage directly from "is" to "ought.").

[229] See section 2.2.1 (outlining whether a legal system can be described as monist or dualist and discussing why this matters in the context of this dissertation).

[230] This chapter does not adopt "Legal positivism", which refers to theory of law that holds that the norms that are *legally valid* in any society are those that emanate from certain recognised *sources (*such as legislatures or courts) without regard for their *merits*, i.e., without regard for whether the norms are fair or just or efficient or sensible. See, c.f., Andrzej Grabowski, *Juristic Concept of the Validity of Statutory Law: A Critique of Contemporary Legal Nonpositivism* (2013, Springer) 289.

[231] C.f. Jan Woleński, 'The Problem of the Validity of Law' in Jan Woleński, Kazimierz Opałek (eds) 39 *Selected Papers in Legal Philosophy* (Springer, 1999) 6, 18. See further section 8.1.2 (defining "optimum regulatory framework").

[232] Grabowski, above fn 209, 287.

[233] Ibid.

primarily through statute. So, that if it is assumed that the intention of the concept of the validity of the norms of [statutory] law should be clarified by means of their membership in the system of "valid" law (a structural issue, not at issue in the present dissertation), and secondly that the concept of the system of valid law would not stand for anything else than the system, (an ordered set) of valid statutory norms, then we would find ourselves in a definitional *circulus vitiosus* from which there is no reasonable way out. While Virginia, Victoria, Italy and France are all (as well as part of) established legal frameworks where there is a valid system of law, such a point should be explored where the jurisdiction at issue may not have a common law or civil law legal system, nor any formal (i.e. recognisable) legal means of statutorily governing the wine industry. For example, certain African states and North Korea.[234] Regarding the former (i.e. 'valid' law) for the purpose of this dissertation, refers to whether a law so classified as a 'wine law' is direct or indirect.[235] It is further noted that jurisdictions discussed in this dissertation (i.e. Victoria within Australia, Virginia, Italy and France) comprise established legal systems, and valid laws (insofar as they are deemed constitutional). Further to the above, within each system of valid law are regulatory frameworks that regulates the wine industry.

At issue in this dissertation is therefore not whether statutory laws are valid or invalid, but rather do they serve the purpose of what regulation of the wine industry seeks to achieve? Should there be prospects of introducing new statutory law within this framework, however, the above normative concepts may be of relevance. Since established legal systems exist and that this dissertation analyses whether existing legal regimes are indeed appropriate requires pinpointing: (i) what norms does the legal system seek to protect, or recognise; and (ii) how legal regimes or laws within a regulatory framework protect and recognise interests and rights of entities? This requires a normative analysis of what is meant by the term 'legal norm'. Legal theories are, therefore, directed to focus on "the system of [valid] law",[236] which requires an analysis of the following: (i) what comprises a law within that system;[237] (ii) on what basis can a law be described [as valid]; (iii) what is the relationship between a [valid] law, and an optimal regulatory framework?

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[234] See Sarah Hinchliffe, 'Trademarks, GIs and Commercial Aspects of Wine Distribution Agreements' (2014) *Journal of Food Law and Policy* 14.
[235] See section 3.1.2.
[236] Such a vision of the legal system, which, like a logical system, per se, justified not only the validity of its components (which can be accepted under some conditions), but which also justified its own validity as a whole.
[237] See, e.g., Wieslaw Lang, 'Obowiazwanie normy prawney Wczasie Wswietle logiki' (Validity of a Legal Norm in Time in the Light of Logic of Norms) (1960) 283-5 (considering the issue of the validity of the legal system as an "extra normative problem", and highlighting the negligible cognitive and practical value of this concept).

As rightly observed by Kazimierz Opalek, the justification of the internal validity of law (in this context, a 'wine law') by justifying the validity of the legal system as a whole (i.e. the law's external validity) is meaningless, because it is based on a failure to differentiate between these two meanings of validity.[238] This is because the jurisdictions in the present dissertation, form part of established legal systems. And while there is a nexus between the function of a legal system, and legal regulatory frameworks, due to their established nature, an intricate discussion of the validity of the former is unnecessary. The issue of the validity of the legal system as such (i.e. the external legal validity) is acknowledged to be a rare object of inquiry for analytical and philosophy of law,[239] and not previously explored in existing wine law research.

Beyond McCormick's observations that "there is no single uniquely correct reconstruction of the raw material of law in the single canonical form of a 'legal system',[240] a detailed discussion of why a legal system may be described as valid exist,[241] is beyond the scope of this dissertation. For present purposes, it would appear that legal theoreticians leave aside the issue of the validity of the legal system because they believe that this is not a proper way to explain the problem of the validity of individual legal norms. In order to resolve the above inquiry, it is enough to adopt the condition or presupposition (as followed by Kelsen, Hart and Peczenik in their theories) that the legal system is – as Kelsen wrote – *im groben und ganzen* "effective".[242]

2.1.1 The Concept of Law and Order

Proposing an optimum regulatory framework to regulate the wine industry requires an understanding of a legal system's basis, the factors that drive the legal system, also regulatory regimes and laws. The three most general and important features of 'law' or regulatory regimes (e.g. intellectual property regimes, income tax regimes, and so on) are that it is normative,

[238] C.f. Woleński, above fn 210 (The author uses the distinction of validity in the absolute and relative sense, rather than the external and internal validity. But, it does not change anything with regard to the merits of his criticism). Similarly, A. Pecsenik, "The Structure of a Legal System", 4, emphasises the differences in the means of establishing the external validity of the 'total legal system', and the internal validity of 'single legal rules'.
[239] Grabowski, above fn 209, 286.
[240] Neil MacCormick, 'On Institutional Normative Order: An Idea about Law' in Ernesto Garzon Valdes et al. (ed), *Normative Systems in Legal and Moral Theory* (Oxford University Press, 1986) 423.
[241] Ibid, 284.
[242] Ibid.

institutionalised, and coercive.[243] It is normative in that it serves, and is meant to serve, as a guide for human behaviour. It is institutionalised in that its application and modification are to a large extent performed or regulated by institutions, within a legal system. And it is coercive in that obedience to it, and its application, are internally guaranteed, ultimately, by the use of force. Naturally, every theory of legal system must be compatible with an explanation of these features. Because of their importance it is, moreover, expected that every theory of legal system will take account of these features, and will, at least partly, explain their importance for 'the law', and therefore a greater appreciation for the legal system in which they operate.

Austin defines 'a law' as "a general command[244] (or order),[245] (issued by some person[246]) of a sovereign,[247] addressed to his subjects."[248] It naturally follows, therefore, that a "system" exists if its laws exist.[249] In the present dissertation, it is acknowledged that each of the respective jurisdictions fall within an existing legal system. In the case of Victoria, the legal system is primarily

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[243] John Austin, *Lectures on Jurisprudence and the Philosophy of Positive Law* (St. Clair Shores, MI: Scholarly Press, 1977). C.f. Patrick Devlin, *The Enforcement of Morals* (1996) 10. See also Herbert Lionel Adolphus Hart (HLA) Hart in Herbert Lionel Adolphus Hart and Leslie Green (eds) *The Concept of Law* (Oxford University Press, 2012).

[244] See Austin, ibid (For Austin a command is defined in terms of the following six conditions: (1) X desires some other persons to behave in a certain way; (2) he has expressed this desire; (3) he intends to cause harm or pain to these persons if his desire is not fulfilled; (4) he has some power to do so; (5) he has expressed his intention to do so; and, finally (6), X expresses the content of his desire (1) and of his intention (3) and nothing else. Austin distinguishes a command from "other significations of desire…", and further states that:

> "…by the power and purpose of the party commanding to inflict an evil or pain in case the desire be disregarded. A command then, is a signification of desire. But a command is distinguished from other significations of desire by this peculiarity: that the party to whom it is directed is liable to evil from the other, in case he comply not with the desire" ibid 136.

The idea that law consists of commands in the sense of requests accompanied by threat of harm is generally abandoned outside the area of criminal law. Although, one way of retaining Austin's definition is to treat laws, as does Kelsen, as commands issued to officials. See, however. Hart above fn 222, 37 (noting that this is a possible way of viewing the matter but it is awkward and, as Hart comments, does not adequately take cognizance of the fact that most laws are not published to officials only, but to the community in general as well).

[245] Ibid Hart, 39.

[246] Ibid (noting that Austin's usual expression is 'set' or 'given').

[247] The sovereign, according to Austin, is the direct or indirect legislator of all the laws in a system. i.e. is habitually obeyed by a certain community and does not render habitual obedience to anyone.

[248] See above, fn 222 (it is synthesised that although, Austin's sovereignty differs from superiority – a discussion of which is beyond the scope of the current dissertation. Save to say, it may be observed that the existence of the facts constituting the sovereignty of the legislator are a prerequisite to the validity of every law in the system, but they are the same facts in the case of every law). Compare, e.g. Austin, ibid (where it may be observed that, contrary to Austin's tacit assumption, it does not follow from the sovereignty of the legislator that he is superior to the subjects of any particular purported law relative to the sanction of that law. A man can be a sovereign and yet not be superior to some of his subjects relative to certain purported laws. Austin knows, of course, that the negative condition of sovereignty—the fact that the sovereign does not habitually obey anyone—does not entail that he is superior to the subjects of his laws. But neither does the positive condition of sovereignty entail that fact. The bulk of the population can habitually obey the sovereign without being inferior relative to every law).

[249] Compare above, fn 222 (Austin has very little to say about the structure of a legal system).

at a State, Commonwealth or national level. For France and Italy, the legal system is two-fold, namely: national, and each respective country as part of a larger EC legal system.[250]

Austin also sets out the criteria for a law, stating that it is 'a general command'.[251] In this sense, law is implicitly coercive. It is more correct to say that a wine law, for example whether there is a breach of a trade mark used on a wine label, is coercive. Such a law exists within statute and sets out criteria that defines what amounts to a breach.[252] From the standpoint of the sense of law, an in particular its normativity, manifested in the form of the binding force of law, it is clearly unacceptable that law be deprived of its coercive nature to become something akin to a voluntary game – for example, chess.

Norms are different to 'orders. The latter is less formal than law, as orders are non-binding and is relevant to the question of whether there should be a legal regulatory framework governing the wine industry. Or, should there be some form of natural law, or cultural law (e.g. indigenous law)?[253] This dissertation adopts the view that yes there should be a formal legal regulatory framework; not an *ad hoc* system of informal administration of the wine industry. To the legal systems of each of the jurisdictions at hand, orders may appear an irrelevant consideration – although, they may exist in the form of self-regulation by producers (for example, co-operatives). Italy, Victoria, Virginia and certainly France are established legal systems, comprising a system of laws and legal regimes. While orders are normative in the same sense as laws,[254] there are, on the other hand, so many occasions and reasons to refer to laws in abstraction from the circumstances of their creation is the justification for regarding laws as abstract entities.[255] Similarly, it is erroneous to say that law is the same as a norm, or vice versa.

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[250] See generally, Maurice Sheridan & James Cameron, *EC Legal Systems: An Introductory Guide* (Butterworth-Heinemann, 1992).
[251] Ibid, 14.
[252] Laws, in the present context, are civil in nature as opposed to criminal.
[253] See section 7.2.4, (discussing indigenous 'law' in the context of intellectual property). See also Irene Calboli, 'Reconciling Tradition and Innovation: Geographical Indications of Origin as Incentives for Local Development and Expressions of a Good Quality Life' in Susy Frankel & Daniel Gervais (eds.), *The Internet and the Emerging Importance of New Forms of Intellectual Property* (Kluwer Law International, 2016) 141.
[254] Ibid.
[255] The validity of a nonpositivist empirical argument, being the assumed scope of the concept of law postulated by the creators of the nonpositivist conception of law, is beyond the scope of this dissertation. See, however, Hans Kelsen, *General Theory of Law and State* (1949) 198 (where it may be observed that such a discussion regarding the universal concept of law – as opposed to the concept of law relativised to a particular legal culture or the state legal system – the more universally valid should be the empirical theses used in nonpositivist argumentation). In the

2.1.2 The Concept of Law versus Norms in a Legal System

It is well acknowledged that a legal system is understood as a set of norms (in the distributive sense),[256] and is merely an abstract object.[257] A legal system, as already discussed, is best described as the set of all the laws enacted by the exercise of powers conferred, directly or indirectly, by one or several basic norms. There are three types of norms relevant in this dissertation: a legal norm,[258] a basic norm, and a sovereign norm.[259] In adopting Kelsen's concept of a norm in the sense that if the norm is a legal norm, then the behaviour is judged to be either legal or illegal, lawful or unlawful.[260]

Certain legal theorists, such as Hans Kelsen, H.L.A. Hart, and Greg Henrik von Wright, to that end develop different conceptions of a norms, and their roles within a legal system.[261] For example, they highlight the highest norms, serving as an ultimate justification of the validity of other 'ordinary' legal norms or as a criterion for identifying them.[262] Authors, such as Gustav Radbruch, Alf Ross, and Joseph Raz-either argue that the juristic doctrine of validity must treat the constitution *as causa sui*,[263] or maintain that there is no Archimedean point, allowing for a verification of the validity of the elements of the legal system in a manner that is independent *of* the legal system. Or,

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present dissertation, those proposed to form part of an optimum regulatory framework to regulate the wine industry are based on existing laws, as developed, or those proposed in Chapters IV and V only.

[256] See Scott J. Shapiro, 'On Hart's Way Out' in J. Coleman (ed), *Hart's Postscript: Essays on the Postscript to the Concept of Law* (Oxford: Oxford University Press, 2001); Jules L. Coleman, 'Incorporationism, Conventionality and the Practical Difference Thesis' in J. Coleman (ed), *Hart's Postscript: Essays on the Postscript to the Concept of Law* (Oxford: Oxford University Press, 2001).

[257] See, Herbert Lionel Hart, *The Concept of Law* (1961) 78, 79, 151. Compare, e.g., Grabowski, above fn 209, 284. Although, I do not agree with the observation that a legal system is "an abstract object". See also, William C. Starr, ''Law and Morality' in H.L.A. Hart's Legal Philosophy' (1984) 67 *Marquette Law Review* 673, 675.

[258] Kelsen, above fn 242, 22-7 (Kelsen refers to 'the immediate range of a norm'. The phrase 'the immediate range of a norm (or a law)' can be defined as follows: An individual act will be said to be within the immediate range of a norm if, and only if, it is done by a norm-subject in circumstances which are an instance of the performance conditions of the norm, and if it is an instance of the generic act which is the norm-act or an instance of the omission of that norm-act. He goes onto mentioned that a norm serves as a direct standard of evaluation of acts within its immediate range only. An individual act belonging to the immediate range of a norm has a positive value (i.e. is commendable, good, legal, etc.) if it is an instance of the duty-act, otherwise it has a negative value).

[259] A detailed discussion of these concepts is beyond the scope of this dissertation.

[260] Kelsen, above fn 242, 193.

[261] Translated by Bonnie Paulson and Stanley Paulson as *Introduction to the Problems of Legal Theory* (Oxford, Clarendon P., 1992); the German subtitle is used as the English title, to distinguish this book from the second edition of *Reine Rechtslehre*, translated by Max Knight as *Pure Theory of Law* (University of California Press, 1967).

[262] Ibid.

[263] In the original: Gustav Radbruch, 'Die Verfassung selbst aber kann und mub eine solche rein juristischen Geltungslehre al seine causa sui auffassen' (1973) 8 *Rechtsphilosophie* 79.

finally, they observe that "law regulates its own validity".[264] Thus, they more or less openly admit that the criteria for the membership of norms in the legal system, and thus their validity (perceived as a membership) are of a circular character.[265]

Kelsen observes that "[a]ll norms whose validity may be traced back to one and the same basic norm form a system of norms, or an order."[266] In establishing who falls within the ambit of a 'wine law', for example, and given that there are several norms (other than those derived from or included within the ambit of a jurisdiction's constitution), it is difficult to take a strict view of Kelsen's perspective in this dissertation. Although the normative presupposition for what can be validly described as a 'wine law' is addressed below, it is necessary to distinguish between internal and external validity of norms within and regarding a legal system in the present section. But, one must therefore be careful, on Kelsen's view, not to make every basic norm include in its content all the conclusions of his theory of norms. For example, the first constitution may contain several norms, some belonging to certain chains of validity, others belonging to other chains.[267] A legal norm, more specifically, has been described by Kelsen[268] as, fundamentally, permissions.[269] For example, an act

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[264] Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81(5) *The Yale Law Journal*, 823–854 reprinted in Marshall Cohen (ed) *Ronald Dworkin and Contemporary Jurisprudence* (Rowman & Allanheld, 1984) (with a reference to Kelsen's views).

[265] Ibid (alluding to the circularity of the ultimate criteria of validity/membership of norms is most clearly manifested when analysing the content of Hart's rule of recognition). As previously mentioned, in accepting that there is an existing legal system, this dissertation focuses on constructing an optimum regulatory framework to regulate the wine industry – with a focus on the New World.

[266] See Kelsen, above fn 242, 96 (where Kelsen repeatedly asserts that the only function of a basic norm is to authorize the creation of the first constitution). Austin's criterion for membership of a law in a system is: A law belongs to a system if, and only if, it was enacted by the sovereign who enacted all the other laws of that system. Kelsen's criterion is: A law belongs to a system if, and only if, it was enacted by the exercise of powers conferred by the basic norm that conferred the powers by the exercise of which all the other laws of the system were enacted. In his own words, "That a norm belongs to a certain system of norms ... can be tested only by ascertaining that it derives its validity from the basic norm constituting the order.")

[267] C.f. Kelsen, above fn 242 (who repeatedly asserts that the only function of a basic norm is to authorize the creation of the first constitution. A legal system, instead of being defined as a basic norm and all the norms deriving their validity from it, will be defined as a first constitution and all the norms deriving their validity from it. Kelsen's criterion of identity presupposes that there is one norm which belongs to the chain of validity of every norm in a legal system).

[268] Ibid, 95 (Kelsen's ideas concerning the nature of norms can be divided into two groups: The first group explains the nature of norms as *guiding and justifying behaviour*. The second group is concerned with the nature of norms as *justified standards* of behaviour. He purports that orders backed by threats are norms. They guide the behaviour of the persons ordered, they are standards by which behaviour can be evaluated, they are made by human beings with the intention of influencing other people's behaviour, and they are supported by a standard reason, namely the avoidance of the threatened sanction).

[269] This is not the same as a justified demand. Therein, norms are not always justified demands. See, e.g., Kelsen ibid (describing the Constitution as the basic norm, whereas in fact the Constitution would be defined also as a body of legal principles that define the content and the form of all other legal norms). See also Raz, above fn 38, 824 (who similarly classifies legal principles and legal rules as general legal norms, allowing for the existence both of

amounting to trade mark infringement leads to civil penalties. In this dissertation, I perceive laws as directly imposing duties *on the law subject*s to perform the law acts, i.e. the norm acts of legal norms, and not, as Kelsen regards them, as directly granting permissions and only indirectly imposing duties.[270]

Then, there is the concept of the highest norms of the legal systems. This is elaborated by prominent legal theorists such as Kelsen's concept of *Grundnorm*, Hart's rule of recognition, or von Wright's sovereign norm, but they do not directly relate to the problem of external legal validity.[271] These ultimate norms, actually belong to the legal system, and can therefore constitute (at least according to the authors of these conceptions) a definitive basis for the validity or identification of the norms of this system, but not the validity of the legal system understood as a whole. Such a discussion is, nevertheless, beyond the scope of this dissertation. It is noted that legal theorists are (no doubt rightly) interested in the first place in unravelling the problem of the internal validity of law – namely, the validity of individual legal norms.[272] But, this inquiry is much more focussed than this. In the present dissertation, laws are viewed as directly imposing duties on the law subjects to perform the law acts, and therein acknowledge the norm acts of legal norms. The present section has acknowledged that legal norms play a role in a regulatory framework, and that legal norms and laws differ. But, in categorising a law as capable of regulating the wine industry requires some justifiable basis explored in 2.5, below. Three categories of norms, being: social, environmental and cultural, are identified as one such a justifiable basis.

2.2 The Importance[273] of an Optimum Regulatory Framework for the Wine Industry

particular legal norms and of other legal standards that are not norms (because they do not guide behaviour directly)).

[270] See Kelsen, above fn 242, 88 (where it can be observed that four main ideas contribute to Kelsen's concept of a norm as an imperative: Norms are (1) standards of evaluation (2) guiding human behaviour, (3) supported by standard reasons for compliance, in the form of the prospect of some evil ensuing upon disobedience, and (4) created by human acts intended to create norms; i.e. to set standards of behaviour, guiding behaviour and supported by the prospect of some evil ensuing upon disobedience, as standard motivation. Such an approach taken by Kelsen also implies a positivist view). See also Shapiro, above fn 256, 24-5.

[271] For more on the various conceptions and ways of grasping the highest norms of the legal system, see: Robert Alexy, Begriff und Geltun des Rechts, 154ff (English version, 95ff); R. Guastini, 'Normas supremas', trans J. Ferrer, SDOXA 17-18 (1995), 257-270; James Stelmach, 'Norma podstawaowa' ([Basic Norm], SFP 1 (2001) 63ff.

[272] Norms are guides to behaviour. See James Penner and Emmanuel Melissaris, 'Classical Legal Positivism: Bentham, Austin, and Kelsen' in Hilarie McCoubrey and Nigel White (eds) *Textbook on Jurisprudence* (Oxford University Press, 5th ed., 2012) 34-7 (outlining that the legal theorists thought that the only way in which laws guide behaviour is by prescribing it). See Kelsen, above fn 242 (looking at what must be individuated as the basic legal entity). See also: Hans Kelsen, *Theorie pure du droit* (2nd ed., 1992) 239, 185-6.

[273] Grabowski, above fn 209, 287.

In this section, the role that society, culture, politics and the economy have played in shaping a legal system is discussed. It is posited that legal theories are drawn upon to articulate the parameters of the regulatory framework that [presently and should continue to] regulate[274] the wine industry.[275] This, as mentioned, provides a basis for justifying why certain legal regimes operate as direct or indirect laws within a regulatory framework.[276]

2.2.1 Monism and Dualism

Most countries are impacted by treaties – whether they be multi- or bi-lateral – to some degree. Monism and Dualism are two legal theories that describe the scope to which international law is integrated into a domestic legal system.[277] But, they are often not employed in their pure form.

[274] See Chapter I, fn 5 (identifying the components of the "wine industry"). Accordingly, "regulatory framework regulating the wine industry" and "wine law regulatory framework" are not the same. The latter has a descriptive focus in that it describes the *types* of laws or legal regimes that form part of the regulatory framework affecting the wine industry (either directly or indirectly). The former refers to the *structure* of or overarching framework that encompasses laws affecting or impacting the wine industry. Reference to "regulatory framework regulating the wine industry" encompasses those bodies or entities responsible for policing or implementing various regulations that therefore affect the wine industry.

[275] Notably, this will come before the outcome outlined in the previous sentence.

[276] This top-down approach is adopted in Chapters III and IV.

[277] Marcus Klamert, *The Principle of Loyalty in EU Law* (Oxford University Press, 2014) 88. See also Christian N. Okeke, 'The Use of International Law in the Domestic Courts of Ghana and Nigeria' (2015) 32 *Arizona Journal of International and Comparative Law* 371, 399-400 (Discussing that constitutional pluralism would be a form of monism under national law). See also Alexander Somek, 'Monism: A Tale of the Undead' in Matej Avbelj and Jan Komárek (eds) in *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing, 2012) 343, 351-2 (where Somek makes the most developed challenge to the empirical dissertation of constitutional pluralism to date. He claims that pluralism does not fit the existing legal practice. "If national courts were to let Union law trump constitutional law, they would clearly act as agents of the supranational system and thereby sever their ties with the national system. Viewed from the national perspective, again, they would not act as courts and produce legally irrelevant statements". Regarding an empirical claim of constitutional pluralism, which is beyond the scope of this dissertation. The author then goes on to describe constitutional pluralism as what best describes the current legal reality of competing constitutional claims of final authority among different legal orders (belonging to the same legal system) and the judicial attempts at accommodating them. This leaves open the question of whether it is more appropriate to conceive of constitutional pluralism in the EU as a pluralism of legal orders (EU and national) or as a pluralism of constitutional claims of authority within the same legal order (with national legal orders being part of the broader European legal order in its respective field of application)). In my Master of Law dissertation, I have conceived of a European legal order composed of national and EU legal orders. However, the best way to present the current legal reality in the practice of courts may be by making use of Tuori's distinction between legal order and legal system: See Kaarlo Tuori, 'The Many Constitutions of Europe' in Kaarlo Tuori and Suvi Sankari (eds) *The many Constitutions of Europe* (Farnham, Ashgate, 2010) 3, 14-5 (outlining that while the legal order refers to law as a symbolic-normative phenomenon, the legal system refers to the legal practices where the legal order is produced and reproduced – law-making, adjudication and legal scholarship). Making use of this distinction, it can be conceived of the EU and national legal orders as autonomous but part of the same European legal system. For those practising law in Europe, this European legal system implies a commitment to both legal orders and imposes an obligation to accommodate and integrate their respective claims. The importance of this resides, among other things,

This is important to acknowledge since some wine laws directly impacting the wine industry – such as labelling laws[278] and laws governing GIs and trade marks – have developed or come about in New World countries, in particular, as a result of bilateral treaties signed with Old-World jurisdictions,[279] and/or multilateral treaties.[280] Their implementation, if the imperative as opposed to option exists in the first place, is important for understanding current and future parameters of a wine regulatory framework. One of the main purposes for negotiating treaties is for better access to markets.[281] This is particularly important to the wine industry.[282] The EU-Australia Wine Treaty, for example, which entered into force on 1 September 2010 provided important safeguards for EU wine interests. It did this by ensuring the protection of GIs and traditional expressions for EU wines in Australia and

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on the hermeneutic requirements imposed on national and European courts when acting within the EU legal system: see Miguel P Maduro, 'Contrapunctual Law – Europe's Constitutional Pluralism in Action' in Neil Walker (ed) *Sovereignty in Transition* (Hart, 2006), 501, 508-9 (outlining that EU law itself does not prevent national judges from adopting decisions disrespecting EU law – what he calls "false decisions" – since ultimately their decisions will not be void and the only consequence may be tort liability. The author states that: "it makes sense to say that Member States retain the power to have their judges adopt false decisions, at any rate, as long as States are willing to pay for it. The conclusion is that "the overarching legal system vests the power to adjudicate supremacy conflicts in the national system").

[278] See, e.g. Chapter III (discussing that the EC-Australia Wine Treaty, for example, safeguards the EU wine labelling regime, by listing optional particulars which may be used by Australian wines (i.e. an indication of vine varieties, an indication relating to an award, medal or competition, an indication relating to specific colours, etc.) and by regulating the indication of vine varieties on wine labels).

[279] This refers to the Agreement between the United States of America and the European Community on Trade in Wine, signed 10 March 2006 [2006] OJ L87 (entered into force 10 March 2006) ('EU-US Wine Agreement'); Agreement between the European Community and Australia on Trade in Wine [1994] OJ L 86/94, superseded by the Agreement between the European Community and Australia on Trade in Wine [2009] OJ L28/3 (entered into force 1 September 2010) ('EU-Australia Wine Agreement'). Reference to "jurisdiction" is in place of "countries" since the EC is not strictly a country.

[280] E.g., Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) ('TRIPS Agreement').

[281] See Mark Vaile, Minister for Trade, *Free Trade Agreement with the United States*, media release MVT08/2004, 8 February 2004 <http://www.trademinister.gov.au/releases> 1; Australia-United States Free Trade Agreement, signed 18 May 2004 [2005] ATS 1 (entered into force 1 January 2005) (US-Australia FTA). See further, European Commission, *EU-Australia wine trade agreement enters into force*, IP/10/1078, Brussels (31 August 2010) <http://europa.eu/> (outlining that in 2009, EU wine exports to Australia were worth € 68 million and Australian exports to the EU were worth € 643 million). See also, Letter from several U.S. Members of Congress and U.S. agricultural groups to Michael Froman, Deputy National Security Advisor for International Economic Affairs, December 20, 2012; CCFN, 'CCFN and Allies Urge U.S. White House to Handle EU GI Discussions with Care' 9 January 2013 (stating that Some members of the U.S. wine industry believe that these agreements limit U.S. imports to third countries and will grant the EU a monopoly on certain wine and food terms that have been used by U.S. wine and food makers for generations). Compare, e.g., CRS communication with representatives of Napa Valley Vintners Association, 26 February 2015 (outlining that some argue that industry trade data suggests that some recent agreements may have had a *de minimis* impact on U.S. wine exports, given that sales of U.S. wine in the Canadian market, for example, appear to have increased rather than decreased since that agreement went into effect).

[282] See Chapter VI (discussing this point in further detail).

beyond.[283] This comprised the commitment that Australian wine producers will phase out the use of key EU Geographical Indications and traditional expressions for wine such as '*Champagne*', '*Port*', '*Sherry*', along with certain traditional expressions such as, '*Amontillado*', '*Claret*', and '*Auslese*' from 1 September 2011.[284]

The conventional wisdom in international law[285] is that a state can accept and integrate international law into the domestic system in one of two ways. In the absence of being implemented into domestic law, however, international treaties (whether they be bilateral or multilateral) fail to have any binding effect on that jurisdiction. Australia and the United States' legal systems are examples of this and are described as dualist. Countries that form part of the EU,[286] on the other hand (including France and Italy), may be described as monist[287] – at face-value, anyway.

Dualist theory prioritises the notions of individual self-determination and sovereignty at the state level. In a dualist legal system, international law stands apart from national law, and to have any effect on rights and obligations at the national level, international law must be domesticated through

[283] See, e.g., European Commission, *EU-Australia wine trade agreement enters into force*, IP/10/1078, Brussels, 31 August 2010 <http://europa.eu/rapid/press-release_IP-10-1078_en.htm?locale=en> (explaining that "The agreement outlined the conditions for Australian wine producers to continue to use a number of quality wine terms, such as "*vintage*", "*cream*" and "*tawny*" to describe Australian wines exported to Europe and sold domestically.").

[284] See Chapter II, outlining when these laws were implemented into domestic legislation.

[285] As previously noted, an analysis of the difference between public and private international law is beyond the scope of this dissertation.

[286] See generally, Julie Dickson and Pavlos Eleftheriadis, *Philosophical Foundations of European Union Law* (Oxford University Press, 2012) 423.

[287] In addition to being described as monist, the relationship between the state and the EU as a separate authority (on a superficial level, at least) is inherently pluralistic. See Brian Z Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Sydney Law Review* 375, 387 (stating that this is "because it contains and interacts with a multitude of coexisting, competing and overlapping legal systems at many levels and in many contexts"). Deeper thought needs to be given to the question how we are to understand the EU system and linkages or interrelationships between it at member states and is beyond the scope of this dissertation. See further, Liam Baulm, *Comparative European Legal History: Legal Pluralism and the European Union* (Cambridge University Press, 2010); Ralf Michaels, Global Legal Pluralism (2009) 5 *Annual Review of Law & Social Science* 1, 23-5. Compare, e.g., John Griffiths, 'What is Legal Pluralism?' (1986) 1 *Journal of Legal Pluralism* 3, 4-5 (discussing that there is an obvious classification of the EU as representing a form of 'weak' pluralism, with the member states answerable to the central authority of EU – a quasi-state-centred approach. The 'strong'/ 'weak' binary has been held out as the foundation of pluralism since the 80's. As part of his conception, Griffiths introduced a strong binary, between 'strong' pluralism and 'weak'. The author mentions that 'strong' pluralism refers to the situation wherein not all law descends from the state, directly, or otherwise view state-sponsored bodies: ibid, 5. However, whilst this seems a tidy answer, by virtue of the fact that some member-states retain supremacy clauses, it is unsatisfactory. Likewise, any attempts to squeeze it within the 'strong' category is futile owing to the systematic nature of the EU. Put simply, the European Union is more pluralistic than weak pluralism, but coherent and unified enough to be a legal system, in a way that strong pluralism disallows).

legislative process.[288] In a monist legal system, on the other hand, international law is considered joined with and part of the internal legal order of a state.[289] Monist theory, therefore, prioritises the desirability of a formal international legal order to establish the rule of law among nations. Consider France, for example – a State that may appear (at face value) as monist.[290] As a Member State and given EU law affecting the way in which law regulating the wine industry in France is to be implemented, and what types of laws apply, it is more correct to describe France as quasi-Monist.

The obligation of member states to comply with EC law is set out in Article 10 (formerly Article 5) and Article 249 (formerly Article 189) of the EC Treaty.[291] Article 10 provides that

> "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the Institutions of the Community. They shall facilitate the achievement of the Community's tasks."

Article 249 defines the different forms of community legislation and describes the legal obligation they entail. In particular Article 249 defines Regulations as "binding in their entirety" and 'directly applicable' on all member states. Directives, however, are defined as legislation that is binding "as the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." Member states are thus given discretion to consider the most appropriate means of implementing directives into domestic law provided that the objectives of the directives are attained and provided that the directive is implemented into domestic law within the required timescale.[292] In the words of Lord Hoffman

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[288] See Joseph Gabriel Starke, 'Monism and Dualism in the Theory of International Law' (1936) 17 *British Yearbook of International Law* 66, 68 (noting that the tension between these competing views of international law reached its height in Europe between World War I and World War II, when legal scholars began to seriously question how and to what extent binding international legal obligations and formal international institutions could minimize the threat of war).

[289] See Starke, ibid, 68 (providing that Unlike dualism that leaves it to nations to either integrate or isolate international law from their domestic laws); William Slomanson, *Fundamental Perspectives on International Law* (Cengage Learning, 2010) 17 (describing monism as regarding international law as inherently woven into the legal fabric of every nation).

[290] See Fuerea Augustin, *Manual of European Union Law* (Publishing House, 2nd ed, 2006) 42 (observing that most European countries have provided in their constitutions, with international recognition as part of their internal system. Such a system of perception is found in Austria, Italy, France and Germany).

[291] European Union, *Treaty Establishing the European Community (Consolidated Version), Rome Treaty* 298 UNTS 3 (25 March 1957).

[292] Commission v. France Case C-197/96, Commission v. France [1997] E.C.R. I -1489. See also Case C-361/88, Commission v. Germany [1991] E.C.R. I-2567 (where the Court of Justice held that directives must be implemented with "unquestionable binding force and with the specificity, precision and clarity" (Case C-197/96, Commission v.

"Community law is indifferent to the internal arrangements of power within a member state"[293] Only laws, acts and measures that are 'necessitated' by virtue of a Member States' membership of the EC are constitutionally immune.[294]

The French Constitution recognises the supremacy of EU law[295] but this does not imply that EU law takes precedence over the French Constitution.[296] Although French law requires that treaties on trade,[297] peace,[298] and other international issues[299] or treaties that aim to modify the national legal

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France [1997] E.C.R. I -1489 at para. 15) that is necessary to satisfy the requirement of legal certainty, so that where a directive confers rights on individuals, the persons concerned must be enabled to ascertain the full extent of the rights set out in the relevant directive).

[293] R. v. Secretary of State for Health [2001] 1 W.L.R. 127 at 138 (H.L. per Lord Hoffman), cited by Fennelly J. in Maher v. Minister for Agriculture [2001] 2 I.R. 139 at 250 (H.C. & S.C.).

[294] See, Van Gend en Loos and Costa v. Enel, 'Direct Effect, Supremacy and the Nature of the Legal Order' in Craig, P. and de Búrca, G. (ed), *The Evolution of EU Law* (Oxford University Press, Oxford, 1999) 177, 197 (providing that supremacy firmly established in community law). See also, Philip Filipescu Ion and Augustin Fuerea, *Institutional European Community Law* (Actami Publishing House, 2000) (explaining that European Union law confers rights and obligations not only of Member States but also of the citizens and enterprises subject to certain rules directly. It is part of the legal system of Member States to respond, firstly, the correct application of these regulations); Octavian Manolache, *Treaty of Community law* (CH Beck Publishing House, 2006) (outlining that each Member State is responsible for implementation within national legal systems, law (transposition of the deadlines, compliance and correct application). Under the Treaties, the European Commission watches over the correct application of European law).

[295] The European Court of Justice (ECJ) has made three mutually exclusive assertions of supremacy: see Karen Alter, *Establishing the Supremacy of European Law* (Oxford University Press: Oxford, 2001); Nicholas Barber, 'Legal Pluralism and the European Union' (2006) 12(3) *European Law Journal* 306, 323 (outlining that "that the Court of Justice is entitled to definitively answer all questions of European law; that the Court of Justice is entitled to determine what constitutes an issue of European law; and that European law has supremacy over all conflicting rules of national law"). Whilst these claims do not lack clarity and certainty, the courts' in a number of member-states have, in a range of cases, reserved ultimate authority over EU laws: see, Michael Giudice, 'Global Legal Pluralism: What's law got to do with it?' (2014) 34(3) *Oxford Journal of Legal Studies* 589, 593-594; Raoul Georges Nicolo [1990] 1 CMLR 173 (Conseil d'Etat); R v Secretary of the State for Transport, ex p Factortame Ltd (No 2) [1991] 1 AC 603 (HL); Brunner v The European Union Treaty [1994] 1 CMLR 57 (This latter case represents a direct contradiction as to the mechanics of the legal order, with two legal bodies arguing competing claims of supremacy over the law).

[296] See Maher v. Minister for Agriculture [2001] 2 I.R. 139 at 227 (H.C. & S.C.) per Murray J., emphasis added (explaining that if there is a wide discretion on a state as to how it can fulfil an obligation necessitated by EC law, there is an obligation to adopt the method that is most consistent with the Constitution. He held:

> … where the State enacts a legislative measure in the exercise of a discretion conferred by Community law it is not ipso facto absolved from ensuring that such legislation is compatible with the Constitution).

See also, Griffith above fn 266 regarding legal pluralism. In this sense, legal pluralism could be described as have led to many changes in French and Italian wine law, as these countries were compelled to comply with the broader European wine regulatory framework. Thus, pluralism has transformed the national wine laws of these Old-World countries, while at the same time leaving room for national interpretations and adjustment.

[297] See French Constitution of 4 October 1958, Title VI 'On Treaties and International Agreements"' <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/constitution_anglais.pdf>.

[298] Ibid, Art. 53, stating:

> Peace Treaties, Trade agreements, treaties or agreements relating to international organization, those committing the finances of the State, those modifying provisions which are the preserve of statute law, those relating to the status of persons, and those involving the ceding, exchanging or acquiring of territory, may be ratified or approved only by an Act of Parliament.

system[300] should be ratified[301] so as not to restrict the exercise of French sovereignty,[302] this rule is simply a formality.[303] An opposing position has been taken by Italy, where courts traditionally take the view that international treaties cannot display legal effects before they are made operational on a national level.[304]

The US, by comparison, enjoys a mixed monist-dualist system, as international law applies directly in U.S. courts depending on whether a treaty is considered self-executing or not.[305] A self-executing treaty may be defined as a treaty that may be enforced in the courts without prior legislation by Congress, and a non-self-executing treaty, conversely, as a treaty that may not be enforced in the courts without prior legislative "implementation".[306] As opposed to Australia, where

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They shall not take effect until such ratification or approval has been secured.
No ceding, exchanging or acquiring of territory shall be valid without the consent of the population concerned.

[299] Ibid, Art. VI (On Treaties and International Agreements).

[300] Ibid, Art. 53.

[301] Art. 53-1.

[302] Ibid. Art. 88-2, 88-2, 88-7. See also Art. 55.

[303] See Constitution of the Italian Republic <https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf> Art. 10, (providing that "…The legal status of foreigners is regulated by law in conformity with international provisions and treaties…); Art. 72, (outlining the legislative process of ratifying treaties); Art. 80 (stating that "Parliament shall authorise by law the ratification of such international treaties as have a political nature, require arbitration or a legal settlement, entail change of borders, spending or new legislation"). See also Art. 87 (The President shall… – accredit and receive diplomatic representatives, and ratify international treaties which have, where required, been authorised by Parliament."); Art. 120 (stating: "The Government can act for bodies of the regions, metropolitan cities, provinces and municipalities if the latter fail to comply with international rules and treaties or EU legislation, or in the case of grave danger for public safety and security, or whenever such action is necessary to preserve legal or economic unity and in particular to guarantee the basic level of benefits relating to civil and social entitlements, regardless of the geographic borders of local authorities."). See further, Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2013) 163. Note that this observation is directed not to the contents or substance of each regulation, but rather on the form or structure of France's legal system and overarching framework to identify that it is a monist system.

[304] See, ibid. See also, Paul Craig and Gráinne De Búrca, *The Evolution of EU Law* (Oxford University Press, 2011) 325.

[305] Curtis A. Bradley, 'Bread, 'Our Dualist Constitution, and the Internationalist Conception' (1999) 51 *Stanford Law Review* 529, 531-532. See also, Jordan J. Paust, 'Self-Executing Treaties' (1988) 82 *American Journal of International Law* 760, 763; Yiji Iwasaw, 'The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis' (1986) 26 *Villanova Journal of International Law* 627, 635 (providing that the precise distinction between treaties that are self-executing and those that are not, is a matter of some controversy). See also, Carols Manual Vazquez, "Treaty-Based Rights and Remedies of Individual" (1992) 92 *Columbia Law Review* 1082, 1117-23 (providing that the precise distinction between treaties that are self-executing and those that are not, is a matter of some confusion).

[306] See, e.g., Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 373 (7th Cir. 1985); Tel-Oren v. L1byan Arab Republic, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork,J., concurring), cert. denied, 470 U.S. 1003 (1985); Vorhees v. Fischer & Krecke, 697 F.2d 574, 575 (4th Cir. 1983); British Caledonian Ainvays v. Bond, 665 F.2d 1153, 1160 (D.C. Cir. 1981); Posta~ 589 F.2d at 875; Diggs v. Richardson, 555 F.2d 848,850-51 (D.C. Cir. 1976); Bartram v. Robertson, 15 F. 212, 213 (C.C.S.D.N.Y. 1883), affd, 122 U.S. 116 (1887); Noriega, 808 F.2d at 798;

there is an absence of any Supremacy Clause in the Commonwealth Constitution, The Supremacy Clause, U.S. Constitution Art. VI, cl. 2, provides as follows:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; **and all Treaties made**, or which shall be made, under the Authority of the United States, **shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby**, any Thing in the Constitution or Law of any State to the Contrary notwithstanding."

None of the treaties concluded with the US, however, are regarded as "self-executing". Therefore, in the context of this dissertation – and for the purpose of an optimum regulatory framework to regulate the wine industry – the US may be described as dualist.

Lastly, Australia's legal framework is considered dualist.[307] If a treaty contemplates that individuals will be treated in certain ways or their rights and liabilities governed by particular rules, the treaty must be "implemented" by Parliament and the required norms incorporated into domestic law by statute.[308] Thereafter, the statute, but not the treaty itself, will be given effect by domestic law-applying officials. In other words, all treaties in Australia are "non-self-executing."[309]

It is observed that monism and dualism mainly relate to constitutional order. In the context of the present dissertation, however, the importance of distinguishing whether the Old-World and New World countries may be described as monist or dualist is because it assists in articulating the parameter of a regulatory framework. Propositions made in this dissertation are skewed towards implementation in New World countries, and so a dualist regulatory framework is appropriate. As outlined above, there is nothing in [Member] State, or EC law that prohibits the binding nature of

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Thomas Buergenthal, 'Self-Executing and Non-Self-Executing Treaties in National and International Law' (1992 IV) 235 *Recueil Des Covrs* 303, 317. See generally, Carlos Manuel Vazquez, 'The Self-Executing Character of the Judge Protocol's Nonrefoulement Obligation' (1993) 7 *Georgetown Immigration Law Journal* 39, 44-49 (expressing that a court may legitimately conclude that legislative action is necessary to authorize it to enforce a treaty, notwithstanding the Supremacy Clause).

[307] Australia would appear to incorporate a system of 'weak pluralism': see Griffith, above fn 266, since one form of law system (e.g. the common law system of Australia) is superior to, or has greater recognition in society than, the other law system (e.g. Indigenous customary law).

[308] See *Australian Constitution*.

[309] The British rule ·was described in some detail by Justice Iredell in Ware v. Hylton, 3 U.S. (3 Dall.) 256, 274-75, *rev'd on other grounds*, 3 U.S. (3 Dall.) 199 (1796). (Justice Iredell's decision on Circuit was reversed because a majority of the Court disagreed with Iredell's narrow construction of the treaty. The other Justices did not take issue with Iredell's discussion of the history or purpose of the Supremacy Clause. Justice Story cited Iredell's discussion of this history with approval in: 3 Joseph Story, *Commentaries on the Constitution of the United States* 696 (1833).

such a regulatory framework to regulate the wine industry, should it be considered in Old-World countries – France and Italy. Other differences between the legal systems within these respective countries are detailed below.

2.3 Individualism of Legal Regimes

Complementing categorizing the types of legal systems, and describing the basic normative mechanics, the present section explores some normative themes that can be utilised to set the parameters of a legal regulatory framework [within a legal system] to regulate the wine industry. Doing so requires relaying some key themes of a legal system generally, and therein to explain the relationship between wine law (and legal regimes or laws within those legal regimes that can be best described as a wine law) within a legal regulatory framework that forms part of a legal system.

2.3.1 Comparative Legal Systems

The term "legal system" has already been highlighted through clarifying that the legal systems discussed are established, and that an analysis of the system's validity is not necessary.[310] But, accepting that each legal system does have its own individual elements, whether that be on the basis of an overarching constitution, and/or other individualist elements,[311] is insufficient alone to understand how a legal regulatory framework functions, the driving forces behind the operative mechanics of such a framework.[312]

From a theoretical starting point, it is accepted that "a legal system exists if, and only if, it reaches a certain minimum degree of efficacy"[313] – the efficacy of the system being a function of the efficacy of its laws which is determined by the obedience to them, reinforced by the application of

[310] See Leighann Lindquist, 'Champagne or Champagne? An Examination of US Failure to Comply with the Geographical Provision of the TRIPS Agreement' (1999) 27 *Georgia Journal of International and Comparative Law* 309, 313 ('In the 1800s, the United States experienced a huge influx of immigrants from Europe … Many of these immigrants brought their wine-making skills and vine cuttings with them')
[311] See section 2.1.1, above.
[312] This observation may be seen as an extension of Legal Transplantation Theory, and its application. See, section 2.4.1 below.
[313] Joseph Raz, *The Concept of a Legal System: An Introduction to the Theory of Legal Systems* (Oxford University Press, 1973) 140.

sanctions.[314] Also, it is accepted that a normative system is a legal system only if it has 'a certain minimum degree of complexity',[315] that is, every legal system should at least possess a court structure of some kind and lay down sanctions. These are normative analyses and can be construed as not only true of a legal system, but a legal regulatory framework that regulates the wine industry. Interpreting this from a comparative context, a legal framework within a legal system means the complex of legal institutions, actors and processes in the context of a legal culture, norms and the secondary legal rules.[316] The relationship between legal frameworks is tied to the observation that a legal system:

> "…has a vocabulary used to express concepts, its rules are arranged into categories, it has techniques for expressing rules and interpreting them, it is linked to a view of the social order itself which determines the way in which the law is applied and shapes the very function of law in that society."[317]

The nature of a legal system (including distinguishing legal systems from other types of social phenomena)[318] paves way for discussion of the driving forces behind the techniques for

[314] This dissertation is not a criminal law-focussed discussion by any means: see section 2.1.1, above. The scope of 'sanctions' is therefore limited to civil consequences in the event of a breach of trade mark (in the case of IP), application of tariffs and direct taxation (in the case of domestic taxation regimes), and remedies in the event of breaches of consumer protection law. Note that Hans Kelsen's normative analysis, elaborated by Joseph Raz, depends on the criterion of efficiency which means obedience to the laws and application of sanctions as reinforcement for them: see ibid.

[315] Raz, above fn 292, 141 (where Raz observes that a 'normative system is a legal system only if it has a certain minimum degree of efficacy: ibid at 93. This refers to the efficacy of the system being a function of the efficacy of its laws which is determined by the obedience to them, reinforced by the application of sanctions. This normative approach to a legal system which indicates a wider context – as it can be utilized by comparative lawyers, more generally – requires a minimum degree of complexity for the existence of a legal system which demands some kind of court structure and sanctions). See also, HLA Hart, 'Concept of a Legal System: The Primacy of Sanctions' (1975) 84(3) *Yale Law Journal* 584, 585.

[316] See John Merryman, *The Civil* Law *Tradition: An Introduction to the* Legal *Systems of Europe* (Stanford University Press, 3rd ed, 2007) 85-6, 101 (Merryman's definition stresses the legal institutions, actors and processes in the context of a particular legal culture, which is more appropriate in the present context).

[317] Rene David and John E.C. Brierley, *Major Legal Systems in the World Today* (London Stevens, 3rd ed., 1985) 193.

[318] See Hart, *The Concept of Law*, above fn 294, 45. See also Hart, above fn 222. In the years following the publication of The Concept of Law, a number of articles in philosophical and legal journals have sought to clarify Hart's conception of the distinctive structure of municipal law (here, domestic law). Generally speaking, Hart's commentators have maintained that the core of his concept of a legal system is to be located either in his analysis of rules and rule-governed behaviour: see Raz, above fn 292, 858; or in his rather extended discussion of the difference between legal and moral obligation: ibid. Since this is not a dissertation concerning criminal law, a detailed discussion of theorists' interpretation of legal sanctions is, however, beyond the scope of this dissertation. It is worth noting, nonetheless, that Hart's belief that law without sanctions is perfectly conceivable is not justified by his own concept of a legal system: see ibid, 586.

expressing rules and interpreting them.[319] In other words, the internal relations existing between laws in a legal regulatory framework within a legal system.[320]

2.3.2 Internal Relations between Laws in a Legal System

Identifying the driving forces behind the creation of laws [or rules] accepts that: (i) there is more than one norm in a legal framework;[321] and (ii) law is a complex creature created with reference to external factors including social and cultural; and (iii) law is therefore capable of evolving, then we can begin to identify operative mechanics between laws (here wine laws) that exist within a legal regulatory framework.

What then are the operative mechanics between laws within a legal system? Noted is that the kinds and patterns of internal relations existing between laws in a legal system depend ultimately on two factors: (1) the principles of individuation;[322] and/or (2) the richness, complexity, and variety of the *content* of the legal system. While this dissertation acknowledges the context of the former, its focus is on the latter. Rene David and John Brierley provide an extensive definition of a legal system requiring the existence of a specific vocabulary, rules arranged into categories and techniques for interpreting these rules. In this definition, the legal system is also linked to a view of the social order,[323] which determines the way in which law is applied.[324] In the same way, the opportunity to interpret rules arises only where these laws exist in the first place. The existence of such laws (e.g. laws that may be classified as wine laws) requires an understanding of the role that culture places as part of the content of the respective legal system.[325]

Although it is difficult to assess how far any legal system is linked to a specific social order, it can be said that in most societies laws are deeply imbedded in political and social cultures. It is

[319] This view extends David and Brierley's view, above fn 91, 193 (stating that a legal system 'has a vocabulary used to express concepts, its rules are arranged into categories, it has techniques for expressing rules and interpreting them, it is linked to a view of the social order itself which determines the way in which law is applied and shapes the very function of law in that society.'
[320] This is the focus of section 3.3.
[321] See section 3.1.2
[322] See, however, section 3.1.
[323] This turns attention to the "content" of a legal system (see below), in understanding how laws interact to form a particular regulatory framework.
[324] This alludes to Raz's distinction between internal and external legal culture: see above fn 292, 27-8. See also section 2.3.2.
[325] See section 4.4.1 (discussing the role of culture).

essential, therefore, for the purpose of explaining differences and similarities encountered in the legal systems under comparison, that the notion of a system as encompassing macro-units, combines legal frameworks with the societal, cultural, political and economic systems. Macro-units refer, in this regard, to the legal regimes that comprise a legal regulatory framework within the respective legal system. This begs the question: is a comparison between the four jurisdictions at hand, valid? The answer to this is, yes. At this point, it is noted that the issue of 'comparability' has been resolved by comparative lawyers with the argument that the comparison must extend to the same evolutionary stage of different legal systems under comparison.[326] For example, Harold Gutteridge understands from 'compare like with like', that 'concepts, rules or institutions under comparison must relate to the same stage of legal, political, and economic development'. That is to say, that at the macro-legal[327] also the legal systems under comparison should be at the same stage of development, whether economic,[328] social or legal.[329] France and Italy, while classified as countries in the Old-World, are developed countries in the same way as New World countries Australia and the United States.[330] At the same time, it is arguable that France and Italy have more developed wine laws. In the context of the present dissertation, wine law is not subject to evolution but can be subjectively optimised and that is what I am seeking to do.

2.3.3 Individuation vs Content: The Role of Culture

In understanding the operative mechanics of a legal framework, with the objective of a "wine law", and factors that play more pertinent roles than others, it is necessary to distinguish between individuation and content of a legal system – the latter being the focus in the present dissertation.[331]

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[326] See, e.g., Lawrence M. Friedman, *The Legal System: A Social Science Perspective* (Russell Sage Foundation, 1975); Franz Wieacker, 'Foundations of European Legal Culture' (1989) 38 *American Journal of Common Law* 1, 1 ff.; Csaba Varga (ed), *Comparative Legal Cultures* (1992); James L. Gibson and Gregory A. Caldeira, 'The Legal Cultures of Europe' (1996) *Law & Society Review* 30, 55 ff.; Reinhard Zimmermann, 'Roman Law and European Culture' (2007) *New Zealand Law Review* 341, 341 ff.

[327] Reference to 'macro-units' refer, in this regard, to the legal regimes that comprise a legal regulatory framework within the respective legal system.

[328] See section 6.1.2.

[329] See section 3.3.1.

[330] Discussion regarding the degree of development, legal or otherwise, is a secondary consideration requiring a preferred selection, and is beyond the scope of this dissertation. See, however, Walter Kamba, 'Comparative Law: A Theoretical Framework' (1976) 23 *International and Comparative Law Quarterly* 494, 507-8.

[331] See section 6.1.2 (discussing culture in the context of IP regimes. Specifically, the role of culture in defining the appropriate use of an IP regimes within a wine law regulatory framework).

The principles of individuation[332] are determined by legal theory, whereas the content of a system depends on contingent facts concerning that particular system. Culture, being one. From the perspective of 'general' jurisprudence, the 'individuation of laws' is about the theoretical problem of making sense of our commonsense belief that the law guides us in several more or less discrete ways, from prohibiting certain acts to registering a trade mark to levying taxes. Devising 'principles of individuation' (an intricate discussion of which is beyond the scope of this dissertation) – that is, the principles according to which one determines the scope of a single law – is a matter of legal philosophy, not the responsibility of the individual subject of the law.[333] What the individuation of laws makes clear is that branches of law like the law of property are situated in a network of legal rules forming a system.[334] Only acceptance of this definition is relevant in the present context.

Unlike the principles of individuation which make the existence of certain types of internal relations possible, the complexity of the system determines whether relations of these types actually exist in the system concerned. It is the elements *of* complexity, not a discussion of *how* complex they are, that is relevant in the present context. The following observation is made at this point: Legal frameworks are individual, legal regimes are individual but interact in a distinct way depending on certain factors and norms.

Clearly law (defined above) alone cannot create such understandings of acceptable behaviour, to (for example) influence individuals' choices of projects, promote or constrain

[332] It is not necessary for the purposes of this study to formulate the principles of individuation themselves. All that is needed is to lay down broad guidelines, in the form of general requirements by which the adequacy of every proposed set of individuating principles will be tested. These requirements are of two kinds: guiding and limiting. See Jacqueline Mariña, 'The Principle of Individuation' in Jacqueline Mariña (ed) Transformation of the Self in the thought of Schleiermacher (Oxford Scholarship Online, 2008) ch. 3 (explaining the guiding requirements set forth aims that the principles of individuation should attain; the limiting requirements specify pitfalls to be avoided. The limiting requirements determine the range of possible sets of individuating principles by excluding certain ill-conceived suggestions. The guiding requirements help us to choose the best of the sets of individuating principles that pass the test of the limiting requirements).

[333] See section 2.1.2 above, for a discussion of individualism. See also Eric A. MacGilvray, 'Experience as Experiment: Some Consequences of Pragmatism for Democratic Theory' (1999) 43 *American Journal of Political Science* 542, 545.

[334] See Kelsen above fn 242, 13. Notwithstanding the content of a system, if its laws are individuated according to Kelsen's principles the resulting pattern of internal relations (if any) will differ from the patterns of internal relations which will result from individuating the same system. On the other hand, if the system is impoverished in certain respects, this may affect the pattern of its internal relations. If, for example, none of its laws is backed by sanction then there will be no punitive relations between its laws. While sanctions are not discussed in detail in the present dissertation, a 'regulatory' framework implies that there is an element of sanctions present. That being rules are enforced or policed by entities within a formal structure. See above… The latter is not of concern in this dissertation, since jurisdictions involved are developed as opposed to Third World.

individual's ambitions, specify the limits or possible or desirable social change, and to measure the relative value of particular social institutions and social practices. This point is also relevant in articulating why a law or legal regime may be regarded as direct or indirect. It requires an acknowledgement of the role of culture in law as an aspect of the content of a legal system.[335] I acknowledge, in this regard, that the identity of legal systems depends on the identity of the social forms to which they belong, and therefore the importance of culture.[336] The criterion of identity of legal systems is therefore determined not only by descriptive analysis or constitutional considerations but by other considerations as well, considerations belonging to other social sciences. I explain this below.

Therefore, if the function of law is accepted to an institutionalised doctrine that is shaped by pre-existing patterns of power which, in legal doctrine's particular institutional settings, may formalise, systemise, divert, and influence but which in various ways it reflects, we have a good starting point.[337] And, if legal ideas[338] have the power to influence, they are themselves produced, in these institutional settings, in response to wider social pressures.[339] This implies that because of the interrelationship between culture and law, law is a cultural accomplishment of a particular people,[340] and the cultural characteristics of its people.[341] While it is not autonomous, it is coercive because of this. For example, health policy,[342] and quasi-political motivations including the need to raise revenue for a particular social need or to encourage a certain industry.[343] Law is an aspect of society,

[335] See section 7.4.2. C.f. Hart's description of law imposing a social duty: above fn 294, 299. See also The Allen Consulting Group: *Alcohol taxation reform: starting with the wine equalisation Tax. Foundation for alcohol research and education* (2011) (http://www.fare.org.au/); CD Parry et al, 'Alcohol consumption and non-communicable diseases: epidemiology and policy implications' (2011) 106 *Addiction* 1718, 1721; World Health Organisation, 'Global strategy to reduce the harmful use of alcohol' (2010) <http://www.who.int/substance_abuse/alcstratenglishfinal.pdf>.

[336] See Kelsen, above fn 242, 198.

[337] The Constitution of a jurisdiction may be seen as an example of this.

[338] Reference to "legal ideas" here refers to the effect of culture on law: see section 2.4.2.

[339] For a discussion of social influences (referred to interchangeably with pressures), see Chapters I and II. See also Roger Cotterell, *Law, Culture and Society – Legal Ideas in the Mirror of Social Theory* (2007); David Nelken, "Defining and Using the Concept of Legal Cultures", *in* Esin Örücü, David Nelken (eds.), *Comparative Law – A Handbook* (2007), 109 ff.

[340] See section 6.4.4.

[341] See section 6.4.5.

[342] See, e.g., Alan Watson, *Legal History and a Common Law for Europe: Mystery Imagination, Reality* (2001) 14-7.

[343] See Australian Government, *Consultation and Review: Wine Equalisation Tax Rebate*, Treasury Discussion Paper, (2015) <www.treasury.gov.au> (outlining that the wine equalisation tax was introduced in 2000 as part of the GST tax reforms, with the rebate introduced four years later. It was designed to support small regional wine makers by allowing them to claim up to $290,0000 of the tax they paid on wholesale wine).

not an autonomous force acting on it.[344] Thus, claims made about law's ideological power are not mainly about the extent or sources of power, but about its nature.

In the present context, what is the motivation *for* wine law – for law to regulate the wine industry?[345] The argument here is that if law's capabilities (i.e. its limits and potential) as an agency of regulation in contemporary society are to be understood it is important to recognise that these may lie as much is providing a structure of social understandings as in ordering a system of state coercion.[346] Regarding the latter, the claim is that law's point or function is to justify state coercion by creating a certain kind of community, namely one that is based on the political ideal of integrity. This is best understood as a claim about the concept of law in this dissertation. Associative political obligations are said to arise in fact only when the conditions of integrity are met. These are, roughly, that members of the community reciprocally accept that they have special responsibilities toward one another, and that they plausibly suppose that their community's practices manifest an equal concern toward all members (including those within a particular group).[347] It is acknowledged that legal doctrine is adaptable, malleable and subject to continuous internal conflicts and tensions products in

[344] See section 2.4.1 (discussion on norms).

[345] In answering this question, I do not delve into reveal the diversity of legal thinking and interpretation in its social contexts – recognizing, for example, the variety of lay and professional understandings of law, changes in these understandings, and variations in modes of interpretation and application of legal doctrine in different institutional settings. This would imply that this dissertation is one concerning legal interpretation. This dissertation is concerned with objectively analysing legal institutional frameworks and systems. In this regard, this dissertation is not a sociology of legal doctrine. Nor does this dissertation explore legal ideology (which is not to be equated with legal doctrine), and which is prevalent in Marxist legal theory. See generally, Karl Marx, *Wage Labour and Capital* (Neue Rheinische Zeitung, 1849). A sociological study of law should contribute to legal theory by helping to show the nature of legal thought as a social phenomenon, treating law as institutionalized doctrine. It should help, therefore, to reveal the diversity of legal thinking and interpretation in its social contexts – recognizing, for example, the variety of lay and progressional understandings of law changes in these understandings, and variations in modes of interpretation and application of legal doctrine in different institutional settings. But, this is beyond the scope of this dissertation. A sociology of legal doctrine will recognise that this doctrine is typically presented, by those whose professional task is to interpret and apply it, in ways that emphasize and enhance its moral and intellectual consistency and continuity: see generally Max Weber, *The Theory of Social and Economic Organization* (Simon & Schuster Inc., 2009).

[346] This refers to Dworkin's own substantive theory of law: see Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986) 197. Compare, e.g., Stephen R. Perry, 'Holmes versus Hart: The Bad Man in Legal Theory' in SJ Burton (ed) *The Legacy of Ouver Wendell Holmes: The Path of the Law and its Influence* (Cambridge University Press, 2016).

[347] Dworkin, ibid, 197-202 (explaining that the theory of law as integrity is meant to address what Dworkin calls "the puzzle of legitimacy": ibid. at 190-95. It is possible to imagine "external" accounts of law's legitimacy, which could well be associated with the kind of external philosophical theory that was discussed in the preceding section). These would argue for the moral legitimacy of state coercion without supposing that those subject to coercion have an obligation to comply: see, e.g., Robert Ladenson, *In Defence of a Hobbesian Conception of Law* (1980) 9 *Philosophy and Public Affairs* 134, 136.

the political, cultural and social confrontations that lawyers think of as processes of legal interpretation.[348]

2.4 Legal Norms

As discussed, the minimum content and the minimum complexity of all legal systems, together with the principles of individuation, determine the necessary internal relations existing in every legal system that is the internal structure which is necessarily common to all legal systems.

2.4.1 Norms and Unity

Following from a discussion about norms above, it could be further stated that norms do not help to establish the unity and identity of legal systems, nor do they help in arranging the norms of legal systems.[349] It logically follows that there is a difference in normativity between legal systems and orders,[350] which can be explained by the fact that legal systems have a built-in possibility of dynamic justification of most of their norms. The system is said to be the source of validity of legal norms, but in that role, they do not justify these norms.[351] Norms, as Chapters V and VII highlight, may be specific to and in a particular regime. In the context of IP, for example, norms of the trade mark regime are depicted as the fundamental goal of that regime – i.e. to protect private rights.[352] In this dissertation, laws operate to directly impose duties on the law subjects to perform "the" law acts, and therein acknowledge the norm acts of legal norms. It is possible to extend this analysis by

[348] See Weber, above fn 117. See also Roger Cotterrell, *Law's Community: Legal Theory in Sociology* (Oxford Scholarship Online, 1997) 13-16. See also 6.4.4.

[349] For a discussion about modern legal theory, see: Mark Galanter, 'The Modernization of Law' in M. Weiner (ed) *Modernization: The Dynamics of Growth* (Basic Books, 1966) 153 (providing that the nature of modern law can be seen most clearly when contrasted with the processes of social ordering in traditional societies. There, patterns of conduct are defined and maintained by primary social groups, such as the village, lineage, or tribe. As a result, normative prescription varies with geographic place and social situation: There is a separate "law" for each village or tribe, and the "law" that binds the lord is not the law that binds the serf or burgher. Modern law, on the other hand, consists of general rules applied by specialized agencies universally and uniformly through all regions and to all social strata. Modern law is also relatively autonomous from other sources of normative order. Thus, one unitary and superior social entity-the modern legal system-replaces the village or tribe in social control). See also section 2.4.2, below (discussing legal transplantation).

[350] See, e.g., Eugene Hagen, *The Economics of Development* (Cambridge University Press, 1968) 480-84; Walter Lewis, The Theory of Economic Growth (George Allen & Unwin Ltd, 1955) 408-10 (outlining that even development economists generally concede that development re- quires some legal framework, which usually means a minimal provision of law *and* order.). See also, Galanter ibid.

[351] See discussion on modern law, below.

[352] See Chapter IV.

forming the opinion that, by being a kind of basic norms, the legal principles represent the general consensus on basic society understandings. They are a kind of default rules of behaviour that cannot be changed by a just ad hoc decision of any state body, but sole through a generally taken decision that would not be against the reason. From this perspective, the legal principles are rules of human behaviour that used to be considered as just before the law started being written. Kelsen's concept of a norm is adopted in this dissertation, in the sense that if the norm is a legal norm, then the behaviour is judged to be either legal or illegal, lawful or unlawful.[353]

As identified above, norms are backed by sanctions, which exist as laws within legal regimes. For example, the trade mark regime may be punitive in circumstances where an entity uses another's registered trade mark.[354] Such sanctions are relatively similar from jurisdiction to jurisdiction. GIs, on the other hand, have varying degrees of sanctions which can be attributed to the operation of the regime itself within an existing regulatory framework. In France, for example, the AOC regime is strict – particularly when it comes to entitlement to use a GI. Virginia, on the other hand, has less defined sanctions – which may be attributed to the fact there is no GI formal regulatory regime in place. Although, there is a looser AVA system.[355] In Victoria, while there are GI regions, these were already defined by pre-existing criteria that excluded *terroir*. In my opinion, justifying whether a law should be regarded as a "wine law" or law capable of regulating the wine industry, a standard of valuation must exist, and that standard must be substantiated, i.e. there must be some standard reason for some people to apply the standard. This can be addressed by identifying exactly what the goal of wine law is? I acknowledge that there are laws that may be considered either direct or indirect within a wine law regulatory framework,[356] but the extent to which those laws operate within what can be described as an optimum regulatory framework requires: (i) understanding the legal framework of that jurisdiction (discussed above); (ii) the goals of a particular regime (i.e. in this dissertation, IP and

[353] Kelsen above fn 242, (Kelsen refers to 'the immediate range of a norm'. The phrase 'the immediate range of a norm (or a law) ion that, by being a kind of basic norms, the legal principles represent the general consensus on basic society understandings. They are a kind of default rules of behaviour that cannot be changed by a just ad hoc decision of any state body, but sole through a generally taken decision that would not be against the reason. From this perspective, the legal principles are rules of human behaviour that used to be considered as just before the law started being written.' can be defined as follows: An individual act will be said to be within the immediate range of a norm if, and only if, it is done by a norm-subject in circumstances which are an instance of the performance conditions of the norm, and if it is an instance of the generic act which is the norm-act or an instance of the omission of that norm-act. A norm serves as a direct standard of evaluation of acts within its immediate range only. An individual act belonging to the immediate range of a norm has a positive value (i.e. is commendable, good, legal, etc.) if it is an instance of the duty-act, otherwise it has a negative value.)

[354] See Chapter VII (economic analysis of IP).

[355] See section 4.2.1.

[356] See section 3.1.1 (indirect and direct wine laws).

taxation regimes are discussed); (iii) whether the operation of laws of a particular regime achieve the goals of that regime, and in the context of the factors/dynamic of norms of that jurisdiction.

The following section takes the approach that norms make possible the normative interpretation or evaluation of behaviour. For example, a consumer's attitude towards a brand reflects the role of social order and culture to and with a legal system.[357] Such recognition is important in clarifying the appropriateness of the inclusion of certain legal regimes or laws that may be validly classified as wine laws within an optimal framework regulating the wine industry. At any rate, it is clear that guides to behaviour exist only if accompanied by a standard reason for following them. The standard reason for following them is specific to a particular regime. This is clearly recognised by Kelsen who stipulates that guides of behaviour are substantiated by some standard reason (not always sufficient and not always heeded) for preferring the prescribed behaviour to other alternatives. That much is presupposed by Kelsen when he says that types of social order 'are characterised by the specific motivation resorted to by the social order to induce individuals to behave as desired'.

2.4.2 Cultural Norms and Legal Norms – Impact on Legal Transplantation

The development of scholarship recognises law as a cultural accomplishment.[358] In the 19th century the idea of law as the cultural accomplishment of a particular people (as well as the attempt to determine the 'spirit' of particular law) became popular.[359] At that time, the Old-World was the recognised producers of wine, and so there was no distinction between the Old-World and New World. In the 20th century, Max Weber established a comparative cultural sociology of law and introduced with it the idea of rationality as culture.[360] Weber saw considerable cultural differences within this western law, especially between civil law and common law jurisdictions,[361] a distinction important to clarify the application of legal transplantation theory.

[357] See, e.g. Joseph Raz, 'Two Views of the Nature of the Law: A Partial Comparison in Hart's Postscript; Jules Coleman and Ori Simchen, 'Law' (2003) 9 *Legal Theory* 1, 3; Ronald Dworkin, 'The Model of Rules I' reprinted in *Taking Rights Seriously* (Harvard University Press, 1977). A discussion of Modern Law Theory is beyond the scope of this dissertation.
[358] Ibid.
[359] Ibid.
[360] Ibid.
[361] Ibid. A discussion of this point is beyond the scope of this dissertation.

For example, codification in civil law countries is sometimes explained as a reflection of the higher value civil law places on systematisation and completeness as opposed to common law.[362] At the same time, however, proof that civil law countries prefer systematisation and completeness is reflected by virtue of the fact that codification exists in civil law, but not in common law systems. The difference in regulatory frameworks, from a structural perspective, may pose as a barrier to direct transplantation of a legal framework from one jurisdiction to another.

Looking beyond a structural framework to the substance of laws, whether regulatory coherence, as Waye proposes,[363] is truly possible requires identifying the cultural norms within a legal framework. This is because culturally dependent legal norms are thought to be transferable only between legal systems with similar legal cultures.[364] This requires defining cultural norms within a legal context by drawing on Patrick Devlin observation that law should be used to enforce the norms of a society's culture. He states that:

> "[S]ociety means a community of ideas; without shared ideas on politics, morals, and ethics no society can exist.... If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically; it is held by the invisible bonds of common thought.... A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price."[365]

Newer studies have shown it more probable that the success of a legal transplant depends on the legal system of the receiving country and its culture.[366] If, as is frequently the case, the transplanted legal norm or institution interacts with the recipient legal culture in other ways than it does with the donor legal culture,[367] this does not signify a failed transplant. Legal culture is also

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[362] This is a statement in point, but a thorough discussion is beyond the scope of this dissertation.
[363] Waye, above fn 193, 212-3.
[364] See Chapter I, section 1.4.1.
[365] Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, 1965) 10 (Devlin imagines that law enforces "the invisible bonds of common thought" that hold us "together" as a society, and that this "fundamental agreement" in turn legitimates law. Law is thus figured as the arm of a coherent antecedent culture that is the ultimate source of society's identity and authority. This image has deep jurisprudential roots, stretching at least as far back as the work of Friedrich Karl von Savigny. See, e.g., Friedrich Karl Von Savigny, *Of the Vocation of our Age for Legislation and Jurisprudence* (Arno Press, 1975) (Savigny stressed the "organic connection of law with the being and character" of a people, so that law "is subject to the same movement and development as every other popular tendency." Ibid, 27).
[366] See, e.g., Otto Kahn-Freund 'On Uses and Misuses of Comparative Law' (1974) 37 *Modern Law Review* 1.
[367] Gunther Teubner speaks in this context of legal irritants instead of legal transplants

relevant for the creation of uniform law. Even if the law of different states is formally unified through a treaty, each state will likely adapt the unified law according to its respective legal culture. This can stand in the way of effective legal unification. For example, the TRIPS Agreement is interpreted differently in different legal systems. This makes sense within the context of the modern legal system.

The Devlin model of the relationship between law and culture may be viewed as pervasive, since the law commonly understands itself as enforcing "the common sense of the community, as well as the sense of decency, propriety and morality which most people entertain."[368] In other words, that the law is shaped by society's expectation which shapes and is shaped by political forces which, in turn, shapes the law. For instance, law is often utilised as a tool by governments within a modern administrative state to socially engineer, or pursue politically desirable purposes.[369] Laws setting a legal drinking age, or the imposition of tariffs to promote market efficiency follow the logic of instrumental rationality, which may be contrary or even hostile to the logic of cultural values.[370] Law is also sometimes drawn on to revise or reshape culture.[371] Some labelling laws mandate source identifiers (e.g. a geographical indication) of a wine, promoting information exchange to consumers. Health warnings similarly raise a culture of health awareness amongst consumers. On this account, the law does not merely reflect the norms of a pre-existing culture, but is instead itself a medium that both instantiates and establishes culture.[372] This is consistent with Friedrich Carl von Savigny reference to law as being a cultural achievement,[373] and scholars "constitutive vision of law" which "sees legal discourse, categories, and procedures as a framework or guidance through which individuals in society come to apprehend reality.[374] For example, Austin Sarat's observed that law shapes "society from the inside out by providing the principal categories in terms of which social life is made to seem largely natural, normal, cohesive and coherent."[375]

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[368] Pennsylvania v. Randall, 133 A.2d 276, 280 (Pa. Super. Ct. 1957). See also Robert Post, 'Law and Cultural Conflict' (2003) *Faculty Scholarship Series*, paper 180, 486.
[369] See Post ibid, 488.
[370] See ibid.
[371] See Post ibid, 489.
[372] See ibid.
[373] Ibid.
[374] Paul Schiff Berman, 'The Cultural Life of Capital Punishment: Surveying the Benefits of a Cultural Analysis of Law' (2002) 102 *Columbia Law Review* 1129, 1140-41 (2002). See also ibid, 489.
[375] See 1.2.2. See Austin, above fn 222, 134; ibid, 489. C.f. Patrick Devlin, *The Enforcement of Morals* (1965) 10. See further Post ibid, 189 (noting that "[i]f the Devlin model rests on an incomplete account of law, it also presupposes an incomplete account of culture". This is because the premise of the Devlin model is that "culture

It is recognised, in this regard, that "[l]egal systems derive authority from their service to the basic aims of society."[376] The basic aims of society in France, Italy, Victoria and Virginia can be categorised as falling within a republican legal system. A republican community locates rights-protecting institutions at the international level (for example, the WTO), while leaving culture-promoting activities such as the regulation of wine through vinicultural practices and wine production to be locally determined.[377] The basic attributes of republican legal systems include service to justice and the public good through popular sovereignty, the separation of powers, and the rule of law. Although, strictly speaking, only the initial commitment to the common good is essential. The latter can be seen in the presence of laws that regulate health and promote responsible drinking of wine. The legal system in which wine law framework operates, whether described (from a normative perspective) as monist or dualist, reflects a cultural perspective that may be described as republican.

Devlin's model, and Post's observations, also cast further light on the application of legal transplantation theory in an optimum regulatory framework for the wine industry. Notwithstanding that legal systems of jurisdictions in this dissertation are developed and that they incorporate the rule of law, transplantation of laws from one jurisdiction to another is subject to cultural limitations.[378] They should reflect the norms of a society's culture – which differs in the New World and Old-World jurisdictions. While there is a lot written about legal transplantation theory, there is little discussing that reason for shortfalls in legal transplantation may also be attributed to the norms of a society's culture. Since legal culture[379] represents that cultural background of law which creates the law and

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subsists in "shared ideas" that establish an enduring and discrete community identity. The model assumes that culture is stable, coherent, and singular").

[376] Post above fn 347, 486.

[377] Some scholars present a nexus between republican community and federation. The latter can be said to leave local culture and cultural development to the self-determination of self-governing republics or nations, while putting important individual rights under the protection of an over-arching union of republics, to prevent the tyranny of local majorities. See further Post above fn 347, 490.

[378] Post ibid, 487 (outlining that Patrick Devlin famously argued that the law should be used to enforce the norms of a society's culture).

[379] Legal culture is often viewed as that part of the culture which concerns itself with the law. However, law is relevant in nearly all areas of life, so it is difficult to draw a sharp division between legal culture and general culture: see Friedman, above fn 305, 28-30 (drawing a division between internal and external legal culture. He explains that internal legal culture describes the attitude towards law of legal actors such as judges and lawyers. Whereas external legal culture describes the attribute towards law of the general population. In my opinion, these presume a relatively homogenous and static concept of culture. Culture, therefore, is used with a view to a communication (frequently a nation-state) and provides this group with its identity, by establishing internal coherence and external difference, and well as relative consistency over time).

which is necessary to give meaning to law,[380] direct transplantation or even uniform legal regimes would be fraught with difficulty, given the role of different legal sources, the actual authority of different actors and institutions. For the same reason, legal culture cannot sensibly be separated from law.

2.4.3 Law, Culture and History

istory plays a role in shaping a legal system.[381] Meyler has referred to history and law as an "…old, established pair, whose passions have ebbed and flowed with new interests and renewed affairs."[382] While history alone is insufficient to justify the present regulatory frameworks in jurisdictions, it is an important factor in shaping what is known to be and capable of being a regulatory framework to regulate the wine industry.[383] In the context of wine law, Mendelson discusses the historical motivations for regulating wine in the U.S., and so a detailed account in the present dissertation is unnecessary.[384]

Legal culture, as discussed, represents that cultural background of law which creates the law and which is necessary to give meaning to law. But, inherent within legal culture is the history that it reflects, and therefore contributes towards shaping a regulatory framework.[385] For example, in highlighting that grape growing and wine production appeared in the U.S. around 1862, tracing back to the first European settlers who establishes the American colonies,[386] Mendelson implies that history provides an insight into a jurisdiction's culture.[387] History and culture may also influence

[380] Ibid.
[381] See section 1.3.2. See also sections 6.4.4 and 6.5.1
[382] Bernadette Meyler, 'Law, Literature, and History: The Love Triangle' (2015) 5 *UC Irvine Law Review* 365, 375. See also Stephen J Greenblatt, *Learning to Curse: Essays in Early Modern Culture* (1990) 1-4.
[383] See Mendelson, *Wine in America*, above fn 44, 42. The above is separate to the goals of regulating alcohol (generally) which, as Mendelson acknowledges, is: (i) to raise revenue through taxes; (ii) ensure an orderly market for alcoholic beverages; (iii) cultural reasons; (iv) promotion of economic development through stimulating the agricultural sector. See Mendelson, ibid, 11 (outlining that many states adopted "farm winery" laws granting special privileges to local wineries that made wine from grapes frown in the state, including the privilege of direct sales to in-state consumers). But see, Granholm v. Heald 544 U.S. 460 (2005) (case. The Court's mandate was to end discrimination and level the playing field between in-state and out-of-state wineries with respect to direct shipments).
[384] See ibid.
[385] See section 6.1.2.
[386] This was following much trial and error from the 1700s until 1860s. See Mendelson, *From Demon to Darling*, above fn 7, 3 (acknowledging that it was not until the 1820, following the introduction of American hybrids, that domestic wines began to be produced that did not require fortification or adulteration).
[387] See Mendelson, *Wine in America*, above fn 44, 387.

consumer preference of one wine over another.[388] Such an observation is pertinent in not only understanding the influences of legal culture, but because of the former, whether legal transplantation is ever possible.

As discussed in Chapter I, having dismissed absolute extremes of Watson and Legrand, one has to look for other theories explaining transplantation. These are some kind of mirror theories that vary according to the choice of factors influencing receptiveness of legal system towards transplants and the strength of the tie between the factor and the law in a given legal system. A little bit further from the denial of transplantation is the work of Kahn-Freund as a classical example of application of mirror theories to the issue of transplant. Kahn-Freund was historically the first opponent of Watson.[389] In his early work Kahn-Freund draw heavily on Montesque ideas, who in mid-1700-ies claimed that the laws of one country cannot serve the people of other countries since the environments are too different. As summarised by Kahn-Freund Montesque's environmental factors included geographical factors (climate, fertility of soil, the size and geographical position of the country), economic and sociological factors (the wealth of people, density of population, their occupations), cultural (religion and moral standards) and political factors (principles of government, degree of constitutional freedoms).[390]

Although Kahn-Freund does not deny the validity of Montesque's factors, he insists that within the last two centuries geographical, social, economic and cultural factors lost while political factors gained in importance. Based on that proposition, he suggests that three particular aspects should be examined with regards to legal transplants: the macro-political structure, the distribution of powers, and the role played by organised interest groups.[391] This is the position similarly adopted in the present dissertation and, as noted by Friedman, national culture can be perceived as not necessarily an obstacle to transplants but as a source of effectiveness of law.[392]

For example, the constitution also political institutions are seen as exhibiting a strong presence and influence on the legal environment in the US. So, an optimal framework to regulate the

[388] See section 6.4.4.
[389] For Watson's response to Kahn- Freund, see A Watson 'Legal Transplants and Law Reform' (1976) 92 *Law Quarterly Review* 79.
[390] Above fn 141, 7.
[391] Ibid, 11-13
[392] See Friedman, above fn 305, 39-44. See also section 6.4.4.

wine industry would inevitably require constitutional consideration, also a political element. Regarding the latter, the US and its composite States would be hard-pressed – particularly under the present Trump administration – to transplant any other legal system into its own. The justification for this, it is observed, dates back to the American Revolution (which was a dispute about government), also the Declaration of Independence of 4 July 1776, where Americans sought new models of government to replace the British institutions. George Washington, at the time of giving his inaugural speech as the first President of the US under the new federal constitution, asserted that "the destiny of the republican model of government" was "deeply, perhaps… finally staked on the experiment entrusted to the hands of the American people".[393]

The political history of the Roman republic is probably one of the most important of the many classical influences on the American founding fathers because the American Revolution was political and could neither have taken place nor succeeded as it did without classical learning to guide it. With the Revolution's triumph in the US Constitution, the new American republic supplanted its ancient models.

It is therefore incorrect to assert that law is a singular phenomenon, since such an assumption dismisses that "law enforces an antecedent culture, or constitutes culture, or displaces culture" because it functions as an instrument of rigid organization.[394] Law is in fact capable and does perform these different relationships to culture and, because cultural norms unfold in time, law can enforce cultural norms only by intervening into an ongoing process of historical development.[395] In the context of a wine regulatory framework, a legal regime (as will be discussed) is not always the preferable option – direct legal intervention that could hamper wine oenological practices in the New World,[396] could potentially retard positive evolutionary changes for the industry.[397] Similarly, market

[393] April 30, 1789.
[394] See Post, above fn 347, 489; Theodore Adorno and Max Horkheimer, *Dialectic of Enlightenment* (John Cumming trans., 1972) 87.
[395] See, e.g., Naomi Mezey, 'Law as Culture' (2001) 13 *Yale Law Journal and Human Rights* 35, 46 (stating that "the relationship between culture and law" is "always dynamic, interactive, and dialectical-law is both a producer of culture and an object of culture.").
[396] See section 1.3.5.
[397] See section 1.4.3.

forces[398] – which may be linked to the political dimension[399] – inevitably induce changes in local production methods and consumption preferences.[400]

From a practical perspective, vinicultural practices and wine production practices have evolved over time – most from the Old-World, particularly France. The importance of culture in articulating a regulatory framework is that it should recognise past history and thus support distinguishing the Old-World from the New World. Baron de Montesquieu postulated in his "Esprit des Lois" (1748) the necessity for positive law to be adapted to the geographical features of the country and the cultural characteristics of its people. In so doing, a legal framework should not dampen the evolutionary progress of New World jurisdictions, as they carve out their own culture.

2.4.4 Health

Society places emphasis on health and related interests.[401] The particular approach to alcohol control, however, depends on the country's religious and sociocultural context and on how it balances competing ideological, social, health, and commercial agendas.[402] In this section, health provides an illustrative vehicle of the nexus between social, political and commercial objectives in the legal regimes classified as wine laws.[403] In acknowledging the present of these factors in driving the presence of such laws, the scope of the present regulatory framework that – and potential for a regulatory framework to – regulate/s the wine industry is highlighted. This section focusses its discussion on the regulatory context from the perspective of the wine industry only. What then is the

[398] See section 6.4.7.
[399] See section 6.4.1.
[400] See section 6.5.1.
[401] See section 1.2.3. See also, World Health Organization, *Strategies to Reduce the Harmful Use of Alcohol*, Report of the Secretariat A61/ 13, 1 (20 March 2008) (identifying the harmful use of alcohol as "one of the main risk factors for poor health globally."). See also, Marc Moore and Dean Gerstein (eds.) *Alcohol and Public Policy: Beyond the Shadow of Prohibition* (National Academy Pres, 1981), and Philip Cook, *Paying the Tab: The Costs and Benefits of Alcohol Control* (Princeton University Press, 2007). See also Mendelson, *Wine in America*, above fn 44, 442.
[402] See Mendelson, *Wine in America*, above fn 44, 350 and 360 (mentioning that given the array of problems caused by heavy drinking, various policies have been adopted over time to keep the health and social harms to a minimum. This is generally known as "harm reduction," "harm minimization," or the "public health perspective." These alcohol policy measures generally fall into the following 6 categories: access and availability; taxation and pricing; altering the drinking context; drinking and driving; advertising and marketing; and prevention, specifically including education and treatment).
[403] See section 1.1.4 (noting that the present dissertation explores this the context of regulation of the wine industry. Not wine as a business, which is broader).

motivation for countries to recognise health risks regarding the consumption of alcohol? Is this justified?[404] And, how do they go about regulating health risks?

In order to prevent the harmful use of alcohol and control its adverse effects on drinkers and society at large, most countries regulate the production, sale, and consumption of alcoholic beverages in some manner.[405] One means of restricting access to alcoholic beverages is through the minimum legal drinking age. Another is through labelling requirements (i.e. to disclose the medical dis-benefits of wine, for instance, concerning pregnant or nursing women).[406] Also, through the imposition of excise taxes, or impose a levy on products sold from an entity (whether that entity be a retailer, wholesaler or producer) to a consumer.

Regarding the former, all 50 states in the US have established 21 as the minimum drinking age.[407] Although, they vary in terms of the exceptions granted for home consumption or for religious, medical, or educational purposes.[408] By limiting the pool of buyers, a minimum drinking age should reduce demand, and accordingly reduce prices.[409]

This, in turn, decreases demand,[410] and promotes temperance.[411] Although, price controls are used by some states (including Virginia) for purposes other than the promotion of temperance.[412] In the US, for example, some state "price affirmation" laws require manufacturers to affirm that they will sell their products to wholesalers at prices that are no higher than the lowest prices that they charge to wholesalers anywhere else in the US during a prescribed future period (i.e. typically one month). These so-called prospective price affirmation laws ensure that consumers in the state will receive the lowest available alcoholic beverage prices, but these laws also interfere with the

[404] C.f. section 1.3.1.
[405] See Mendelson, *Wine in America*, above fn 44, 350.
[406] See section 5.6.3.
[407] Ibid, 362 (noting that, in 1982, President Ronald Reagan appointed the Commission on Drunk Driving that recommended, among other things, the establishment of 21 as the national minimum drinking age).
[408] Ibid. The logic was that if 18-year-olds can vote and serve in the military, they are old enough to drink alcoholic beverages.
[409] See section 5.2.2.
[410] See section 5.2.2.
[411] See California Retail Liquor Dealers Association v. Midcal Aluminum 445 U.S. 97 (1980) (where the US Supreme Court invalidated this form of resale price maintenance as a per se violation of the federal Sherman Antitrust Act). See also Mendelson, *Wine in America*, above fn 44, 367.
[412] See section 5.2.1.

manufacturers' ability to change their prices in other states during the time that the price affirmation is in effect.[413]

Following repeal of national prohibition in the US in 1933, some states initially decided to continue their own prohibition against the production, distribution, and sale of alcoholic beverages within their borders. Other states decided to leave the issue to local jurisdictions, including counties and cities, a practice called local option. The US Supreme Court in 1986 invalidated New York's prospective price affirmation law in Brown-Forman Distillers v. N.Y. Liquor Authority, stating: "While New York may regulate the sale of liquor within its borders, and may seek low prices for its residents, it may not 'project its legislation into [other States] by regulating the price to be paid' for liquor in those States." Because of this extra-territorial effect, the Supreme Court found New York's price affirmation law to be unconstitutional under the Commerce Clause.[414]

The World Health Organisation (WHO) has also asserted that:

> "[p] rice is an important determinant of alcohol consumption and, in many contexts, of the extent of alcohol-related problems."[415]

Professor Philip Cook, in Paying the Tab: The Costs and Benefits of Alcohol Control, is more direct in saying that:

> "Quite simply, alcohol taxation and other measures that increase the price of ethanol are effective in promoting public health and safety. Higher prices are conducive to lower rates of underage drinking, traffic fatalities, and sexually transmitted disease. There is less direct evidence on the effects of higher prices on the prevalence of chronic excess drinking and related medical conditions, but the indirect evidence is compelling on that score as well."[416]

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[413] This presents as a potential trade barrier, but is not examined in detail in this dissertation.
[414] See Mendelson, *Wine in America*, above fn 44, 368.
[415] Ibid, 364.
[416] Philip Cook, *Paying the Tab: The Costs and Benefits of Alcohol Control* (2007) 156 (stating that whether price intervention is good public policy depends on how sensitive consumers are to price changes and whether the reduced consumption has a corresponding effect on adverse health and social consequences. Price sensitivity is known as the price elasticity of demand. It is measured as the percentage change in consumption resulting from a 1 percent change in price). See Mendelson, *Wine in America*, above fn 44, 364.

Typically, taxes are imposed for revenue generation, not for prevention.[417] Taxes also may not translate directly into higher prices because of the intervening complex market decisions of producers, wholesalers, and retailers. Finally, high taxes can have unintended negative consequences such as illicit production, adulteration, counterfeiting, and smuggling.[418]

2.4.5 Constitution and Framework Structure

Mendelson also alludes to the importance of the Constitution in American culture, and legal culture. The reason for the US adopting diverse approaches to the regulation of wine amongst US states[419] is due to the Twenty-First Amendment, which explicitly authorises the states to control the delivery and use of alcoholic beverages within their borders (i.e. intrastate commerce). Following the Repeal, each state developed its own alcoholic beverage regulatory scheme, while the national jurisdiction retained regulatory control over interstate commerce in alcoholic beverages and developed a separate regulatory regime.[420]

As a result, three levels of government — local,[421] state, and federal[422] — are intimately involved in regulating the wine business in the US. This concurrent authority is a hallmark of US wine law.[423] At the federal level, the IRC[424] and the FAA Act are the principal pillars of federal supervision and oversight of the wine industry.[425] The FAA Act established a system of controls designed to protect the wine consumer from fraud and deception and to foster fair marketing practices. The focal points of the FAA Act are the permit requirements for producers, wholesalers, and importers (but not retailers) of alcoholic beverages; the trade practice provisions that regulate unlawful economic practices in restraint of trade; and labelling, advertising, and marketing practices.

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[417] See sections 5.1.1, and 5.4.
[418] See Mendelson, *Wine in America*, above fn 44, 365.
[419] Ibid, 10. See also 21st Amendment of the US Constitution (outlining that each state adopts its own liquor laws and regulations and its own administrative machinery after the Repeal, leading to the adage that the US is not a single wine market but 50 separate markets).
[420] See Mendelson, *Wine in America*, above fn 44, 14 (outlining that only in the sphere of intrastate retail sales did the states have exclusive jurisdiction).
[421] See ibid, 14 (under the local option, local jurisdictions (counties, cities, even voting precincts) vote on whether, when, and where beer, wine, or spirits can be sold within their respective boundaries).
[422] See ibid, 34-6. See also section 5.4.3.
[423] See Mendelson, *From Demon to Darling*, above fn 7, 14.
[424] See section 5.4. (The IRC governs the taxation and production of wine. The internal revenue laws are designed primarily to protect and secure the government's tax revenue. The IRC regulations are designed to ensure that no alcoholic beverage subject to tax escapes taxation). See Mendelson, *Wine in America*, above fn 44, 20.
[425] See section 5.4.3.

Under each Act, the TTB is vested with the authority to promulgate additional rules in the form of regulations. The issuance of these regulations is controlled by the Administrative Procedures Act, which requires that rules be issued through a procedure called informal rulemaking, commonly referred to as Notice and Comment Rulemaking.[426]

It is accepted that law is the activity of subjecting human behaviour to the governance of rules. The rule of law, for example, is concerned with regulating the use of power.[427] Whereas society is a spontaneous order,[428] the state is a protective agent with the monopoly role of enforcing the rules of the game. Since the monopoly on coercion belongs to the government, it is imperative that this power not be misused since, under the rule of law, everyone is bound by rules, including the government. As explained by Hayek in his various works, the rule of law requires law to be: 1) general and abstract, 2) known and certain, and 3) equally applicable to all people.[429] The rule of law also necessitates independent judges unmotivated by political considerations and protection of a private domain of action and property. The following sections outline what this means, and the degree to which this is achieved.

2.4.6 Political Climate vs Political Economy

Finding any previous study that explores the role of political economy in the context of wine regulation was difficult.[430] Most of the studies examined in the literature review focused on alcohol policy and posited that public interest (i.e. from a health perspective) is the motivator behind wine

[426] See Mendelson, *Wine in America*, above fn 44, 21.
[427] Richard A. Posner, 'Hayek, Law, and Cognition' (2005) 1 *New York University Journal of Law and Liberty* 147, 148. See also Friedrich A. Hayek, 'Economics and Knowledge' (1937) 4 *Economica* 33, 36-7; Friedrich A. Hayek, 'The Use of Knowledge in Society' (1945) 35 *American Economic Review* 519, 520; Friedrich A. Hayek, 'Two Pages of Fiction: The Impossibility of Socialist Calculation' in Chiaki Nishiyama & Kurt R. Leube (eds) *The Essence of Hayek* (1984) 53; Sherwin Rosen, 'Austrian and Neoclassical Economics: Any Gains from Trade?' (1997) 11 *Journal of Economic Perspective* 139, 140-1; Steven Horwitz, 'From Smith to Menger to Hayek: Liberalism in the Spontaneous-Order Tradition' (2001) 6 *Independent Review* 81, 84-5; Louis Makowski & Joseph Ostroy, 'Perfect Competition and the Creativity of the Market' (2001) 39 *Journal of Economic Literature* 479, 487-89.
[428] Posner, ibid.
[429] See Posner, ibid, 88.
[430] See Stigler, above fn 50, 219, reprinted in D. Lamberton (ed) *The Economics of Information* (Penguin, 1970) (defining "Political economy" as a term used for studying production and trade, and their relations with law, custom, and government, as well as with the distribution of national income and wealth). See, however, section 6.4.4.

industry regulation.[431] But, the concept of "political economy" is broader in scope. Exploring the interactions between stakeholder interests in a supply chain model,[432] provides further insight into the impact of present legal regimes on demand, production and trade. Wolfson recognises the impact of social movement organizations on legislative actions.[433] Reikhof and Sykuta utilise Stigler's private theory of capture theory of regulation as it related to alcohol industry logistics and distribution. The essence of capture theory, as proposed by George Stigler, is that over time, regulatory agencies that are designed to regulate industries for the public interest become "captured" by the industries they are supposed to regulate.[434] Viewed another way, Stigler's capture theory recognises that regulatory frameworks within a legal system recognise interests (e.g. public health, and the effect of alcohol on public health). They found that private economic interests, through embodiment in legal regimes and laws, played a role in the ability of some states' wineries to legally ship wine direct to consumers.[435] In line with Stigler's capture theory of regulation, Reikhof and Sykuta conclude that regulators end up regulating industries in a way that benefits the regulated industry, rather than the general public.[436]

It is entirely plausible for the public interest theory of regulation to be the primary underlying theory where the motivation is stakeholder interests of the consumer. But, because the public interest theory predicts regulation to occur in markets that have failed or created externalities detrimental to social welfare, it is expected that the regulation of an industry whose products contribute to harmful externalities is motivated by public interest, and therefore bias against it.[437] For example, if concern for public interest and the negative externalities caused by alcohol consumption is the motivation behind alcohol regulation, then when testing for motivation, we should expect to find support for the public interest theory,[438] as well as theories on consumer protection shown above. North postulates the more complex the environment, the greater the need for formal rules, which increases the need

[431] This is sharp contrast to landmark studies such as that conducted by Stigler that argued that government regulation is generally a response to the private interests of groups that are able to wield important political power. See Stigler, above fn 50, 14-5.
[432] See section 1.2.1.
[433] Mark Wolfson, 'The Legislative Impact of Social Movement Organizations: The Anti-Drunken-Driving Movement and the 21-Year-Old Driving Age' (1995) 76 *Social Science Quarterly* 311-327 (1995); J Kubik, J. Milyo and J. Moran, *The Effects of Campaign Finance Laws on State Excise Taxes on Alcohol and Tobacco*, Working Paper, Dept. of Econ., Syracuse University (2005).
[434] See Stigler, above fn 50, 1-5.
[435] Gina Riekhof, and Michael Sykuta, 'Politics, Economics, and the Regulation of Direct Interstate Shipping in the Wine Industry' (2005) 87 *American Journal of Agricultural Economics* 439, 245-7.
[436] Ibid, 7.
[437] See sections 6.1.3 and 6.1.4.
[438] Ibid.

for third-party enforcements.[439]

One application of the concept of political economy is alluded to by North. He describes the institutional background of the US' alcohol industry, especially the wine industry, as a "heterogeneous patchwork of state regulations". Drawing on the model in Chapter I, the more complex the legal system, the greater the need to recognise different stakeholder interests, and the more complex the dynamics between stakeholders in a supply chain. Legislatures may view this as a need to fill the gaps through legislative intervention, which can lead to a complex environment for intra- and inter-state trade, also the potential to impact smaller and medium-sized firms in a jurisdiction.[440] This points to a related dimension between law and the economy.[441] All nations now aspire to increase their level of economic well-being through commercialisation. Identifying the types of market and command of a jurisdiction assists to analyse the economic role of law,[442] and the function of a regulatory framework.

Legal origins theory can provide preliminary insight into this inquiry, as it can be utilised to describe the reason for certain laws within a regime. According to the legal origins theory, the primary determinant of a country's financial development is its legal origin.[443] In other words, fundamental differences between legal systems create differences in economic law that consequently support different levels of financial development. The basic assumption of this theory is that common law, as opposed to French civil law, is associated with more orientation towards institutions of the market, which determines common law countries' economic success.[444] For example, strong legal protections for minority shareholders lead to dispersed shareholding markets associated with superior economic performance for an industry.[445] Civil law, in its turn, is associated with more substantial government ownership, more formalism in judicial procedures, and less judicial independence.[446] For

[439] See Douglass North, *Institutions, Institutional Change and Economic Performance: Political Economy of Institutions and Decisions* (Abebooks, 1990).
[440] See sections 1.1.4, and 6.5.1.
[441] Most analysis of law and development, from Weber to the core conception, stresses the contrast between traditional and industrial economies, but obscures the fact that the traditional economy is largely a thing of the past
[442] See section 6.5.1.
[443] Stephen M Bainbridge, *Research Handbook on Insider Trading* (Edward Elgar Publishing, 2013) 276.
[444] Greg N Gregoriou, Maher Kooli and Roman Kraeussl, *Venture Capital in Europe* (Butterworth-Heinemann, 2011) 34.
[445] Dan W Puchniak, Harald Baum and Michael Ewing-Chow, *The Derivative Action in Asia: A Comparative and Functional Approach* (Cambridge University Press, 2012) 366.
[446] John Linarelli, *Research Handbook on Global Justice and International Economic Law* (Edward Elgar Publishing, 2013) 322.

example, the World Bank's role in promoting economic reforms in developing countries through the adoption of the legal origins approach demonstrates that this theory has clear and practical policy impacts.[447] In addition, legal origins theory, because of a regime's origin, indicates that the transplantation of legal and regulatory frameworks might be a source of inefficiency, as rules suitable for one country or a group of countries might lead to massive delay in other countries copying them.[448]

2.5 Chapter Summary

This chapter's heavy emphasis on a normative analysis of wine law seeks to place existing legal theories in a focussed context. That being to assess what targets an optimum regulatory framework ideally meet, and the factors that comprise such a framework. This chapter brings into focus the relevance of legal theories in proposing an optimum wine law regulatory framework, and which are relevant to wine laws that form part of that framework.

Discussed was the purpose of regulation (or law)[449] within a [valid] legal system that encompasses an identifiable legal framework[450] as a means of designing and deploying the appropriate tools for implementing policies issued at the local, government, and supranational levels.[451] Reference to 'tools', in this regard, is to be distinguished from the motivations or objectives underlying why laws are and should be classified as wine laws. A structural analysis is first required by analysing legal theories in the context of constitutional order.[452] This facilitates explanation of

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[447] Michael Barry and Adrian Wilkinson, *Research Handbook of Comparative Employment Relations* (Edward Elgar Publishing, 2011) 76.

[448] Holger Spamann, *Contemporary Legal Transplants: Legal Families and the Diffusion of Corporate Law* (Mimeo, Harvard University, 2006).

[449] This refers to what rights and interests and present in that particular framework.

[450] This is to be distinguished from the 'practical' need of an optimum regulatory framework for wine law, discussed in Chapter I. The focus in the present chapter is normative to justify why a particular legal framework exists in the first place, its scope of operation, function, and objectives. This lays the foundation for whether there is need, acceptance and indeed scope for change to or within that legal framework. For this reason, this section refers to "the *importance* of an optimum regualtory framework for the wine industry".

[451] This falls strictly within the scope of administrative law. See Chad J. McGuire, *Environmental Law from the Policy Perspective* (CRC Press, 2014) 172. See also, M. Scott Norton, *Human Resources Administration for Educational Leaders* (Sage, 2008) 283. Also, regulation is defined here as public rather than private law. See Matthew D. Adler, 'Regulatory Theory' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Wiley-Blackwell, 2nd ed, 2010) 591. This dissertation does not discuss these two terms are not discussed in the context of international law, as it is irrelevant to the objectives of this dissertation.

[452] See, Mark Tushnet, *The New Constitutional Order* (Princeton University Press, 2010) 8 (defining Constitutional Order as combines novel guiding principles with distinctive institutional arrangements.) This is to be distinguished

reasons for the development of (and differences in) legal systems[453] of jurisdictions in the Old-World and the New World. The following approach to explain the interaction between legal regimes within a legal regulatory framework was synthesised: (i) Legal frameworks are individual in their own right, because of the legal systems in which they operate. This is identifiable by reference to the driving force of laws (see iv); and (ii) while legal regimes (and therefore laws) are individual, there is a degree of interplay between legal regimes that comprise a legal framework. (iii) This interplay does not depend on whether a legal system is described as monist, dualist or even pluralist; but, (iv) rather, the interplay (which is capable of evolving) depends on the presence of certain norms, including cultural norms,[454] also other factors of that jurisdictions, including: political, historical, economic, and social factors.

Some of the key items highlighted included that: (i) legal theories play a key role in explaining concepts in this dissertation; (ii) constitutional order explains the reasons for the development of legal systems in the Old-World and New World countries discussed; (iii) discussion of norms clarify the weight to be given to internal and external validity of a legal system, but that a legal system exists, and therefore concepts of what is a valid legal system does not add to any discussion in the present dissertation; (iv) because of our understanding of what a norm is, that the history of a jurisdiction has shaped that jurisdiction's regulatory culture, which plays an undeniable role in shaping the laws in a jurisdiction; and (v) legal theories operate as a pertinent guide for clarifying the parameters of the current regulatory frameworks[455] It is similarly crucial to take into

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from Constitutional theory, which is an area of constitutional law that focuses on the underpinnings of constitutional government. It overlaps with legal theory, constitutionalism, philosophy of law and democratic theory. It is not limited by country or jurisdiction: see, Richard Davis Parker, "The Past of Constitutional Theory – And Its Future" (1981) 42 *Ohio State Law Journal* 223, 226-7.

[453] See section 2.2.1 (distinguishing between a monist or dualist legal system, and why this matters).

[454] This is to be distinguished from legal culture.

[455] This refers to the regulatory frameworks that regulate the wine industry in Italy, France, Victoria and Virginia. This chapter clarifies the parameters of the current regulatory frameworks, with reference to legal theorists, including Austin, Kelsen above fn 242, and Raz, above fn 336. See, e.g., John Austin, *The Province of Jurisprudence Determined* (1832); John Austin, *Lectures on Jurisprudence and the Philosophy of Positive Law* (St. Clair Shores, MI: Scholarly Press, 1977) (outlining that Austin, having determined that all laws are commands, distinguishes them into four categories: divine laws; the laws of positive morality; laws so-called only by analogy; and positive law, which is the law of the realm). It is noted that a comprehensive analysis of this is beyond the scope of this dissertation. It is acknowledged that there is no such thing as an optimal theory for a legal system. Positive law alone is the subject matter of legal science and the main focus of his work. Law properly so called is the law of the realm and comprises the aggregate of the general commands of the sovereign. Austin's analytic approach to law offered an account of the concept of law, that is, what law is. This was termed "Legal Positivism" because it set out to describe "what law is" in terms of what humans posited it was, thus the link between "positive law" and "Legal Positivism." Austin's theory of law is a form of analytic jurisprudence in so far as it is concerned with providing necessary and sufficient conditions for the existence of law that distinguishes law from non-law in every possible

account the historical origins of law in a particular jurisdiction before introducing certain changes (for example, wine laws) inspired or dictated by other countries. Historical origins are also relevant to an economic analysis of legal regimes, discussed in Chapter VI.

Chapter II concluded that laws may be borrowed or transplanted into legal systems, which implies that a framework for the unity of wine regulations may be built in order to ensure the sustainability of the wine industry going forward. But that uniformity is in the objectives of the industry, which may require a different regulatory framework to be adopted in one jurisdiction to another.

world. See also Hart, above fn 294, 300 (providing a positivist account of law that at once improved upon that developed by Austin and destroyed Austin's central concept: the command theory of law. A Concept of Law was a step by step effort to provide an account of the nature of law that: (i) rejected the notion that law's moral force was grounded in morality, and having done so, (ii) provided an analytic account of the criteria of legality: the criteria a norm must satisfy in order to count as a legal norm).

CHAPTER III

LEGAL REGIMES AND REGULATORY FRAMEWORKS IN ITALY AND FRANCE

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CHAPTER III
LEGAL REGIMES AND REGULATORY FRAMEWORKS IN ITALY AND FRANCE

Chapter III explores regulatory frameworks governing the wine industry in France and Italy, primarily from a descriptive perspective. Although the heart of this dissertation is not so much a normative account of the protection of wine, but rather how best to regulate and classify it in particular regions of a jurisdiction in the best interests of the jurisdiction, producers and consumers, articulating the context of regulation is a necessary first step.

First, some of the key aspects of international regulatory framework of the wine sector is outlined and focusses primarily on treaties governing intellectual property (IP) rights. In so doing, it challenges the limitations of regulatory uniformity by noting its limitations, and how these may be addressed.[456] Second, an explanation of the drivers of the regulatory framework in the European Union (EU) is provided. The motivating factors, from a historical perspective, provide a context within which laws in Italy and France operate. Third, the gaps and potential opportunities in existing regulatory frameworks in these Old-World jurisdictions are discussed, and opportunities that the New World may be presented with to capitalise for the benefit of the wine industry, within those jurisdictions, going forward.

[456] See section 1.2.1. fn 86.

3.1 International Regulatory Framework

All jurisdictions in this dissertation are signatories to numerous multilateral and bilateral treaties.[457] The international protection of geographical indications (GIs), for example, has developed in various stages and on various levels. Until the TRIPs Agreement came into force in 1995,[458] the protection on the international level was based on the Paris Convention and its global protection systems, the Madrid Agreement of 1891 and the Lisbon Agreement of 1958, both addressing the protection of geographical indications.[459]Both the US and Australia are members of the Paris Convention,[460] and to the sub-agreements.

The Paris Convention concerns industrial property, and it lists '*indications de provenance*' and '*appellations d'origine*' as objects of protection, which implies that the basic principle of the convention – national treatment – also applies to GIs. Reference to 'national treatment' means that each member state is obliged to offer citizens of other member states equal treatment to their own citizens. However, national treatment does not grant foreign citizens a minimum protection – they just enjoy the same protection as domestic citizens. So, if this protection of domestic GIs worthy of protection is weak (or non-existent – such as in the United States), national treatment is of minor importance to the protection of foreign GIs. Except for Article 10 (paragraph 1), dealing with false indications of source, there are no special arrangements for GIs in the Paris Convention.[461] The Paris Convention does not mandate the use of one specific concept of protection. The Madrid Agreement,[462] like the Paris Convention,[463] is neutral regarding concepts of protection but requires

[457] See paragraph 3, below. There are a number of international treaties that apply to IP: see, e.g., Paris Convention for the Protection of Industrial Property, 21 U.S.T. 1583, 828 U.N.T.S. 305; Madrid Agreement for the Repression of False or Misleading Indications of the Source of Goods, 828 U.N.T.S. 163. However, the Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) (TRIPS Agreement, or TRIPS), is the most prevalent among them.

[458] Ibid.

[459] The Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods of 14 April 891 and the Lisbon Agreement for the Protection of Appellations of Origin and their International registration of 31 October 1958.

[460] The Paris Convention for the Protection of Industrial Property, signed in Paris, France, on 20 March 1883.

[461] See, fn 450 below regarding the interpretation of article 10*bis* on unfair competition in the context of TRIPs.

[462] Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, 15 U.S.C. §1141a(b) (2004) (Madrid Protocol). See generally The Madrid Protocol Implementation Act, 15 U.S.C. §1141 <http://www.uspto.gov> and implementing rules 37 CFR §7.1- §7.41 <www.uspto.gov/>; World Intellectual

that the states grant protection against misleading use of GIs.[464] This is a stronger protection than what can be deduced through a restrictive interpretation of the Paris Convention. The Lisbon Agreement requires a higher level of protection. Appellations of origin are granted a high level of protection in line with the protection of registered trade marks. Protection under the Lisbon Agreement is, however, only open to states that apply the concept of '*appellations d'origine*'. A concept of unfair competition, which applies in some Nordic countries such as Norway and Sweden, do not comply with the requirement of domestic protection in the Lisbon Agreement. Important actors in international trade, such as the US, Germany and the South-East Asian countries are not members of the Lisbon Agreement, and neither is Spain – even though Spain has got its own system of registered appellations of origin.[465]

TRIPs is the latest addition to the line of international conventions protecting GIs.[466] Since there is substantial literature regarding this multilateral treaty, discussion here is limited. Geographical indications are regulated in TRIPs Articles 22 to 24. TRIPs is based on the principles of National Treatment and Most-Favoured-Nation Treatment, which implies that any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.[467]

Geographical indications (GIs) are defined in Article 22.1 as:

> "indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin."

Property Organization (WIPO), *Guide to the International Registration of Marks under the Madrid Agreement and the Madrid Protocol* <http://www.wipo.int/ >.

[463] The full name of the Paris Convention, September 28, 1979, 21 USR 1583 is the 'Paris Convention for the Protection of Industrial Property' (Paris Convention).

[464] Ibid.

[465] According to the Spanish Act No. 25/1970 on wine, wine areas and alcohol art. 84 and 85 wines may bear an appellation of origin ('denominación de origen') or a qualified appellation of origin ('denominación de origen califada'). See the Rioja-decision by the ECJ (case C-388/95).

[466] See above fn 436. The TRIPs Agreement is a part of the package deal that was the result of the Uruguay-round in the General Agreement on Tariffs and Trade (GATT) that lead up to the establishment of The World Trade Organisation (WTO).

[467] TRIPs above fn 436, Art. 4.

Contrary to the EC Regulations (discussed below), there are no product specific criteria of protection. The only limitation in this sense is that services are not an object of protection under TRIPs.[468] Like the EC Agricultural Regulation,[469] TRIPs requires a connection between the good and its geographical origin. A given quality, reputation or other characteristics of the good must be essentially attributable to its geographical origin.[470] The core of the commitments in Article 22.2 is that member states are obliged to protect GIs against misleading use and any use which constitutes an act of unfair competition within the meaning of Article 10*bis* of the Paris Convention.[471]

Article 22.2 (a) imposes a duty on the Member States to provide legal means to prevent:

> "…the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good."

When the provision uses the term 'suggests' in addition to 'indicates', this indicates that not only positively false indications of origin but also means that evoke certain associations among the public must be prevented. It is uncertain whether 'suggests' also comprises use of correcting or delocalising additions. Article 10*bis* of the Paris Convention is a general clause in international competition law. According to the first paragraph, the provision shall assure to the nationals of the

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[468] Ibid (Services. E.g. Swiss banking was protected in Swiss proposal in the Uruguay-round).

[469] See, e.g., Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013, establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (CMO Regulation).

[470] The qualification 'essentially' has no equivalent in the Agricultural Regulation article 2.2 litra b. This distinction may indicate that the requirements of the connection between the characteristics of a product and its origin are higher in TRIPs than in the Agricultural Regulation. Pierre Knaak, *Case-Law of the ECJ on the Protection of Geographical Indications and Designations of Origin Pursuant to EC Regulation No. 2081/92,* IIC 32, 375-484, 2001, 647; See Gerald Reger, *Der internationale Schutz gegen unlauteren Wettbewerb und das TRIPS-*(Übereinkommen, 1999) 162.

[471] The reason why misleading use and unfair competition are alternative ways to violate article 22 lies in the history of article 10*bis* of the Paris Convention. Article 10*bis* was given its present wording at the Revision Conference in Lisbon in 1958. Article 10*bis* third paragraph deals with misleading designations, and reads as follows:

> "indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods."

It is noteworthy that misleading indications of source is not included. From a European perspective, a prohibition against misleading indications of source is a central and natural part of the protection against unfair competition. It is uncertain whether unfair competition in Art. 10*bis* of the Paris Convention comprises misleading indications of source. To take away any doubts to whether or not this kind of misleading indications is prohibited by TRIPS Art. 22.2, it is expressly taken in as an alternative kind of violation on equal status with unfair competition within the meaning of article 10*bis* of the Paris Convention.

Paris Union 'effective protection against unfair competition'. To assure such protection, the member states are obliged to prohibit 'any act of competition contrary to honest practices in industrial or commercial matters'.[472] Examples of unfair competition are given in the third paragraph. Although the Paris Convention is more than one hundred years old, there is no international consensus on the content of the provision. However, WIPO has published the 'Model Provisions for Protection Against Unfair Competition', which contains recommendations about the interpretation and application of the general clause, but these recommendations are not binding in international law.[473]

Additional protection for GIs for wines and spirits is given in Article 23 of TRIPs. The provisions of article 23 are more accurate and more comprehensive than the general provisions in article 22 and supplement the general provisions. Consequently, there is a double set of protective regulations for these products. Article 23.1 imposes a duty on the member states to provide legal means for interested parties to prevent use of GIs identifying wines for wines or spirits not originating in the place indicated by the GI in question. The obligation to prevent use extends to translations of the GI or where the indication is accompanied by correcting additions. Like in the Lisbon Agreement, the prohibition does not depend on risk of confusion.

Article 22.3 emphasises that the prohibition against misleading the public in Article 22.2(a), also applies to registration of trade marks. A trade mark that contains or consists of a GI with respect to goods not originating in the territory indicated, shall be refused registration or invalidated if the use of a trade mark for such goods in that member state is of such nature as to mislead the public as to the true place of origin. Article 23.2 contains an obstacle to registration for trade marks for wines containing or consisting of a GI identifying wines, with respect to such wines not having this origin. The same applies to registration of trade marks for spirits not having the origin of the GI. The exception in Article 24.5 allows coexistence between GIs and similar or identical trade marks applied for or acquired before the date of application of the TRIPs provision or before the GI was protected in its country of origin, provided they were acquired through use in good faith.

No agreement was reached on provisions that could eliminate the risk of degeneration, like the provisions in the Lisbon Agreement and the Agricultural Regulation mentioned above.

[472] Article 10*bis* at [2].
[473] Frauke Henning-Bodewig and Gerhard Schricker, 'New initiatives for the harmonisation of unfair competition law in Europe' (2002) *European IP Review* 271, 182.

Degeneration is seen as a question of actual development that is not possible to stop or reverse by law.[474] Neither are there in TRIPs provisions to re-establish GIs that have already become generic terms. The situation is better when it comes to mechanisms that decrease the risk of degeneration in the future. The prohibition against correcting and delocalising additions to GIs for wines and spirits appears to imply that an important factor in the process of degeneration is thus eliminated. The obstacles to trade mark registration also imply steps in the right direction in the battle against degeneration.[475] The effect of the protection is undermined by the exception in Article 24.6. GIs that have already degenerated, may still be used as generic terms despite the strict regulations in Article 22 and – especially – Article 23. According to this provision, the US may still use the designations 'Champagne' and 'Chablis' on wine produced in the US. Generic terms are defined in Article 24.6 as 'the term customary in common language as the common name for such goods or services'. According to Article 24.9, TRIPs does not impose any obligations to protect GIs which are not, or cease to be protected, in their country of origin, or which have fallen into disuse in that country. This is an important issue when proposing which IP regime is most appropriate to regulate the wine industry.[476]

An understanding of the scope also limitations of international treaties and their administering bodies, which focus on either health (e.g. the WHO), trade (e.g. the WTO), and intellectual property (e.g. WIPO, through TRIPS and/or other bilateral treaties with respect to the wine industry) provides a minimum standard for rights and interests, But, to leave specific regulations with regards to quality to be at a domestic level. The political economy of government regulations, as well as domestic fiscal or economic considerations play a large role in why this should continue to be the case.

[474] Lindsey A. Zahn, 'Australia Corked Its Champagne and So Should We: Enforcing Stricter Protection for Semi-Generic Wines in the United States' (2012) 21 *Transnational Law and Contemporary Problems* 477, 487.
[475] See section 3.4.1, below.
[476] See Chapter IV.

3.2 Regulatory Framework of the European Union

In Chapter I, the effect of general insights on the political economy of government regulations on the inability for a blanket approach to wine regulation were posited. This section provides additional insight into the EU regulatory framework, and why this is the case.

3.2.1 Context of Regulation of the wine sector in the EU

The EU wine sector is a fascinating case study, in this regard, because the wine regulations are so pervasive. More than two thousand regulations, directives and decisions on wine have been published since 1962 in the EU. While not detailed in this dissertation, the main wine framework law of 1962 was reformed five times.[477] European policies have tried to regulate both the quantities, prices and qualities of wines. As with many government interventions in other food and agricultural markets, the quantity and price regulations can only be understood from a political perspective, i.e. by analyzing how the political pressures induced by the rents created by the regulation influenced government decision-making.

Some of the regulations were introduced to protect existing rents when these were threatened by innovations or surging imports. Other regulations, however, appear to both enhance welfare (efficiency) and redistribute rents, which makes their analysis both more complex and richer. The case is also particularly insightful because of its long history in regulation. As parts of Europe were the main wine producing region about two millennia ago, it provides a fascinating case of how increased production and innovations have induced regulatory changes.

European policies have tried to regulate both the quantities, prices and qualities of wines. As with many government interventions in other food and agricultural markets, the quantity and price regulations can only be understood from a political perspective, i.e. by analyzing how the political pressures induced by the rents created by the regulation influenced government decision-making.[478]

[477] Gerard Petit, 'Pour une histoire de la réglementation vitivinicole des Communautés Européennes' (2000) 5 *Bulletin de l'OIV* 324, 334-5. See also, Council Regulation No 479/2008.

[478] There is an extensive literature on the political economy of agricultural and food policies: see Harry de Gorter and
Johan Swinnen, 'Political economy of agricultural policy' in Bruce Gardiner and Gordon Rausser (eds), *Handbook of Agricultural Economics* (North Holland, Vol 2, 2002) 1898. But, there have been no applications to wine policies

Their primary purpose is to redistribute rents between different groups in society, from (potential) new producers of wine and from consumers of wine to the existing producers. These interventions typically reduce overall welfare and efficiency.

In contrast, regulations to guarantee a certain quality of wine, as many products and process standards in general, may increase efficiency and overall welfare. In an environment with asymmetric information between producers and consumers where consumers have imperfect information and high ex-ante monitoring costs about the quality of a certain product, such as wine, government regulations that guarantee a certain quality or safety level, or that reduce information costs, can enhance overall welfare. Similarly, regulations that forbid the use of unhealthy ingredients may increase consumer welfare by reducing/eliminating problems of asymmetric information. For example, some of the early regulations target the dilution of wine with water which hurts consumer interests and producer reputations.[479]

However, quality regulations also affect income distribution. Depending on their implementation, they may create rents for certain groups of producers who face fewer costs in implementing certain quality standards of for those who have access to key assets or skills that are required by the regulations.[480] For example, regulations that restrict the production of certain types of (expensive) wines to a certain region will benefit the owners of the fixed factors (such as land and vineyard) in that region and will harm the owners of land and vineyards in neighboring regions.

Some of the EU wine quality regulations have strong income distributional effects as they require access to very specific assets, such as plots of land in specific regions. In fact, the official EU regulations explicitly specify that:

[479] More recent regulations specify that the use of certain ingredients must be indicated on the label. Since 2006, sulfites (added to preserve wine) must be disclosed on the labelling since these additives may cause allergic reactions: see Council Regulation No 607/2009, Art. 51.

[480] There is an emerging literature on the political economy of food standards which focuses on the interaction between "rent" distribution and welfare enhancement (see e.g. Anderson, K., R. Damania, and L.A. Jackson, "Trade, Standards, and the Political Economy of Genetically Modified Food" (2004) *CEPR Discussion Papers* 4526, C.E.P.R. Discussion Papers; Fulton, M. and K. Giannakis "Inserting GM products into the food chain: The market and welfare effects of different labelling and regulatory regimes" (2004) 86(1) *American Journal of Agricultural Economics* 42-60; Moschini, G., Menapace, L., and Pick, D "Geographical Indications and the Competitive Provision of Quality in Agricultural Markets" (2008) 90 *American Journal of Agricultural Economics* 794-812; Johan Swinnen, *The Perfect Storm: The Political Economy of the Fischler Reforms of the Common Agricultural Policy* (2008, Brussels: CEPS publications); Johan Swinnen, "The Growth of Agricultural Protection in Europe in the 19th and 20th Centuries" (2009) 32(11) *The World Economy* 1499, 1525-7, but none of these insights have been applied to wine policies.

> "[T]he concept of quality wines in the Community is based … on the specific characteristics attributable to the wine's geographical origin. Such wines are identified for consumers via protected designations of origin and geographical indications."[481]

Other examples of so-called 'quality' regulations with clear distributional effects are cases where regulations do (not) permit certain new techniques, such as the use of hybrid vines, the mixing of different wines (e.g. in rosé wine production), the use of new vine varieties, and so forth. In historical perspective, this approach to quality regulation in the EU is not an exception, but the rule. Over time, quality regulations for wine have been motivated both by efficiency considerations and to restrict the production of wines to certain regions, or certain technologies.[482]

3.2.2 Quality Regulations in the EU

The EU has introduced a series of regulations with the official intention to affect the quality and location of the wine supplies. So-called "quality regulations" include a variety of policy instruments, such as the geographical delimitation of a certain wine area, winegrowing and production rules (as regulations on grape variety, minimum and maximum alcohol content and maximum vineyards yields, the amount of sugar or the additives that can be used – i.e. so called "oenological practices") and rules on labelling.

Quality regulations were part of the initial wine policy in 1962[483] and have been strengthened since.[484] They apply to both "low quality" (so-called "wines without a Geographical Indication (GI)", previously called "table wines") and "high quality" wines (so-called "wines with a Geographical Indication (GI)", previously called "quality wines").[485] In 2008, EU wine classifications were

[481] Council Regulation No 479/2008 of 29 April 2008 (OJ 6.6.2008), Art. 28.
[482] Giulia Meloni and Johan Swinnen, 'The Political Economy of European Wine Regulations' (2013) 8(3) *Journal of Wine Economics* 244, 247.
[483] See Council Regulation (EEC)
No 24/1962, Preambles at (3) (stating that "(…) whereas the common organization must aim at stabilizing markets and prices by adjusting supplies to requirements, such adjustment being directed in particular towards quality production").
[484] Regulations of 1970, 1979, 1987, 1999 and 2008 included provisions that strengthen the requirements in order to increase quality.
[485] Meloni and Swinnen, above fn 461, 248 (outlining that in the pre-2008 system, EU wines were classified into two categories: "quality wines produced in specified regions" (abbreviated to "quality wines") and "table wines" (separated into table wines protected by geographic indications and those not protected by geographic indications).

transformed and wines are now divided into "wines with a GI" and "wines without a GI".[486] Within the first category, there are two subcategories: Protected Designation of Origin (PDO) wines and Protected Geographical Indication (PGI) wines, with PDO as the highest quality level. With the 2008 regulation, certain table wines (as French VdP or Italian IGT) were elevated to the rank of wines with a GI (PGI). Even if the new classification harmonised the wine market with other EU food products that already adopted the PDO/PGI system, member states still have the possibility to use these national classifications on the labels.

The EU heavily regulates 'wines without a GI' and their quality requirements by defining the oenological practices (indicating the recommended/authorised varieties or the maximum enrichment/alcohol per volume allowed), by requiring particular methods of analysis[487] and by restructuring and converting vines.[488] The alcoholic strength of wines without GI ranges between 8.5 and 15 per cent by volume and total acidity content of not less than 3.5 grams per liter. Also, wine analysis involves alcoholic strength, total acidity, pH, density, residual sugar, and mineral elements, such as iron, copper, sodium and potassium.[489] For 'wines with a GI' it only sets the minimum legal framework, and it is up to each member state to determine its own system of classification and control.[490] For this reason, within the EU, 'wines with a GI' and 'wines without a GI' can have different meanings between member states.[491]

The EU further regulates 'high quality' wines based on a system of GIs, based on the French concept of *Appellation d'Origine*. Appellation of Origin (AOC) is:

[486] See ibid, 249 (outlining that only Romania has adopted the PDO/PGI system, casting doubts on the 'simplicity' of the system).
[487] See ibid, 249 (stating that grapes and musts analysis regards three components, sugar, acid and ph. By comparison. See also Robinson above fn 5, 22.
[488] Support for restructuring and conversion of vineyards includes: varietal conversion, relocation of vineyards and improvements to vineyard management techniques. It involves, for instance, uprooting existing old vines and planting new vines but also, among others, terracing, stone picking, soil disinfection and land leveling, with the aim of improving vineyard's quality: see Council Regulation No 479/2008, Art. 11.
[489] See Meloni and Johan Swinnen above fn 461, 249.
[490] For instance, wines with a GI in Italy are regulated by the Governmental Legislation 164/92 and by the Ministerial Decree 256/97 and three categories are defined: Controlled and Guaranteed Denomination of Origin (DOCG) and Controlled Denomination of Origin (DOC) and Typical Geographical Indication (TGI). The DOCG are subject to stricter requirements compared to DOC. See Federdoc. 2012. "I vini italiani a Denominazione d'Origine 2012". Federdoc. Available at: <http://www.federdoc.com/>.
[491] Robinson above fn 5, 678.

> "[T]he name of the country, region or the place used in the designation of a product originating from this country, region, place or area as defined to this end, under this name and recognised by the competent authorities of the country concerned."[492]

A name place is thus used to identify the wine and its characteristics, which are thus defined by the delimited geographic area and specific production criteria (so-called '*cahier des charges*' in France or '*disciplinare di produzione*' in Italy).[493] These governing rules delimit the geographic area of production, but also determine the type of grape varieties that can be used, the specific wine-making methods, the maximum yield per hectare and the analysis of wines (assessment of organoleptic characteristics –as appearance, color, bouquet and flavor– and a chemical analysis that determines the levels of acidity and alcohol). This implies that the wine's denomination can only be attributed if the grapes are grown and pressed in the delimited region and the wine production process fulfills certain criteria. For instance, in the case of 'Chianti Classico', specific varieties of grapes have to be grown in one of only nine villages in Italy.[494]

As part of these 'quality' regulations, the EU also specifies the type of labels that can and should be used. Until 2008, labels listed only the geographical areas but not the wine's grape composition. For instance, the indication of 'Burgundy' was mentioned but not that of Pinot noir (the name of the grape).[495] The 2008 wine reform introduced changes in labelling for wines without a GI. The label now allows to mention grape variety and harvest year, thus facilitating the identification of the product's characteristics.[496] This aligns European producers with new world wine producers (like Victoria and Virginia) who document on their labels the brand and the grape variety rather than the area of origin where the wine is produced.[497]

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[492] OIV, *International Standard for Labelling Wines*, International Organisation of Vine and Wine (2015) <http://www.oiv.int/oiv/info/enplubicationoiv>.
[493] Ibid, Annex 1 (providing an example of such "*cahier des charges*" regulation applied to Bordeaux wines).
[494] The area includes the villages of Barberino Val d'Elsa, Castellina in Chianti, Castelnuovo Berardenga, Gaiole in Chianti, Greve in Chianti, Poggibonsi, Radda in Chianti, San Casciano Val di Pesa and Tavarnelle Val di Pesa In order to produce a Chianti Classico DOCG, the varieties of grapes used in the preparation of the wine are fixed: 80% of Sangiovese, plus 20% of either native varieties like Canaiolo or "foreign" types like Merlot Cabernet and Sauvignon. See Consorzio Vino Chianti Classico, 'Production code of Chianti Classico denominazione di origine controllata e garantita wine' (2012) <http://www.chianticlassico.com/en/vino/disciplinare>.
[495] Germany is an exception. The classification system is based on grapes' sugar levels, ripeness of the grapes and regional classification rather than only on geography (Maher, 2001).
[496] Article 50 of the Council Regulation (EC) No 479/2008.
[497] Michael Maher, 'On vino veritas? Clarifying the use of geographic references on American wine labels' (2001) 89(6) *California Law Review* 1881, 1891.

3.2.3 Quantity Regulations in the EU

In addition to the so-called 'quality regulations', the EU has a series of policies that influence the amount and price of wine produced in Europe. Since the start of the EU Common Wine Policy, the EU has imposed minimum prices for wine and organised public intervention in wine markets to deal with surpluses. Surpluses were either stored or distilled into other products with heavy government financing. In addition to distillation and market intervention, the EU wine policy included measures to restrict productions such as restricted planting rights[498] and vineyard grubbing-up schemes.[499]

Despite these regulations, for decades, the wine market in the EU has been characterised by what is typically referred to, in EU Commission documents, as 'structural imbalances', meaning – in layman's terms – the production of vast surpluses of 'low quality' wine that nobody wants to buy. In fact, EU's wine policies, instead of contributing to a solution, appear to have exacerbated the problem. Wyn Grant's[500] review of the EU's wine policy distortions summarised the problems well. She notes that:

> "The EU tries to cope with the situation by siphoning wine out of the lake for distillation (for example, into vinegar) and by grubbing up vines from the vineyards on the hills around the lake. [However,] the problem is that EU-financed distillation is a positive stimulant of over-production of largely undrinkable wine, since it maintains less efficient growers of poor-quality wine which would have given up long since if it were not for the EU support system. … The EU is losing ground in the expanding middle sector of the market [to New World wines] … The EU thus finds itself running a wine support policy that costs around 1.5 billion [euro] a year, involving the annual destruction of an average of 2-3 billion liters of substandard and undrinkable wine."[501]

In the mid-2000s, an average around 20 million hectoliters of wine was being distilled over the year. While the EU commission has made a number of attempts to reform its wine policy, it has faced hostile resistance from wine producers and political opposition from the member state

[498] Planting rights is a system to control European wine grape production. A wine-grower can only plant a vineyard on his land if he has a permission, i.e. a "planting right", to plant vines for the production of any category of wine.
[499] Grubbing-up premium are given by the EU to winegrowers who permanently (and voluntarily) abandon vineyards.
[500] Wyn Grant, *The Common Agricultural Policy* (MacMillan Press, 1997).
[501] Ibid, 137-138.

governments.[502] This resulted in surplus problems which were reinforced with decreasing wine consumption in the EU and growing competition (and imports) from New World wines.[503] In 2006, the EU Commission proposed a set of bold reforms which included the immediate elimination of traditional market intervention measures (e.g. distillation, aid for private storage,[504] export refunds[505] and planting rights), the consolidation of previously adopted measures (e.g. restructuring and conversion of vineyards), the parallel introduction of new measures (e.g. green harvesting,[506] investment,[507] promotion in third countries,[508] mutual funds[509] and harvest insurance),[510] and simplified labelling rules with the intention to make EU wines more competitive with New World wines.[511] It was envisaged that surpluses would be eliminated through ex-ante measures, such as green harvesting, rather than through ex-post measures (aid for private storage or distillation).[512]

[502] In 1994, the EU Commission attempted to reform the wine market but failed. See Justine Maillard (ed), 'La commission, le vin et la réforme' (2002) 1(5) *Politique européenne* 68, 72 (outlining that the 1994 Uruguay Round agreement resulted in lower tariffs and increased global competition from New World wines coming from South America, Australia and South Africa. Further explaining that, in 1999, a new wine CMO was adopted as part of "Agenda 2000" which confirmed the ban on new vineyard plantings until 2010, changed the distillation policy from compulsory to voluntary distillation, and introduced restructuring and conversion measures for vineyards). See also Peter Conforti and Richard Sardone, 'Assessing the Effectiveness of the EU Common Market Organization for Wine: A Research Agenda' in Silvia Gatti, Eric Giraud-Heraud and Samir Mili (eds) *Wine in the Old-World: New Risks and Opportunities* (FrancoAngeli, 2003).

[503] Ibid.

[504] In years of overproduction, aid for private storage was a support given to winegrowers to store their wine surplus.

[505] Export refunds covered the difference between world and EU market prices. See European Commission, *Ex-post evaluation of the Common Market Organisation for wine*, European Commission (2004) <http://ec.europa.eu/agriculture/eval/reports/wine/fullrep_en.pdf>.

[506] Green harvesting is the destruction of the grapes before harvest: see Council Regulation No 479/2008, Art. 12.

[507] Support may be granted for "investments in processing facilities, winery infrastructure and marketing of wine": see Council Regulation No 479/2008, Art. 15.

[508] The measures include, among others: public relations, promotional or advertisement measures; participation at events, fairs or exhibitions; and information campaigns: see Council Regulation No 479/2008, Art. 10.

[509] This measure was foreseen to "provide assistance to producers seeking to insure themselves against market fluctuations": see Council Regulation No 479/2008, Art. 13.

[510] Support may be granted to "safeguarding producers' incomes where these are affected by natural disasters, adverse climatic events, diseases or pest infestations": see Council Regulation No 479/2008, Art. 14.

[511] See European Commission, *Communication from the Commission to the Council and the European Parliament – Towards a sustainable European wine sector*, European Commission, COM (2006) 319. <http://ec.europa.eu/agriculture/capreform/wine/com2006_319_en.pdf>. See also Robert Cagliero and Richard Sardone, 'La Nuova OCM Vino' in Ernst Pomarici and Richard Sardone (eds) *L'OCM Vino. La difficile transazione verso una strategia di comparto* (INEA, 2009) 32-4.

[512] See, Isabel Bardají, Alberto Garrido et al., *State of play of risk management tools implemented by Member States during the period 2014-2020: National and European frameworks* (EC Commission, 2016) 3 (noting that, for instance, distillation removed wine surpluses ex-post, thereby creating an artificial demand for wine, with winegrowers producing wine intended for the more rentable distillation market).

Similarly envisaged was that the available budget[513] would be allocated in national support programs (see Appendices, Table 2), according to national priorities, thereby strengthening the power of the regions. Producers would be compensated through farm payments under the 'Single Farm Payment scheme' which has existed since 2003 for other commodity market regimes.[514] The reform was approved in 2007 but, because of opposition from the wine industry, some reforms were dropped (e.g. banning enrichment through the addition of sugar), diluted (e.g. grubbing-up was reduced from 400,000 to 200,000 to 175,000 hectares).[515] The Commission proposed that planting rights restrictions be removed by 2013, thus allowing producers to freely decide where to plant. However, the Council decided that current regime on planting new vines would not be lifted until 2018 for Member States seeking to continue the restrictions.

The above presented an important insight into present issues affecting the wine industry, and the impact also perception by the industry of politically driven policy. Research findings indicate that there is a negative perception amongst the wine industry when legislative change is proposed. In investigating the historical origins of current regulatory framework in the EU by studying the hybrid vines, Meloni and Swinnen found that these types failed to spread in France mainly because of a politically driven policy directed at the restriction of emerging hybrids' production.[516] Wiseman and Ellig reported a contrary outcome for Virginia, when they investigated the impact of the legalization of direct wine shipment in Virginia. They found that authorities' involvement helped lower the retail price and increase market efficiency that benefited both producers and consumers.[517] The Virginian wine industry saw regulatory change, in this context, as resulting in a positive market outcome.[518]

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[513] The total available wine budget is 5.3 billion euro (2009-2013). In 2011, the restructuring and conversion measure accounted for 41% of the member states' national support programs, reaching 97% of EU's subsidies in Romania. Distillation has now a minor role, only accounting for about 12% of the national support programs. A complete policy reversal since, in the last 20 years, the measure accounted for 50% of the CMO budget: See European Commission Statistics (2004); European Commission Statistics (2012) <https://ec.europa.eu/commission>.

[514] Member states that have implemented this measure in their national support programs are: Greece, Luxembourg, Malta, Spain and UK: European Commission (2012) ibid.

[515] Because of over-subscription, the Commission initial proposal proved to be right. The total EU demand for grubbing-up was equal to 351.223 ha of vines, a number extremely close to the initial EU Commission proposal (400.000 ha). Only 50,4% of the areas claimed could be accepted: see European Commission, *European Court of Auditors Report* (2012) <https://ec.europa.eu/commission>.

[516] Giulia Meloni and Johan Swinnen, 'The Rise and Fall of the World's Largest Wine Exporter – And Its Institutional Legacy' (2014) 9(1) *Journal of Wine Economics* 3, 9-10.

[517] Alan E Wiseman and Jerry Ellig, 'The Politics of Wine: Trade Barriers, Interest Groups, and the Commerce Clause' (2007) 69(3) *Journal of Political Economy* 859, 869.

[518] Won Fy Leea and William C Gartner, 'The Effect of Wine Policy on the Emerging Cold-Hardy Wine Industry in the Northern U.S. States' (2015) 4(1) *Wine Economics and Policy* 35, 43.

The next section explores, from a historical perspective, the political economic origins of key regulatory interventions that have impacted the wine industry in these Old-World jurisdictions.

3.2.4 Geographical Indications and Gaps in the Regulatory Framework

Protection of GIs could be seen as a manifestation of protectionism, incompatible with the basic principles of the European Economic Community (EEC).[519] The extent to which GIs were protected by European Community law was unclear for years. The 1992 case of *Touron* was a breakthrough for the protection of GIs in European Community law.[520] The issue in that case was whether the protection of GIs in the Franco-Spanish agreement of 27 June 1973 was compatible with the free movement of goods or the exceptions from this principle in the EEC Treaty Article 36 (Article 30 in the present treaty), in the interest of protection of industrial and commercial property. By way of background, the Spanish designations of marzipan, Turron de Jijona and Turron de Allicante, which were listed in the appendix to the Franco-Spanish agreement, were used in France on French marzipan. The designations were used by French manufacturers with and without delocalising additions. The French manufacturers claimed that 'Turron' or 'Touron' had degenerated and become a generic term. Degeneration was, however ruled out by the Franco-Spanish agreement, which expressly precluded transformation into generic terms. The question was sent to the ECJ, which concluded that the Franco-Spanish agreement did not violate the EEC Treaty Article 30 and 36 (the present Articles 28 and 30).

Contrary to previous EC case law,[521] and the Commission's opinion, the court recognised the need for protection for all GIs, including quality-neutral indications of source. ECJ further explained that this protection, regardless of its form, falls within the protection of industrial and commercial property within the meaning of Article 36 (the present Article 30) of the EEC Treaty. It is not an easy

[519] See, Case 120/78 *Rewe-Zentral* [1979] ECR 649, para 14; Case C-376/98 *Germany v Parliament and Council* [2000] ECR I-8419, paras 83 and 95.
[520] Case C-3/91.
[521] Case C-12/74.

task to develop a uniform system of GI protection within the EEC. Instead of a uniform system of protection embracing all categories of products,[522] a half-hearted system of product specific regulations of protection has been developed, especially within the agricultural sector. This may be a consequence of the fact that the aim of protection within the EEC was not actually a uniform regulation of competition law, but to protect the sale and distribution of agricultural products of high quality within the union.[523] The product specific regulations are first and foremost:

- Council Regulation No. 2392/89 of 24 July 1989 laying down general rules for the description and presentation of wines and grape musts, now replaced by Council Regulation No. 1493/99 of 17 May 1999 on the common organisation of the market in wine ('the Wine Regulation');
- Council Regulation No. 1576/89 of 29 May 1989 laying down general rules on the definition, description and presentation of spirit drinks (the Spirit Regulation); and
- Council Regulation No. 2081/92 of 14 July 1992 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs (the Agricultural Regulation).[524]

The Wine Regulation of 1999 has a much broader focus than the Wine Regulation of 1989, and replaced several EC Regulations and comprises rules governing:

> "wine production potential, market mechanisms, producer organisations and sectoral organisations, oenological practices, description, designation, presentation, quality wine psr [quality wines produced in specified regions], and trade with third countries."[525]

The Wine Regulation grants extensive protection against misleading use and usages that are likely to confuse the public. Article 48 of the Wine Regulation says:

> "The description and presentation of the products referred to in this Regulation, and any form of advertising for such products, must not be incorrect or likely to cause confusion or to mislead the persons to whom they are addressed."

[522] This was proposed in a report by Ulmer in 1965. See Gerald Reger, *Der internationale Schutz gegen unlauteren Wettbewerb und das TRIPS* (Übereinkommen, 1999) 137.
[523] See Preamble of Council Regulation No. 1576/89.
[524] This regulation is considered to fall outside the Agreement on the European Economic Area.
[525] Cf. Article 1 of the Wine Regulation.

This applies even if the information is used in translation or with correcting or de-localising additions. The protection is linked to the provisions of TRIPs, as stated expressly in Article 50.1 which states that:

> "Member States shall take all necessary measures to enable interested parties to prevent, on the terms set out in Articles 23 and 24 of the Agreement on Trade-related Aspects of Intellectual Property Rights, the use in the Community of a geographical indication attached to products referred to in Article 1 (2)(b) for products not originating in the place indicated by the geographical indication in question, even where the true origin of the goods is used in translation or accompanied by expressions such as 'kind', 'type', 'style', 'imitation' or the like."

The definition of 'geographical indications' in the Wine Regulation is similar to that of TRIPs':

> "…indications which identify a product as originating in the territory of a third country which is a member of the World Trade Organisation or in a region or designated by the name in accordance with the provisions of the relevant Community and national rules."

Article 52 also grants some protection for traditional specific terms like 'Claret' and 'Liebfrauenmilch'.[526] Lists of quality wines produced in specified regions are published by the Commission in the 'C' Series of the Official Journal of the European Communities according to article 54.5. Provisions on description, designation, presentation, and protection of sparkling wines, such as Champagne, are found in Annex VIII to the Regulation, whereas similar provisions for certain other wine products are given in Annex VII. Conflicts between wines bearing GIs and trade marks for wine products are regulated in Annex VII F.[527] The GIs will, in most cases, prevail in these conflicts.

According to F No. 1. (a), brand names that supplements the description, presentation and advertising of the products referred to in the Wine Regulation, may not contain any words, parts of words, signs or illustrations which are likely to cause confusion or mislead the persons to whom they are addressed within the meaning of article 48. The prohibition of confusing brand names applies

[526] See Art. 52.2.
[527] Note that similar provisions regarding sparkling wines bearing GIs are found in Annex VIII H.

even if the brand name or a part of the brand name is liable to be confused by the relevant public with only a part of the description of a product referred to in Annex VII (F no. 1 (b). Brand names identical to the description of any such products are prohibited regardless of the likelihood of confusion. Coexistence between brand names for wines and geographical indications of wine are only possible if the strict criteria in F no. 2 are fulfilled. The provision applies to so-called homonymous indications of wine:

> "..the holder of a well-known registered brand name for a wine or grape must which contains wording that is identical to the name of a specified region or the name of a geographical unit smaller than a specified region may, even if he is not entitled to use such a name pursuant to point 1, continue to use that brand name where it corresponds to the identity of its original holder or of the original provider of the name, provided that the brand name was registered at least 25 years before the official recognition of the geographical name in question by the producer Member State in accordance with the relevant Community provisions as regards quality wines psr and that the brand name has actually been used without interruption."

This provision is called the 'Lex Torres' and became a part of the former wine regulation to solve a conflict between the Spanish trade mark Torres and a Portuguese wine region called Torres Vedras.[528] The Wine Regulation applies to Italy and France due to membership of the Agreement on the European Economic Area. Wine and grape must are refined agricultural products which are included in article 8.3a of the EEA Agreement. The implementation is achieved by reference to the relevant EC Regulations.[529] The Agricultural Regulation is the most interesting product-specific regulation. The scope of protection is broader than that of the Wine Regulation and the Spirit Regulation.[530] Basically it comprises all agricultural products and foodstuff.[531] An important

[528] See Knaak, above fn 449, 375-484.
[529] However, the EC Regulations are supplemented by some provisions regarding designations from EFTA states who are not members of the European Union (Norway, Iceland and Liechtenstein).
[530] Discussion of the Spirit Regulation is beyond the scope of the present thesis. See further Reger, above fn 449, 41 (discussing that the protection under the Spirit Regulation is a list-based system with precise definitions of the criteria for registration. The extent of the protection is defined in article 8, in which the designations of the Spirit Regulation are protected against the use of correcting and delocalising additions. Consequently, one may also assume that translated versions of the designations are prohibited if the product does not fulfil the criteria set down in the regulation). The extensive protection in the Spirit Regulation reduces the danger of degeneration of the geographical indications listed in Annex II to a minimum. The approximately 200 designations on the list e.g. Cognac and Cassis de Dijon (Annex II of the Spirit Regulation in the Official Journal of the European Communities L 160/4 of June 12, 1989) enjoy a high level of protection within the entire EEA area. Geographical indications not listed in Annex II are protected against misleading use by Art. 5.2.

exception is made in article 1, as it shall not apply to wine products or to spirit drinks. The most valuable GIs are actually found in the categories of wine and spirits.

The Agricultural Regulation applies to Italy and France, as both are part of the EEA Agreement. Conceptually, the Agricultural Regulation is based on the system of formally defined and registered designations of origin. The Regulation establishes a registration process and a set of protection measures. Registration is the criterion for protection, which appears as an intellectual property right in line with patent and trade mark rights. Article 2 makes a distinction between two categories of geographical indications. The difference between these two categories is first and foremost related to different requirements as to the link between the quality of the product and its geographical origin. The two categories are designations of origin and geographical indications.

The opening is identical in both definitions, but the requirements of connection between the manufacturing process and origin of the product and its character are different. The definition of designations of origin is based on the definition of appellations of origin in the Lisbon Agreement. In order to be registered as a designation of origin, the entire production process must take place in the defined geographical area. The definition of geographical indications is more lenient, as it does not require that the entire production process has taken place in the specified geographical area. Preparation, processing and production are alternative conditions of fulfilling the criterion of geographical connection. It is difficult to comply with the strict requirements of designations of origin for processed or cultivated agricultural products. Thus, registration as geographical indication is the only possible solution for many of these products.[532]

Another noticeable difference is that the definition of 'designations of origin' requires that the quality or characteristics of the product are 'essentially or exclusively due to a particular geographical environment with its inherent natural and human factors', whereas the definition of geographical indications requires that the products 'possesses a specific quality, reputation or other characteristics attributable to that geographical origin'. This is actually a major difference. The requirement for designations of origin, that the quality or characteristics of the product are due to the

[531] The legal authority of the Spirit Regulation is article 43 of the EEC-Treaty (the present article 37), which concerns agriculture. See, however, Knaak, above fn 449, 608-9 (stating that this legal authority is not sufficient for foodstuff that is not agricultural products).
[532] Knaak, above fn 449, 378.

particular geographical environment, is an objectively provable requirement. In order to be registered as a geographical indication, it is sufficient that the product has a reputation attributable to its geographical origin. Reputation is not objectively provable in the same way as quality and other characteristics, because reputation is based on subjective conceptions among consumers. The concept of unfair competition is sneaking in through the back door of the Agricultural Regulation by adopting the focus on reputation in the definition of GIs. Thus, the Agricultural Regulation effectively becomes a hybrid of the two concepts of protection, despite its roots in the system of formally defined and registered appellations of origin.[533] The extent of the protection is laid down in article 13. First, the registered designations are protected against:

> "any direct or indirect commercial use of a name registered in respect of products not covered by the registration in so far as those products are comparable to the products registered under that name or insofar as using the name exploits the reputation of the product name."[534]

The prohibition is directed towards the use of the designation in an unaltered form. But the protection is directed towards any direct or indirect commercial use. This includes use as trade mark, in labelling and packaging, advertising and other information with commercial purposes. The first alternative in (a) of the regulation applies to products comparable to the product registered under the designation. There are similar provisions in trade mark law regarding identical or similar goods. If the products are not comparable, the protection is dependent on the second alternative in (a). Usage that exploits the reputation of the product name will mainly be an issue for the more well-known GIs. It is first and foremost these designations that have a reputation suitable for commercial exploitation. The provision in the second alternative is similar to the 'Kodak doctrine' in trade mark law.[535] Similarity between the products is not without relevance for the question of exploitation of reputation. This means that the further you move away from the category of products the designation is registered for, the weaker the commercial potential for exploitation. For instance, Parma has a strong commercial potential for meat and Roquefort is highly valuable for dairy products, but the fame is not the same for car accessories or furniture.

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[533] See Reger above fn 449, 149 (The reputation issue is thoroughly discussed).
[534] Art. 13 No. 1(a).
[535] See Frank I. Schechter, 'The Rational Basis of Trademark Protection' (1927) 40 *Harvard Law Review* 813, 829 (discussing that certain trademarks – ones that were "added to rather than withdrawn from the human vocabulary by their owners, and have, from the very beginning been associated in the public mind with a particular product" – had particular value because they actually helped sell the goods to which they were attached).

Article 13 (b) grants protection against:

> "any misuse, imitation or evocation, even if the true origin of the product is indicated or if the product is translated or accompanied by an expression such as "style", "type", "method", "as produced in", "imitation" or similar."

By misuse in this context means the use of an almost identical designation. Imitation does also comprise designations that are likely to confuse, whereas evocation[536] also comprise a use that leads your thoughts to the direction of the original designation and indicates a connection. Like the Lisbon Agreement, the Agricultural Regulation has a provision that excludes legal degeneration, so registered designations cannot be regarded as generic terms. Due to the strict regulation of use of registered designations, actual degeneration will also be very unlikely within the European Economic Area (EEA). However, generic names may not be registered according to article 3 and article 17 No. 2.[537] The relationship to trade mark rights is regulated in Article 14. The provisions are neither solely based on a strict first priority principle nor on a principle of coexistence, but on a compromise between values worthy of protection. A registered GI has priority over a later trade mark likely to infringe the rights set down in article 13.[538] An older registered GI (or designation of origin) implies both an obstacle towards registration and a reason for invalidation if the trade mark is registered. Article 14 No. 2 regulates conflicts between a registered GI or designation of origin and an older trade mark. In these cases, coexistence is the main rule.

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[536] See Gorgonzola/Cambozola (case C-87/97, 4 March 1999) (discussing the concept of 'evocation'. The ECJ that: 'Evocation', as referred to in Article 13(1) (b) of Regulation No 2081/92, covers a situation where the term used to designate a product incorporates part of a protected designation, so that when the consumer is confronted with the name of the product, the image triggered in his mind is that of the product whose designation is protected.' At [29]. The Court also declared that: 'Since the product at issue is a soft blue cheese which is not dissimilar in appearance to `Gorgonzola', it would seem reasonable to conclude that a protected name is indeed evoked where the term used to designate that product ends in the same two syllables and contains the same number of syllables, with the result that the phonetic and visual similarity between the two terms is obvious.' At [27].)

[537] See united cases C-289/96, C-293/96 and C-299/96, 16 March 1999 (discussing the issue of generic terms. The Feta-case was quite complex, because Feta is an indirect indication of source. The court had to take a stand on whether or not Feta really was or had been a geographical indication before it could take a stand on the question of the registration as a geographical indication was valid. The ECJ set aside the registration decision made by the Commission and mentioned that there was not taken due considerations to the fact that Feta made outside Greece was legally sold and marketed in several member states). C.f. Art. 7.4 of the Regulation. See also EC Regulation No. 1829/2002, 14 October 2002.

[538] Compare, Art. 14 No. 1.

3.2.5 The Common Agricultural Policy and Price

In addition to the quality regulations, the EU employs policies that influence the amount and price of wine produced in Europe. Since the implementation of the EU Common Wine Policy in 1970 (forming part of the Common Agricultural Policy (CAP)),[539] the EU has imposed minimum prices for EU wine, tariffs on the import of wine, and organised public intervention in wine markets to counterbalance surpluses. Surpluses were either stored or distilled into other products with heavy government financing. In addition to distillation and market intervention, the EU wine policy included measures to restrict production such as restricted planting rights[540] and vineyard grubbing-up programs.[541]

Multiple EU Regulations that apply to the wine industry have been introduced and implemented within the broader Common Agriculture Policy (CAP). Council Regulation 1493/1999[542] outlined the system of control and provided detailed guidelines as to every possible process related to winemaking. It introduced rules regarding the planting of vines;[543] oenological

[539] Regulation No 25 of 1962; Comité Européen des Entreprises Vins (CEEV), 'About the EU Wine Sector' <http://www.ceev.eu/about-the-eu-wine-sector>. See also, Treaty on the Functioning of the European Union (TFEU) 2008/C 115/01, Arts. 38 to 44; Regulation (EC) No 1308/2013; Council Regulation (EC) No 1370/2013 (Common Market Organisation (CMO)). This legal framework established at European level in the 1960 sought to maintain a balance between supply and demand in the European Community market and allow the wine sector to become competitive. See also Sübidey Togan and Bernard M Hoekman, *Turkey: Economic Reform and Accession to the European Union* (World Bank Publications, 2005) 52 (outlining that the main aim of the CMO is the achievement of income stabilization by creating market equilibrium through market intervention measures. In addition, CMO has provided support for the growth of a competitive European wine sector by means of various regulatory measures). See also Council Regulation (EC) No 1234/2007; Elisa Giuliani, Andrea Morrison and Roberta Rabellotti, *Innovation and Technological Catch-Up: The Changing Geography of Wine Production* (Edward Elgar Publishing, 2011) 35 (explaining that in 2008-2009, with the implementation of the Common Market Organization for wine, national appellation systems had to be rewritten to recognize only the Protected Designation of Origin (PDO) regions for quality wine); Anca Marinov and Carlos Brebbia, *Ecosystems and Sustainable Development IX* (WIT Press, 2013) 212 (outlining that the indication of a province of wine designations of origin and geographical indications of wine became central aspects in determining the wine quality throughout all European Union).

[540] Kohen Deconinck and Johan Swinnen, *The economics of planting rights in wine production* (AAWE Working Paper, No. 130, 2013) 3 (explaining that planting rights is a system to control European wine grape production, in which the planting of new vineyards require permission).

[541] The EU provides grubbing-up premiums to winegrowers who permanently (and voluntarily) abandon vineyards.

[542] Council Regulation (EC) No 1493/1999.

[543] Deconinck and Swinnen, above fn 519, 4. See also European Federation of Origin Wines (EFOW), *Planting rights* (22 March 2012) <www.efow.eu/press/http://www.efow.eu/press/planting-rights-commissioner-ciolos-set-up-a-high-level-grou_id_124/>.

practices and processes, market mechanisms; trade; designation and protection; and labelling requirements.[544] Other regulations include:

- Council Regulation 2392/86 (Community Vineyard Register); [545]
- Commission Regulation 2729/00 (Controls in the Wine Sector); [546]
- Commission Regulation 1227/00 (Vines classification, production inventory);[547]
- Commission Regulation 1607/00 (Quality Wines);[548]
- Commission Regulation 1622/00 (Oenological practices);[549]
- Commission Regulation 884/01 (Accompanying Documents and Records);[550] and
- Commission Regulation 753/02 (Labelling).[551]

These have been explained in detail in previous research, and so need not be covered in the present dissertation.[552] Designations of origin and geographical indications on wines are protected through separate legislation. Commission Regulation 607/2009 lays down detailed rules on protected designations of origin and geographical indications, traditional terms and labelling. Chapter II of Regulation 607/2009, for example, establishes the application procedure for a designation of origin or a GI.[553]

For Protected Designations of Origins (PDOs) and Protected Geographical Indications (PGIs) in relation to wine, Regulation (EC) No 1308/2013 applies. Each of these regulations combine the rules for PDO,[554] PGI,[555] Traditional Specialties Guaranteed (TSG)[556] and optional quality terms into

[544] See Deconinck and Swinnen, ibid.
[545] Council Regulation (EC) No 2392/1986.
[546] Commission Regulation (EC) No 2729/2000.
[547] Commission Regulation (EC) No 1227/2000.
[548] Commission Regulation (EC) No 1607/2000.
[549] Commission Regulation (EC) No 1622/2000.
[550] Commission Regulation (EC) No 884/2001.
[551] Commission Regulation (EC) No 753/2002.
[552] See Hinchliffe, above fn 58, 18-22, on file with author. See also Sarah Hinchliffe, 'Comparing Apples and Oranges' (2013) 13 *John Marshall Review of Intellectual Property Law* 999.
[553] In the context of foodstuff, see European Parliament and Council Regulation 1151/2012 on "quality schemes for agricultural products and foodstuffs", which came into force on January 3, 2013.
[554] "Protected Designation of Origin" (PDO) is defined under Regulation 1151/2012 as follows:
- Originating in a specific place, region, or in exceptional cases, a country
- A quality or characteristics of the product are essentially or exclusively due to a particular geographical environment with its inherent natural and human factors
- The production steps all take place in the defined geographical area

For example, Prosciutto di Parma (Parma ham).

one single legal instrument. Registration under the different schemes is open to third countries. Wines and spirits are covered by specific legislation and do not fall within the scope of the regulation. Regulation 1151/2012 also provides for the development of mechanisms to protect PDOs and PGIs in third countries – within the context of the World Trade Organisation Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement – or in bilateral and multilateral agreements.

Although Regulation 1151/2012 entered into force on January 3, 2013, the European Commission still needs to adopt a set of delegated acts and implementing acts to apply the provisions set out in the new regulation. Unlike New World jurisdictions such as Virginia and Victoria, the Commission maintains a formal register of PDOs and protected GIs to protect them against commercial use, imitation, or evocation.[557] Although, the Australian Grape and Wine Authority (AGWA) does maintain a federal Register of GIs.

Despite Community regulations, Member States are afforded a certain degree of freedom in establishing national legal systems in relation to the wine industry.[558] As a result, there are differences in definitions, production and distribution procedures, scope of geographical indications' protection, as well as enforcement measures.

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[555] "Protected Geographical Indication" (PGI) is defined as follows:

- Originating in a specific place, region or country
- Quality, reputation or other characteristics is essentially attributable to the geographical origin
- At least one of the production steps takes place in the defined geographical area.

[556] Traditional Specialties Guaranteed (TSG). For example: Mozzarella. This scheme applies to foodstuffs with a "traditional" character. Products are eligible for registration if the product's specific character results from a traditional production or processing method or if it is composed of raw materials or ingredients used in traditional recipes. Under Regulation 1151/2012 the time period for a product to be considered "traditional" is set to 30 years. For detailed information, see GAIN Report "The EU's TSG Quality Scheme Explained".

[557] See Council Regulation (EC) No 1234/2007 (EU marketing standards) <https://ec.europa.eu/agriculture/quality_en>; Catherine Seville, *EU Intellectual Property Law and Policy* (Edward Elgar Publishing, 2009) 302.

[558] Walter Cairns, *Introduction to European Union Law* (Cavendish Publishing Ltd, 2nd ed., 2002). Paul Craig and Grainne de Burca, *EC Law Text, Cases & Materials* (Clarendon Press, 1996). John Paterson, *Law Basics Student Study Guides: EC Law* (Sweet & Maxwell, 2002). James Penner, *Mozley & Whiteley's Law Dictionary* (2001, 12th ed., Butterworths). See e.g., Case 6/64, Costa v. ENEL, 1964 E.C.R. 585, 587 ("A Member State's obligation under the EEC Treaty . . . is legally complete and consequently capable of producing direct effects on the relations between Member States and individuals."); Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 1, 8 (holding that Article 12 of the EEC Treaty "produces direct effects and creates individual rights which national courts must protect").

3.3 France

Existing literature discussing the history of the history of French wine laws has been extensively explored and is therefore unnecessary to be rehashed in the present dissertation.[559] Save to say, there are still remnants of France's protectionist history, as demonstrated by the prohibition of the sale and consumption of wines from other regions in the South-West of France in the Middle Ages.[560]

Although, Community Law has mostly pushed such protectionist effects aside this past century.[561] Given the objectives of this dissertation to propose an optimum regulatory framework for regulating the win industry in the New World countries selected, a present account of the wine regulatory framework in France is relevant, and comprises three levels:

- EU law – already discussed;
- National laws; and
- Local regulation.

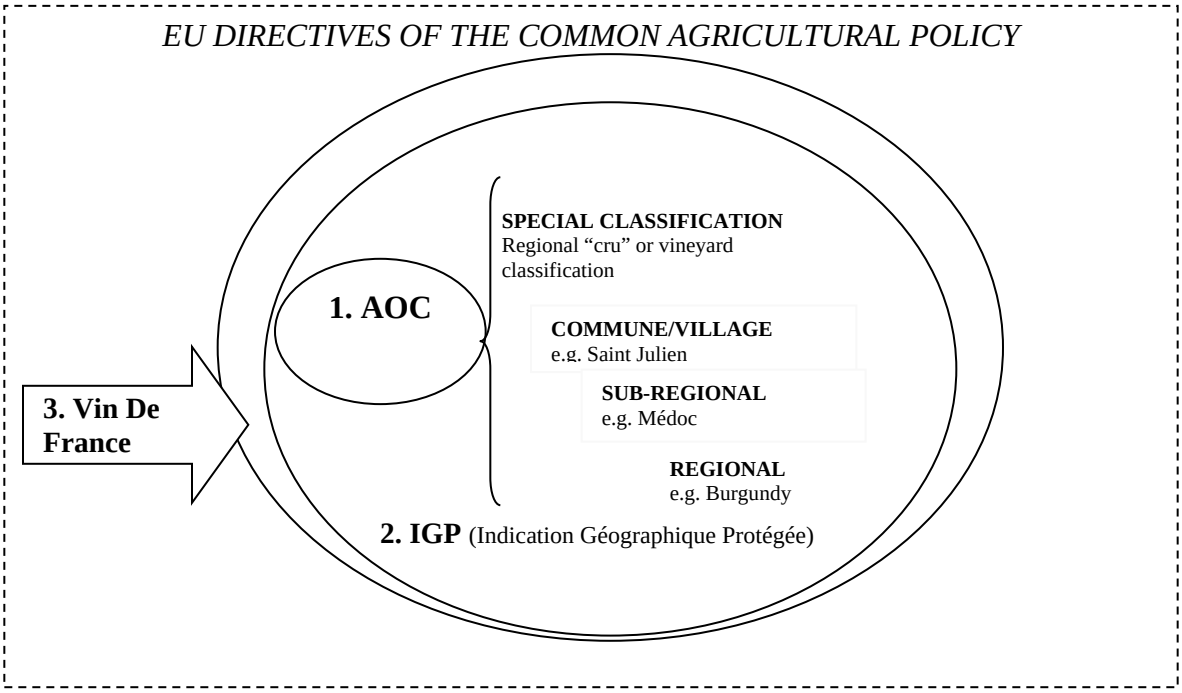
This tri-tier regulatory framework is reflected in the wine classification of French Wines (see Figure 1).

[559] Andre Richard, *De la protection des appellations d'origine en matiere vinicole* (Imprimeries Gounouilhou, 1918) 8. See also, Jean Boursiquot, 'Evolution de l'ence´pagement du vignoble francais au cours des trente dernie`res anne´es' (1990) 107 *Prog. Agriculture Viticulture* 15, 17; Christian Pomeral (ed) *The Wines and Winelands of France, Geological Journeys* Editions (GRGM, 1989). See generally, Oz Clarke, *Wine Atlas—Wines and Wine Regions of the World* (1995, Little-Brown).

[560] Ibid. See also William van Caenegem *Registered Geographical Indications Between Intellectual Property and Rural Policy—Part II* (2003) 2-3 (explaining that right up until the time of the French Revolution of 1789, the Bordeaux region also benefitted from two additional privileges: (a) *the privilège de la descente; and (b) the privilège de la barrique.* Van Caenegem goes onto explain that the latter is said to have been akin to a mark of origin, and thus an early manifestation of the use of such marks to prevent confusion between wines from different regions. Nonetheless, both actually had protectionist motives and effects).

[561] See section 3.1.1, above.

Figure 1 Classification Requirements for Wines (France)



National IP laws of France recognise that AOC comprise special classification, reference to a commune, sub-regional and regional origin of wine. The AOC level is encompassed within the IGP,[562] which forms part of a broader national reference to 'Vin De France'. Domestic laws and legal regimes in this context are subject to operation of the Common Agricultural Policy (CAP). Jurisdictions such as Victoria, by comparison, do not have this tri-level. Instead, reference to GIs reflects a hollow IGP level, comprising regional classifications.[563]

The Intellectual Property Code[564] recognises a parallel system of trade mark registration alongside geographical indications (GIs) (as defined in Article L. 721-2).[565] Title II of the Code sets out governing rules of GIs, and the system of Appellations of Origin (AOC). Article L721-1 (translated) states that:

[562] Code de la propriété intellectuelle (version consolidée au 17 mars 2017), Art. L. 721-2.
[563] See section 4.2.3.
[564] Code de la propriété intellectuelle (version consolidée au 17 mars 2017).
[565] Ibid, Art. R714-3 (providing that: "The indications referred to in Article R. 714-2 shall be inscribed on the initiative of the National Institute of Industrial Property or, in the case of a judicial decision, at the request of the Registrar or on Request of one of the parties. Only final judicial decisions may be entered in the National Register of Trademarks.).

> "The rules relating to the determination of appellations of origin are laid down in Article L. 115-1 of the Consumer Code reproduced hereafter: Article L. 115-1: Constitutes an appellation of origin for the denomination of origin, A country, region or locality used to designate a product originating in it and whose quality or characteristics are due to the geographical environment, including natural factors and human factors."

Most countries, including France, tend to follow the general principle that the first in time to use or register the trade mark or GI has priority.[566] For example, Article L713-6 (translated) states that:

> "The registration of a trade mark shall not prevent the use of the same sign or a similar sign such as:
> (A) Legal name, trade name or sign, where such use is either prior to registration or A third party in good faith using his or her surname;
> (B) Reference to indicate the destination of a product or service, in particular as an accessory or a spare part, provided there is no confusion in origin;
> (C) Geographical indication as defined in Article L. 721-2, except where the mark, having regard to its reputation, reputation and duration of use, The exclusive origin of the reputation or knowledge by the consumer of the product for which a geographical indication is sought.
> However, if such use infringes his rights, the holder of the registration may request that it be limited or prohibited."

In the event of purported dispute of use of GIs, a matter may be referred to the ECJ for determination of infringement.[567] The current French wine regulatory framework was greatly influenced by the decision made in 1935, with the introduction of Appellation d'Origine Contrôlée.[568] An AOC, which is overseen by the Institut National des Appellations d'Origine (INAO) (organisation that oversees the AOC program) – an organisation governed under Arrêté

[566] Compare, e.g. Steven Stern, The Overlap between Geographical Indications and Trade Marks in Australia 2001 2 *Melbourne Journal of International Law* 1, 5 and 17 (observing that priority in time is not the approach being adopted in Australia, but one can only wonder whether the GIC will eventually turn down that path. If so, its attempts to be even-handed, rather than to serve any inflexible rule, will prove very interesting. It may be that, in due course, if the 'first in time' rule achieves eventual supremacy in Australia, it will be tempered or qualified by the results of these experiences. See further, *Rothbury Wines Pty Ltd v Tyrell* [2008] ATMOGI 1 (indicating that the Deputy Registrar of Trade Marks (as a delegate of the Registrar of Trade Marks) will look beyond factors going to the inconvenience of the parties or to the "first in time" principle).

[567] See Arts L722-2, L722-11.

[568] Many authors analysed in detail state intervention in the French wine market and the creation of twentieth-century French regional appellations. See, e.g. Leo Loubère, *The Wine Revolution in France: The Twentieth Century* (Princeton University Press, 1978) 19; James Simpson, *Creating Wine: The Emergence of a World Industry, 1840-1914* (Princeton University Press, 2011).

du 17 août 2016 relatif à la composition des comités régionaux vins et eaux-de-vie de l'Institut national de l'origine et de la qualité[569] - may be described as:

> "…[identif[ying]*sic* a…processed agricultural product which draws its authenticity and typicity from its geographical origin…[It] guarantees a link between the product and terroir…as well as particular disciplines self-imposed by the people in order to get the best out of the land."[570]

By the mid-nineteenth century, viticulture played a major role in France's economic development. It created income, wealth, and employment for many citizens. However, the subsequent appearance of Phylloxera had dramatic consequences and destroyed many vineyards. Phylloxera, a parasite that lives on the vines' root systems and eventually kills the plant, originated in North America and was introduced to Europe in 1863. Unlike American native vine species (e.g., Vitis riparia or Vitis rupestris), European vine species (Vitis vinifera) are not resistant to it. One-third of the total vine area was destroyed, and wine production fell from 85 million hl in 1875 to 23 million hl in 1889—a 73% decrease.[571] While potential cures for Phylloxera were tested, France became a wine-importing country. Since the French government wanted to prevent consumers from turning to other alcoholic beverages, table wines were imported from Spain, Italy, and Algeria (which was French territory from 1830 to 1962). Algerian wine development played a key role in French regulations.[572] The area planted in Algeria increased from 20,000 ha in 1880 to 150,000 ha in 1900, and exports to France grew to 3.5 million hl in 1897. French imports of wine from all sources (not limited to Algeria), increased from 0.1 million hl in 1870 to 12 million hl in 1888.[573]

However, by the beginning of the twentieth century, French vineyards had gradually been reconstructed and production recovered – thanks to the planting of hybrid grape varieties and the use of grafting.[574] The first solution—hybrids—was the crossing-breeding of two or more varieties of

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[569] In 1947, the institution was renamed *Institut National des Appellations d'Origine,* INAO (National Institute for Appellations of Origin) and, in 2007, *Institut National de l'Origine et de la Qualité* (National Institute for Origin and Quality), keeping its acronym INAO: See NOR: AGRT1617107A ELI (September 2016) <https://www.legifrance.gouv.fr>.
[570] Richard Hosking, *Authenticity in the Kitchen: Proceedings of the Oxford Symposium on Food and Cookery 2005* (Oxford Symposium, 2006) 92.
[571] Michel Augé-Laribé, *La Politique Agricole de la France de 1880 à 1940* (Presses universitaires de France, 1950) 27.
[572] Meloni and Swinnen above fn 519, 13.
[114] Above fn 545, 24-6; Hebert Isnard, 'La Viticulture Nord-Africaine' in *Annuaire de l'Afrique du Nord-1865* (1966, CNRS) Vol. 4.
[574] Plant-breeder rights are not discussed in this dissertation.

different vine species.[575] The second solution—grafting—consisted of inserting European vines on to the roots of the Phylloxera-resistant American vine species.[576] The solutions to Phylloxera led, however, to two new problems. First, French domestic production recovered and cheap foreign wines now competed with French wines, thus leading to lower prices. Second, as a reaction to low prices two types of quality problems became common: imitations of brand-name wines to capture higher-value markets and adulteration to compete with cheap wine imports. Examples of imitations were false 'Burgundy wines' or 'Bordeaux wines,' labelled and sold as Burgundy or Bordeaux but produced in other parts of France. Examples of wine adulteration include using wine by-products at the maximum capacity (e.g., by adding water and sugar to grape skins, the piquettes), producing wines from dried grapes instead of fresh grapes, mixing Spanish or Algerian wines with French table wines in order to increase the alcoholic content, or adding plaster or colouring additives (e.g., sulfuric or muriatic acids) in order to correct flawed wines.[577]

The French government introduced a series of laws aimed at restricting wine supply and regulating quality. An 1889 law first defined wine as a beverage made from the fermented juice of grapes, thereby excluding wines made from dried grapes.[578] A 1905 law aimed at eliminating fraud in wine characteristics and their origins. This and other laws also tried to regulate 'quality' by introducing an explicit link between the "wine quality," its production region (the terroir), and the traditional way of producing wine. In this way, the regional boundaries of Bordeaux, Cognac, Armagnac, and Champagne wines were established between 1908 and 1912, and these regional boundaries were referred to as 'appellations.

In 1919, a new law specified that if an appellation was used by unauthorised producers, legal proceedings could be initiated against its use. Later, the restrictions grew further: a 1927 law placed restrictions on grape varieties and methods of viticulture used for the appellation wine.[579] Not

[575] Above fn 549, 4 (Hybrids were the result of genetic crosses either between American vine species ("American direct- production hybrids") or between European and American vine species ("French hybrids")).
[576] George Gale, 'Saving the Vine from Phylloxera: A Never-ending Battle' in Merton Sander and Roger Pinder (eds) *Wine: A Scientific Exploration* (2003 crc Press) 81–4; Harry Paul, *Science, Vine and Wine in Modern France* (1996, Cambridge University Press) 21.
[577] See Stern above fn 549, 21; Alessandro Stanziani, 'Wine Reputation and Quality Controls: The Origin of the AOCs in 19th Century France' (2004) 18(2) *European Journal of Law and Economics* 149, 152.
[578] Jules Milhau, 'L'avenir de la viticulture française (1953) 4(5) *Revue économique* 700, 714-5.
[579] See Loubère above fn 547, 23 (outlining that the 1927 law regulated the varieties of grape allowed for specific Appellation of Origin – for instance Champagne wine producers could only use Pinot Noir, Pinot Meunier or Chardonnay – and required that wines coming from hybrids could not in any case receive an Appellation).

surprisingly, these regulations were heavily supported by representatives of the appellation regions who held key positions in parliament. Finally, in 1935, a law created the Appellations d'Origine Contrôlées (AOC) — which formed the basis for the later EU quality regimes. This law combined several of the earlier regulations, including that it restricted production not only to specific regions (through areas' delimitation), also to specific production criteria such as grape variety, minimum alcohol content, and maximum vineyard yields (thus, adding "controlled" to the "appellation of origin" concept). The Comité National des Appellations d'Origine (i.e. National Committee for Appellations of Origin), a government branch established to administer the AOC process for "high-quality" wines, was established.[580]

Somewhat paradoxically, instead of reducing the number of appellations, the 1935 system encouraged the creation of more AOC regions in France.[581] In 1931, the Statut Viticole tightly regulated French table wines while the AOC wines were exempted from it. This induced many table wines producers to ask for an upgrading to the higher wine category. The share of appellation wines production increased from 8% in the 1920s to 16% in the 1930s and to 50% in the 2000s.[582]As we have seen the system was introduced to prevent unscrupulous producers from using wine names such as Champagne, Bordeaux and Burgundy to sell wines that may have been imported or made using wines from other regions or were made without following the highest winemaking standards.[583]

Initially, the AOC label – backed by the government legislation – was a means of protecting a product from fraudulent copying.[584] Gradually, however, it evolved into a label that details not only the product's identity but also the conditions of production.[585] Nowadays, AOC is considered a prestigious system, which is difficult to follow because of the strict rules and regulations. To earn AOC status, a product must have not only a specific place of origin, but also distinguishing characteristics that reflect unique methods of production.[586] For the past decades, both France and EU have introduced new requirements to complement AOC system and guarantee regional origins in

[580] James Simpson, *Creating Wine: The Emergence of a World Industry, 1840-1914* (Princeton University Press, Princeton, 2011); Allessandro Stanziani, 'Wine Reputation and Quality Controls: The Origin of the AOCs in 19th Century France' (2004) 18(2) *European Journal of Law and Economics* 149, 157.
[581] See Stanziani, ibid, 159.
[582] Josef Capus, *L'évolution de Législation sur les Appellations d' Origine - Genèse des Appellations Contrôlées*. Institut National des Appellations d'Origine (1947) <http://www.inao.gouv.fr >.
[583] See ibid.
[584] Edward Hyams, *Dionysus: A social history of the wine vine* (Thames & Hudson, 1965) 4-5.
[585] José Bové and François Dufour, *The World is Not for Sale: Farmers Against Junk Food* (Verso, 2002) 141.
[586] Anne Willan, *The Country Cooking of France* (Chronicle Books, 2007) 111.

a more comprehensive way. On a European level, this appellation system has been supported by the Commission Regulation (EC) No. 753/2002,[587] which laid down detailed rules for the description, designation, presentation, and protection of wine products in all member states.[588] In this way, in stark comparison to the US approach, European Union GIs enjoy a double layer of protection, within the EU-wide system and domestic laws in individual states protecting the rights of individual wine producers.[589]

According to the INAO classification, all wines produced in France can be divided into four distinct groups, such as Vins d 'Appellation d'Origine Contrôlée (AOC wines), Vin Délimités de Qualité Supérieure (VDQS wines), Vins de Pays (Country wines), and Vins de Table (Table wines). AOC wines are generally considered as being the highest quality wines in France, as there are stringent regulations governing where, how, and under what conditions they are grown, fermented, and bottled.[590] VDQS wines come from AOC regions, and they are regulated quite similarly but the range of grapes that can be used is wider and the degrees of alcohol sometimes lower.[591] Following the new EU wine regulations, recently, most VDQS regions have been upgraded to the AOC category to simplify the appellation system.[592]

Furthermore, Vins de Pays are wines grown outside AOC regions, where more diverse grape varieties and higher yields are allowed. These wines are controlled primarily for the source of the grapes and also for the amount that can be produced per hectare. Vins de Pays are, in their turn, divided into three levels based on the territorial principle, and there are wines classified in terms of regions, departments, and zones.[593] Finally, Vins de Table is the lowest official category of wine recognised by the French government. These wines may come from any part of France, and they are usually blends that are not assigned a vintage.[594] Production of these wines has risen significantly during the past decade, which is associated with a partial relaxation of the wine law.[595]

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[587] Commission Regulation (EC) No 753/2002.
[588] Above fn 565, 138.
[589] Tim Jay and Madeline Taylor, 'A Case of Champagne: A Study of Geographical Indications', *Corporate Governance eJournal* (15 July 2013) <http://epublications.bond.edu.au/>.
[590] Nicola Williams and Oliver Berry, *Discover France* (Lonely Planet, 2010) 366.
[591] Helen Gillespie-Peck, *Winewoman@Bergerac* (Melrose Press, 2005) 237.
[592] Ronald Jackson, *Wine Science: Principles and Applications* (Elsevier, 2014) 61, 153.
[593] Sudhir Andrews, *Textbook Of Food & Beverage Management* (Tata McGraw-Hill Education, 2007) 210.
[594] See Ian Blackburn and Allison Levine, *The Learning Annexpresents The Pleasure of Wine* (Wiley, 2004) 140.
[595] Brian K Julyan, *Sales and Service for the Wine Professional* (Cengage Learning EMEA, 2008) 58.

It is important not to overgeneralise France's system of appellations. On top of AOC, VDQS, Vins de Pays, and Vins de Table designations, many French regions maintain classifications of their own. Bordeaux's system of *crus*, for example, established in 1855, ranks wines according to its own parameters.[596] Moreover, some large AOC territories have smaller zones, differing in the wine production techniques, quality, climate, etc. Thus, AOC name can refer to a region, district, sub-district, village or commune, or even a specific vineyard.[597]

Leaving registered trade-marks law issues aside, French law relating to GIs in general has three levels of regulation; one general, aimed at preventing misleading conduct in relation to geographical names, and two relating to the registration of geographical indications with varying levels of quality significance. As a general principle, geographical indications can be used freely,[598] subject to the general prohibition on the use of false indications of origin, by virtue of Section L 217-6 of the *Code de la Consommation*. Any person who attaches or knowingly uses any indication on or in relation to any goods, in a manner that causes others to believe that they have an origin other than their true origin, is in breach of the Code. However, the law expressly provides that if the true origin is clearly marked on the product, no liability will ensue, unless the false indication of origin is a protected (i.e. registered) regional designation.[599] Agricultural produce and foodstuffs, including wines, are far more prescriptively regulated than products in general. As Olszak puts it:

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[596] Blackburn and Levine, above fn 573, 140, 196.

[597] Stephen Tanzer, *Food & Wine Magazine's Official Wine Guide 1999* (Food & Wine Books, 1998) 9.

[598] The current system of protection of GIs in France is well described in Norbert Olszak, *Droit des Appellations d'Origine* in *Le droit francais des indications Geographiques* (2001) Ch 3. For a recent precis of the protection of GIs in the broad sense, see also Peter Pollaud-Dulian, *Droit de la propriete industrielle* (Montchrestien, 1999). See also Olszak ibid, 69 ("Despite the usual desire for precision in law, the terminology in our area of study [i.e. that of GIs in general] unfortunately remains fluid.")

[599] Article L 115-2 to 4C of the *Code de la Consommation* (does provide for an administrative procedure for the registration of designations of origin. A prescribed process of public inquiry and consultation with affected industry groups results in a decree of the *Conseil d'Etat*. Only very few registrations have been granted by this method, and now it is only relevant for industrial products, as procedures for agricultural produce and foodstuffs are now integrated in the regular procedure for PDOS (or AOPs, to use the French acronym), AOCs for wines, and PGIs (or IGPS), paralleling the European Union system). The administrative procedure is an alternative to the longer established judicial procedure, finding its origins in the Law of 6 May 1919 and now codified in Article L 115-8 to L 115-15 of the *Code de la Consommation.* This procedure allows conflicts concerning the legitimate use of denominations to be referred to a court, which can resolve the conflict and determine for the future the delimitation of an area and the characteristics of the product concerned. This process was previously mainly used in relation to wine, and only rarely in relation to industrial products. According to Olszak, above fn 577, 15, it was last used in 1986.

> "… les produits agricoles et les denrées alimentaires font l'objet d'une politique particulièrement detaillee et complexe, en raison de l'importance évidente des terroirs dans leur cas."[600]

This level of regulation is so extensive and pervasive that Olszak argues that the exercise of the theoretical right/freedom to employ simple indications of provenance is now liable, in almost every case, to fall foul of the protection afforded to AOCs and PGls (the French acronym is IGP). In other words, the system of registered GIs has progressively become more predominant and virtually displaced reliance on unfair competition torts.

In 2006, however, EU began a reform aimed at replacing ACO classification by a simpler European-wide descriptive model to make the whole system of wine labelling easier to understand. This reform implies that gradually, Vin de France, Indication Géographique Protégée (IGP), and Appellation d'Origine Protégée (AOP) would replace all four categories.[601] Furthermore, guided by the existing wine legislation, individual wine producers often determine their own quality controls, which may be stricter than the AOC, thus creating flagship labels with the highest-quality wine.[602] This legislative framework, although being extremely strict, allows for a certain degree of freedom in creating unique wines and managing business creatively on a local level.[603] An illustration of the French wine law framework may be seen in Diagram 1.

In the realm of taxation law, the French wine industry poses benefits for the industry compared to Victoria. As it has been already mentioned, wine tax in France is ten times lower than that on beer, meaning that a 750ml bottle of wine is taxed at 2.7 cents, while the same quantity of beer is taxed at 27 cents.[604] In 2012, the French government passed a law that added 480 million euros in new taxes on beer, while leaving wine industry intact, which once again proved how powerful wine producers are in this country.[605] However, the situation may aggravate in future, as the health lobby actively supports tax reforms that would affect the general consumption of alcohol in

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[600] Olszak, above fn 577, 17.
[601] Percy H Dougherty, *The Geography of Wine: Regions, Terroir and Techniques* (Springer Science & Business Media, 2012) 62.
[602] Tyler Colman, *Wine Politics: How Governments, Environmentalists, Mobsters, and Critics Influence the Wines We Drink* (University of California Press, 2008) 43.
[603] Marion Demossier, 'Beyond Terroir: Territorial Construction, Hegemonic Discourses, and French Wine Culture' (2011) 17 *Journal of the Royal Anthropological Institute* 685, 692-4.
[604] Directives 92/83/EC and 92/84/EC.
[605] Francois de Beaupuy and Caroline Connan, 'Beer Makers Cry Foul on French Levies as Wine Gets a Pass: Taxes', *Bloomberg* (6 December 2012) <http://www.bloomberg.com/>.

the country.[606] Because wine is the most consumed alcohol in France, accounting for approximately 59% of alcohol consumption,[607] these changes may influence considerably the industry's development in the near future.[608] A nexus between consumption and production of French wines exists, but also that the consumption of New World wines increased between 2007 and 2011.

While wine law regulates winemaking and protects wine producers at a national level, there are many local organizations and cooperatives that assist vineries and help maintain a high status (or reputation) of the French wine industry. Notably, many French winegrowers are members of cooperatives, which allow the efficient family vineyards coexist alongside large, capital-intensive businesses.[609] Cooperatives are mutual organizations allowing each member who sells grapes having an equal share of, and vote in, the enterprise. The cooperative, in its turn, is obliged to buy grapes from members.[610] Cooperative members and caves cooperatives, which are an effective institutional reaction to the globalization of the market, today own more than half the vineyard area in France and they produce more than half of all French wine.[611] Experts believe that Southern regions, for example, have become celebrated winemaking locations dominating the national market largely due to cooperatives that successfully operate there.[612] At a national level, cooperatives are supported by the representative organization French Confederacy of wine co-operatives (CCVF), created in 1932.[613]

Leaving aside multiple cooperatives, there are many organizations in France that help winemakers on the local and national levels. Intense lobbying occurs at the UE level, where the Office national interprofessionnel des vins (ONIVINS), Confédération Nationale des Producteurs de Vins et Eaux-De-Vie de Vin á Appellations d'Origine Contrôlée (CNAOC), and Assembly of

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606 Marion Demossier, *Wine Drinking Culture in France: A National Myth or a Modern Passion?* (University of Wales Press, 2010).
607 Jane Anson, 'French Senator Seeks Support for Wine Tax Increase', *Decanter* (14 May 2013) <http://www.decanter.com/wine-news/french-senator-seeks-support-for-wine-tax-increase-19199/#KlDz99UMYH4WioTp.99>.
608 Ibid.
609 James Simpson, *Creating Wine: The Emergence of a World Industry, 1840-1914* (Princeton University Press, 2011) 267.
610 Steve Charters, Wine and Society (Routledge, 2006) 9. See also Christian G. E. Schiller, 'Wine Consumption by Country: Total and Per Capita' (1 February 2013) <http://schiller-wine.blogspot.com/2013/02/wine-consumption-by-country-total-and.html>.
611 Mike Veseth, *Wine Wars: The Curse of the Blue Nun, the Miracle of Two Buck Chuck, and the Revenge of the Terroirists* (Rowman & Littlefield Publishers, 2011) 173.
612 Rohan Jordan, Pietro Zidda and Larry Lockshin, 'Behind the Australian Wine Industry's Success: Does Environment Matter?' (2004) 19(1) *International Journal of Wine Business Research* 14, 17-8.
613 Ibid, 18.

European Wine Regions (AREV) all play an important role in ensuring international recognition of designation of origin and traditional winemaking practices.[614] On a regional level, such organizations as the Interprofession des Vins du Sud-Ouest (IVSO), which is the official wine trade organization of the Southwest region bringing together trading companies, cooperatives, and wine producers, promote the interests of the local winemakers and provide assistance to small vineyards.[615]

France precipitated wine legislation adopted in many countries of the world. First, in 1963, some countries in the Common Market aligned their laws concerning wine growing and production with those of France,[616] thus agreeing on the common categories and quality of produced wine.[617] Second, France is the first state to establish a national set of Appellation Control laws in 1935, which became the model for most equivalent legislation.[618] As France was considered a leading wine nation in the world, the European Economic Community (EEC) broadly adopted a form of the French appellation system across all of its wine-producing member states.[619] The system influenced wine regulation in France's Southern European neighbours, went in to shape the EU's wine labelling system, and served as a foil to the geographical demarcation of wine regions in the New World.[620] The process of adjustment, however, is not simple, as some actors have been claiming that AOC is incompatible with the creation of the unified European market, as it limits competition and innovation. France, in its turn, maintains that AOC is essential for creating EU regulation to limit the use of geographical names that qualify specific products.[621] For decades, European wine regulations have provoked controversy in France, one of the leading wine producers in the world.[622] In many regions, disputes have intensified, as distinct winemaking tradition could not stand the competition against fast developing New World exports. France, therefore, with its producers valuing the individual taste of each wine as the product of a specific location, has been actively promoting its AOC system that protects winemakers and their intellectual property. In this way, one can note that France and EU's legal systems interinfluence each other in the sphere of wine law. In addition,

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[614] Jerry Patchell, *The Territorial Organization of Variety: Cooperation and Competition in Bordeaux, Napa and Chianti Classico* (Ashgate, 2013) 32.
[615] Business Wire, 'South West France Gets Back to Its Roots' (10 June 2010) <http://www.businesswire.com/>
[616] Ibid.
[617] Joseph LaVilla, *The Wine, Beer, and Spirits Handbook: A Guide to Styles and Service* (Wiley, 2009).
[618] Jackson, above fn 571, 61, 158.
[619] Steve Charters, *Wine and Society* (Routledge 2006) 12-3.
[620] Dev Gangjee, *Relocating the Law of Geographical Indications* (Cambridge University Press, 2012) 79.
[621] Benoit Daviron and Stefano Ponte, *The Coffee Paradox: Global Markets, Commodity Trade and the Elusive Promise of Development* (Zed Books, 2005) 39.
[622] Stephen Castle, 'When Is a Wine Not a Wine? When European Regulations Say It's Not', *The New York Times* (29 May 2012) <http://www.nytimes.com>.

evidence clearly demonstrate that although being complex in structure and requirements, French legislative framework concerning wine is advantageous in the way it respects identity of local producers and supports even the smallest businesses through local and national advocacy and interprofessional cooperation.

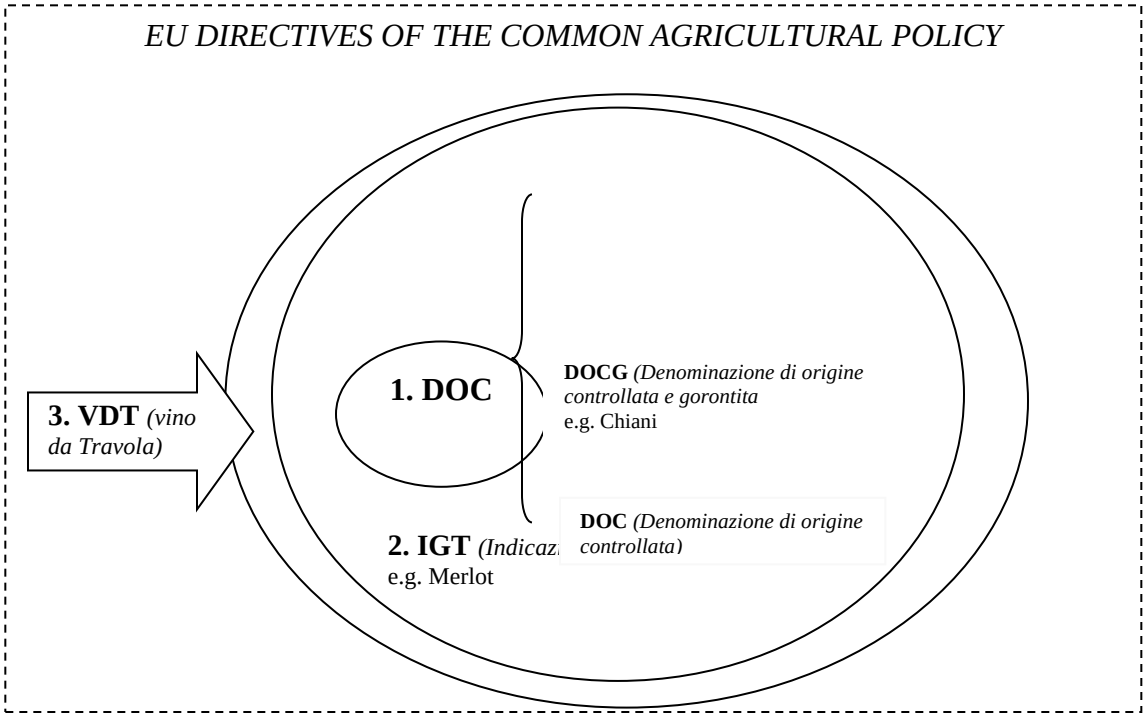
3.4 Italy

Italian history of viniculture is no less extraordinary than that of France. Unique approaches to winemaking in Italy remained unchanged since the Roman Empire for centuries to follow. Wine-growing techniques and first-class wine were further exported to other parts of the world, making Italy the 'motherland' of wine.[623] As such, this vinicultural heritage needed strong legislative protection in the face of global integration, and this was the main rationale behind the development of the wine law in Italy.

Although, the Italian wine law was introduced not only for the preservation of viniculture, but also because the quality of Italian wines in the 19th and 20th centuries had decreased considerably.[624] More Italian producers had readily accepted new cost-effective and faster techniques to produce wine. Also, the Italian government sought to ensure that the wine industry expands to meet increasing demand both in Italy and abroad.[625] However, a coherent regulatory framework was also required to secure Italy's position in the global wine market. As a result, embracing the French interventionist approach seemed a rational thing to do. Thus, Italy also established a rigorously controlled appellation system that imposed strict rules governing yields per acre, vineyard quality, and aging practices.[626]

[623] Ian Spencer Hornsey, *The Chemistry and Biology of Winemaking* (Royal Society of Chemistry, 2007) 35.
[624]
[625] Jeffrey A Munsie, 'A Brief History of the International Regulation of Wine Production' (2002) Harvard Law School, available at: https://dash.harvard.edu/bitstream/handle/1/8944668/Munsie.html?sequence=2 (15 June 2016) 12.
[626] Gino Moliterno, *Encyclopedia of Contemporary Italian Culture* (Taylor & Francis, 2000) 898.

Figure 2 Classification Requirements for Wines (Italy)



GI wines in Italy are regulated by Governmental Legislation No. 164/92[627] and by Ministerial Decree No. 256/97.[628] There are three categories, namely Controlled and Guaranteed Denomination of Origin (DOCG),[629] Controlled Denomination of Origin (DOC),[630] and Typical Geographical Indication (IGT).[631] This system does not only cater for the needs of the European Common Market, but also protects the interests of consortia of producers, who have attempted to designate controlled areas in the past with little success. Because of the present framework of the DOC system, most of Italy's wineries can enjoy a competitive advantage when it comes to the production and distribution of high-quality wines.

[627] Governmental Legislation 164/92.
[628] Ministerial Decree 256/97.
[629] Ibid.
[630] Ibid.
[631] Meloni and Swinnen, above fn 495, 8. See also section 5.6.2.

As a member of the EU, Italy adopts wine regulations at the EU level.[632] Although, there are some peculiarities in Italy's legislative framework. While the Tutela delle denominazioni di origine e delle indicazioni geografiche dei vini[633] (translated as Protection of Origin Names and Geographical Indications of Wines) implements most of the Community Law, it emphasis on Consortiums – what may be otherwise described as a private actor – is unique.

The request for a higher quality wine product (very similar to the France, but unlike the French IP Code, Chapter VIII of the Tutela delle denominazioni di origine e delle indicazioni geografiche dei vini,[634] is achieved through the role of Consortia. Chapter VII, Art. 17 states that:

> **Art. 17 Consortia of protection**
> For each designation of origin protected or indication geographic protected can be constituted and recognized by the Ministry of policies agricultural food and forestry consortium of protection…"

A Consortium represents a voluntary association and, in the case of Italy, is regulated under Art. 2602 of the Italian Civil Code. It is promoted by the economic actors involved in individual sectors with the specific function of protecting the agricultural PDO and PGI production (PDO and PGI).[635] The Italian wine consortiums are Inter-Professional organisations, designated to represent the three categories of the wine industry: growers, vintners, and bottlers of each specific Denomination of Origin. Pursuant to the Common Market Organisation (CMO) Reg. 1308/2013, Consortiums manage supply so as to safeguard and protect the quantity and quality of wine production. Consortia are internally organised into different departments to perform its official tasks, comprising: safeguarding the denomination, providing a variety of services to its members, explore potential export markets, and valorising the brand and the place of origin.[636]

The Italian Legislative Decree no. 61/2010 replaced the former no. 164/1992 law, and provides guidelines for the quality wine production, also regulates the objectives and administrative

[632] Council Regulation (EC) No 1493/1999.
[633] Decreto Legisltativo 8 aprile 2010, Tutela delle denominazioni di origine e delle indicazioni geografiche dei vini in attuazione dell'articolo (15 della legge, 7 luglio 2009) at [8].
[634] Ibid.
[635] Zeffiro Ciuffoletti, Terre, Uve e vini. La Denominazione dei Vini di Qualità nella Toscana Medicea e il Contesto Europeo. Edizioni Polistampa (2016). See also D Gaeta and P Corsinovi, Economics, Governance, and Politics in the Wine Market. European Union Development (Palgrave Macmillan, New York, 2014).
[636] Gori and Sottini, above fn 87, 64.

functions of the consortium. Tutelary consortiums (representing approximately 65% of the denomination and 40% of its wineries) are therefore permitted to manage all oversight,[637] protection and valorisation of the place of the origin and their collective brand. Wine consortia are among the beneficiaries of the EU finance for the promotion of quality wines in third countries[638] and their activities focusing on the development promotional campaigns, trade fairs as a club-based organization with a strong internal governance structure.

Most of the Italian Consortia are characterised by formal institutions, contracts, branch agreements and regulations.[639] The governance depends on repeated, frequent and uninterrupted negotiations between categories of 'players '(producers) with partially convergent interests despite their very considerable economic and social differences. Their effectiveness is the result of a succession of steps towards the construction of complex systems to allow the negotiation of multilateral agreements that regulate the internal mechanisms of Denomination (like to supply control instruments or/and advertising choices).

> "**Chapter VII:**
> Provisions on designation, presentation and protection of wines with denomination offorigin and to display geographical
>
> **Art. 18 Designation, presentation and protection of PDO and IGP wines**
> 1. For the designation, presentation and protection of appellations of origin and theindications geographical the produced wine are directly applicableto the specific provisions laid down by law Community, as well as' the provisions of national implementation…"

In ancient times, especially during the Roman Empire, Italy was considered the centre of winemaking, and for hundreds of years, no product has ever been more closely identified with this country.[640] However, although the wine is produced nearly in every region, it was not until late in the 20th century that Italy finally introduced first comprehensive wine law designed to protect winemakers and promote the industry at a national and international levels. With the gradual

[637] See also Davide Greta, Jon Hanfi and Paola Corsinovi, 'The history of wine consortia from "Arte del Vinattieri" to current legislation' Vineyard Data Quantification Survey, Paper Presented (Bologna, 1 September 2017).
[638] Ibid.
[639] Above fn 615, 65.
[640] Rosemarie Panio, *Celebrate Italy...: And Its Culture of Food and Wines* (DLite Press, 2012) 5.

development of the wine legislation, Italian wines gained a reputation for products of the premier international quality.

In 1960, there was a renaissance of the modern Italian regional wines.[641] In 1963, Italy introduced its first set of national wine laws, patterned after the French AOC rules, in order to improve the image of Italian wines and occupy a higher position in the international market.[642] Presidential Decree № 930/1963 contained the relevant norms, which constituted the first legislative framework for the recognition and protection of designations of origin for Italian wines. Provisions of that Decree were implemented through the Presidential Decree 22 November 1965, which established the National Committee for the Protection of Designation of Origin of Wines. These regulations, enforced by the Italian Ministry of Agriculture, governed yields, grapes that can be used for specific wines, viticultural practices, and alcohol levels.[643] In brief, the new law introduced three categories of wines including Denominazione di Origine Controllata (DOC), Denominazione di Origine Controllata e Garantita (DOCG), and Vino da Tavola, each having strict requirements concerning vine types, grapes and their processing, aging, bottling, production techniques, and labelling.[644]

Despite an evident desire to introduce the clear wine policy that could give a boost to the industry, the 1963 law proved to be a curse for Italian wine producers. Although regulations improved standards and increased the recognition of Italian wines, they also created mass confusion and fostered poor branding, leaving the quality uneven.[645] Many inconsistencies in the law that led to lower quality wines being distinguished above premium products sparked criticism across the country. Over the course of time, geographical restrictions became too generous. In particular, hundreds of DOC zones were established, leading to consumer confusion. Less quality wines watered down even the DOCG classification, which was designed to include only the leading Italian wines. Moreover, rigid rules often placed too much emphasis on the safeguarding traditions at the expense of creativity, innovation, and modernization.[646]

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[641] Ibid.
[642] Ann B Matasar, *Women of Wine: The Rise of Women in the Global Wine Industry* (University of California Press, 2006) 59.
[643] Presidential Decree № 930/1963.
[644] Ibid.
[645] Matasar, above fn 187, 23.
[646] Ibid.

Criticism of the system amplified in the 1970s and 1980s, and much has been written about the dreadful wine laws at that time.[647] Experts unanimously claimed that the Italian regulatory framework promoted quantity over quality, and gradually led to the destruction of the good name of Italian wines. Many of Italy's best wine producers resorted to the Vino da Tavola category, which allowed them to produce high-quality experimental wines that simply did not meet the rigid requirements of the DOC legislation.[648] This has led to many paradoxical situations when poor quality wines received the highest categories while the most prominent products could not bear any geographical designation other than the country itself.[649] For example, one of the Italy's most celebrated wine, the Tuscan Cabernet Sauvignon, was classified as Vino da Tavola until 1994.[650] Similarly, famous Tuscan wines Sassicaia and Tignanello were sold as simple Vino da Tavola.

In 1992, the EU began updating basic wine laws, which all member states were required to follow. That same year, the Italians overhauled their wine legislation as a direct result of the adoption of European-wide wine regulations.[651] In particular, the Goria's Law (Law 164),[652] named after the Italian Minister Giovanni Goria, represented an attempt at reforming the existing classification system. This law established the category of Indicazione Geografica Tipica (IGT), a more permissive regulation, offering wine producers wider freedoms. Higher legal yield limits and the possibility of sourcing grapes or wines from large areas enabled wines labelled IGT to cost less that DOC wines.[653] The central feature of the Goria's Law concerned DOC, as it presented precise rules prescribing the exact geographical area, ageing techniques, and basic chemical parameters, which helped alleviate many intra-regional inconsistencies[654] Goria' Law is still being put into effect, meaning that lists of DOC wines are constantly updated. This is in line with the French system, in which AOCs are regularly monitored and adapted.

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[647] Richard L Elia, *Quarterly Review of Wines* (2011).
[648] Paola Corsinovi1 and Davide Gaeta, 'Managing the Quality Wines beyond Policies and Business Strategies' (2015) 4 *Review of Contemporary Business Research* 1, 24-31.
[649] See ibid.
[650] Dana Facaros and Michael Pauls, *Cadogan Guide Tuscany, Umbria & the Marches* (New Holland Publishers, 2007) 203.
[651] George M Taber, *In Search of Bacchus: Wanderings in the Wonderful World of Wine Tourism* (Simon and Schuster, 2009) 191.
[652] Goria's Law (Law 164).
[653] Bill Nesto and Frances Di Savino, *The World of Sicilian Wine* (University of California Press, 2013) 56.
[654] Touring Club of Italy, *The Italian Wine Guide: The Definitive Guide to Touring, Sourcing and Tasting* (Touring Editore, 2004) 10.

The latest stage of legislative changes occurred in 2008 when the European Union demanded all national appellation rules to be rewritten to recognise only Protected Designation of Origin (PDO) regions.[655] The regulation focused on the definition of two categories of quality wines including protected designation of origin (PDO) and protected geographical indication (PDI), and distinguishing them from Vini (generic wines) and Vini Varietali (varietal wine).[656] The 2008 scheme also called for an end to the distillation of surpluses, the removal of low-quality vines, and higher subsidies to modernise the wine industry in the face of the growing pressure from the New World market. Italy, like the majority of traditional winemaking countries, simply adopted this new framework to its national context. An illustration of the present-day Italian wine law framework may be seen in Figure 2.

EU wine reforms also underlined the necessity of an independent public body or an authorised third party that could perform the monitoring and controlling of all appellations. Besides dealing with internal issues connected with winemaking, this body is required to take recommendations and changes to regulations and present them to the Commission for Agriculture and Rural Development.[657] Thus, only the Commission makes all final decisions for approval or denial of new appellations. In response to this reform, Italy delegated authority from the Consorzi and Ministero delle Politiche Agricole Alimentari e Forestali (the Ministry of Agriculture) to the Valoritalia. Notably, prior to the wine reforms, Consorzi regulated the production in each region, and if they wanted to introduce some changes, they had to propose them to the Ministry of Agriculture.[658]

Currently, Italy has many bodies in charge of wine sector regulation and assistance. Thus, the Ministry of Agriculture deals with adapting the national regulatory framework in accordance with the common EU Regulations. Inspection and control of law enforcement at a national level is conducted by the Frauds General Inspection Department of the Ministry. Regionally, there are organizations dealing with controlling new plantations; supplying production and sales statistics; controlling implementation of national and EU regulations; and establishing production regulations that are often

[655] Geralyn Brostrom and Jack Brostrom, The Business of Wine: An Encyclopaedia (Greenwood Press, 2008) 114, 152, 165, 281.
[656] Davide Gaeta and Paola Corsinovi, *Economics, Governance, and Politics in the Wine Market: European Union Developments* (Palgrave Macmillan, 2014) 56.
[657] Barrett Ludy, 'Confusion: A Quick Summary of the EU Wine Reforms' (5 October 2012) <http://www.guildsomm.com/>.
[658] Ibid.

more rigid than the national wine legislation.[659] Among the most powerful bodies that oversee the application of the wine law are the Italian federation of industrial producers & exporters of wines, spirits, liqueurs cordials vinegars (FEDERVINI)[660]; Confederazione Italiana della Vite e del Vino[661]; and Comitato Nazionale Per La Tutela e la Valorizzazione Delle Denominazioni di Origine e Delle Indicazioni Geografiche Tipiche Del Vino. Sometimes, their missions overlap, but in the majority of cases, these organizations deal with different aspects of the wine industry.

One needs to emphasise that Italy's wine industry has undergone the obvious renaissance in the past decades, mainly due to the introduction of comprehensive EU directives. Nevertheless, despite making some positive changes, Italian wine regulatory framework is still somewhat deficient, as the current appellation system leaves producers frustrated and consumers confused.[662] Furthermore, Italy still cannot unite fragmented wine producers and provide them with an opportunity to build their businesses freely and creatively. This led to the situation when Italian wine producers rely on market feedback and individual innovation to improve their market position instead of being actively supported by the state. Italian wine regulation system failed to move value upstream, because grape growers do not have a strong, politically cohesive group ready to stand for one's rights. In addition, ongoing political divides prevented the development of political cooperation and market protection for the Italian wine industry.

[659] Brostrom and Brostrom, above fn 200, 114, 152, 165, 281, 340.
[660] Federvini, 'Who We Are' <http://www.federvini.it/>.
[661] Unione Italiana Vini, 'Mission' <http://www.uiv.it/>.
[662] Elizabeth Ann Carter, 'Cooperation, Competition, and Regulation: Constructing Value in French and Italian Wine Markets', *University of California, Berkeley* (31 August 2012) <http://digitalassets.lib.berkeley.edu/>.

3.5 Summary

The EU is the largest global wine producing region and the main importer and exporter in global wine markets.[663] It is also the global champion of regulation and government intervention in wine markets, which has been reinforced in recent times by the CAP, and other government interventions, which have taken many forms in the EU wine markets. Regulations determine where certain wines can be produced and where not, the minimum distances of vines, the type of vines that can be planted in certain regions, and yield restrictions. In addition, public regulations determine subsidies to EU producers and wine distillation schemes. The EU also determines public subsidies to finance grubbing-up (i.e. uprooting) schemes to remove existing vineyards and imposes a limit on the planting of new vineyards, which has reinforced dedication to quality commercially produced wines. In this chapter, these regulations have been analyzed from a historical origin perspective and have cast light on the gaps that should pose as a caution to New World jurisdictions.

3.5.1 France

Wine is regarded as part of the French culture and lifestyle, with vine being a strategically and culturally important crop.[664] Despite these measures, and because of strong industry support giving it a voice, particularly through strong cooperative movement. Taking of initiatives by local and national wine organizations, including the Office National Interprofessionnel des Vins (ONIVINS), Confédération Nationale des Producteurs de Vins et Eaux-De-Vie de Vin á Appellations d'Origine Contrôlée (CNAOC), and Assembly of European Wine Regions (AREV), who have been empowered by the industry to protect the appellations of origin and supporting local winemakers. Even small wineries in France an opportunity to secure a place on the global market due to significant financial support from the government, and stringent labelling laws. Low taxation rates, compared to Australia, allow producers to remain competitive in the face of the globalization and integration of international markets.[665] This contributes to the preservation of traditional winemaking culture, and fosters the production of quality products to cater for consumers seeking the like.

[663] See section 5.3.1.
[664] OECD, *OECD Studies on Tourism Food and the Tourism Experience: The OECD-Korea Workshop* (OECD Publishing, 2012) 160.
[665] See Michael Porter, 'The Competitive Advantage of Nations' (1990) (February) *Harvard Business Review* 9, 12.

However, balancing growth and innovation with cultural preservation is challenging for France. French winemakers abide by the complicated system of regulations that oversee every possible aspect of wine growth, production labelling, and distribution, while limits their ability to modernise production techniques or expand their vineyards, unless it meets specific criteria under the AOC system.[666] Although such an approach has proven to bring benefits from a reputation perspective,[667] it severely limits winemakers' activity and environmental sustainability measures. In time, however, revisiting their regulatory framework in light of climate change, may be a necessary step since producers may have to adjust the grape varieties and production methods to adapt to the global warming and environmental challenges.[668]

If France were to revisit their regulatory framework, they may look to providing more freedom of choice to producers, as it could potentially invigorate the industry and avoid stagnation. But, this may be contrary to the essence of the AOC framework. Further, simplification of the AOC system, whilst likely to result in increased competition, be at an expense to wine quality and value.

3.5.2 Italy

Like France, Italy also has a three-tier regulatory level. One of the advantages of the Italian wine policy is the strong preservation of cultural identity, which is achieved through the DOC framework.[669] This system, which was structured after the French AOC promotes improvement of wine quality and increases the efficiency and value of the industry. Italy also uses an IGT system, which is a less strict regime intended to guarantee and indicate a regional origin and label authenticity.[670] Furthermore, interests of Italy's wine producers are protected through multiple local organizations and cooperatives (Consortia), which support small wineries and allow the sector to remain competitive. For example, the Italian Federation of Industrial Producers and Exporters of Wines, Spirits, Liqueurs Cordials Vinegars (FEDERVINI),[671] the Confederazione Italiana della Vite

[666] See section 3.3. By see section 3.4.
[667] See section 6.5.2.
[668] See generally Irene Calboli, 'Reconciling Tradition and Innovation: Geographical Indications of Origin as Incentives for Local Development and Expressions of a Good Quality Life' in Susy Frankel & Daniel Gervais (eds), *The Internet and the Emerging Importance of New Forms of Intellectual Property* (Kluwer Law International, 2016) 141.
[669] See Andre Stasi, Dominic Carlucci and Alsa Seccia, 'Informazione asymmetrical e regolamentazione per l'etichettatura del vino' (2008) 63(2) *Rivista di Economia Agraria* 233, 234.
[670] See Jackson, above fn 547, 769.
[671] See Calboli, above fn 647, 139.

e del Vino[672]; and the Comitato Nazionale Per La Tutela e la Valorizzazione Delle Denominazioni di Origine e Delle Indicazioni Geografiche Tipiche Del Vino promote local wines, control production, and monitor the implementation of national and EU regulations. This is a good example of where organisations operate in the spirit of legislative goals, as does the Common Market Organization working under the CAP provides aid schemes to enable such European organisations, establish a successful brand name and enter global markets.

Small taxation rates are also advantageous to wine producers, allowing even small businesses to stay up. However, Italy has still much to do to make its regulatory framework optimal and efficient. Italy's wine industry has experienced the obvious boost in the past decades, mainly due to the introduction of comprehensive EU directives. However, despite making some positive changes, Italian wine regulatory framework still needs improvement, since their complicated system of labelling and GIs are counterproductive to facilitating information exchange between stakeholders, resulting in harm to both producers and consumers. The DOC system may have decreased the quality of some wines and made them less competitive in an ever-evolving market. Thus, for example, the Chianti DOC limited winemakers to a rather mediocre wine, while the Chianti Classico rules lead to a situation when Italian wines failed to compete internationally as serious and complex products.[673] For consumers, the DOC system means that some excellent wines are not advertised much, whereas some vintage, but poor-quality products are sold at hundreds of dollars per bottle.

If France were to revisit their regulatory framework, they should consider the need to simplify labelling provisions, possibly by advocating for a single legal framework for all European wines. Furthermore, while a zero taxation on wine limits the state revenues, it is also contrary to the EU desire to build a harmonised trade through the imposition of common tax rates and duties.[674] The need to remain competitiveness in international markets is an ongoing issue for the Old-World wine industry to address. Excessive regulation underpins the European wine regulatory framework and casts a shadow over Member State regulatory frameworks. For example, EU Regulations 491/2009[675]

[672] Unione Italiana Vini, 'Mission' <http://www.uiv.it/>.
[673] See Vincent de Rossi, *The Rise and Fall of the Super Tuscan Wine* (10 March 2015) Italy Magazine <http://www.italymagazine.com/news/rise-and-fall-super-tuscan-wines>.
[674] A Stasi, G Seccia and R Viscecchia and A Seccia, 'Italian Wine Demand and Differentiation Effect of Geographical Indications' (2011) 23(1) *International Journal of Wine Business Research* 49, 52.
[675] Council Regulation (EC) No 491/2009.

and 607/2009[676] include labelling provisions; EC 606/2009 Regulation[677] lays down detailed rules on grapevine categories and oenological practices; and EU 203/2012 Regulation includes provisions related to organic wine production. These and other regulations determine where certain wines can be produced, how vines should be planted, the types of allowed vines, yield restrictions, production techniques, and so on. Many of these regulations can be traced back to French wine laws of the 19th and 20th century, which protected famous brand names and producers of high-quality wines.[678] However, they sometimes fail to respond to the current economic environment, where a market-based approach will be increasingly valued in light of economic and environmental sustainability.

[676] Council Regulation (EC) No 607/2009.
[677] Council Regulation (EC) No 607/2009.
[678] Meloni and Swinnen, above fn 461, 170.

CHAPTER IV

LEGAL REGIMES, REGULATORY FRAMEWORKS IN VIRGINIA AND VICTORIA

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LEGAL REGIMES, REGULATORY FRAMEWORKS IN VIRGINIA AND VICTORIA

Wine laws interact from the perspective of a consumer, industry participants, and the government. One can suggest that a regulatory framework would not be effective if it favours one of these three levels to the detriment of other wine industry actors. Therefore, it needs to cater the needs of consumers, wineries, and state equally and aim at providing balance between demand, competition, and state revenues. Consumers appreciate safety, access, quality, and price of wine, which in its turn determines the way wine producers present their products in the market.

The optimum regulatory framework, therefore, should consider consumers' preferences and requirements. Industry representatives – such as wineries – are the core of the system and, should be able to set themselves apart from the Old-World by exercising some discretion in producing their wines. Prescriptive statute, such as labelling laws and wine classification laws (i.e. that require certain grapes to be derived from a region for that wine product to avail itself the use of a GI) may inhibit a firm's discretion. In the absence of regulation, the industry may self-regulate. But, this potentially leads to inefficiencies of information channels,[679] which negatively impact the wine industry associated with a region or jurisdiction. This is counter-productive for consumers and the wine industry, alike.

Whereas Old-World wineries must follow prescriptive rules from growing, harvesting, and winemaking practices, New World jurisdictions, Victoria and Virginia – while imparted by these rules – have, as part of their own regulatory frameworks, more flexibility in how the wine industry is regulated. While such flexibility arguably has its benefits in fostering innovation within the wine industry,[680] once a region develops a reputation amongst consumers, wineries within that region may seek to preserve if not enhance that status.

Outlined first is the constitutional framework within which Virginia and Victoria operate. Consistent with the Model approach in Figure 2 in Appendix I, to analyse regulatory frameworks, a jurisdiction's constitution embodies key cultural and historical factors that make up a legal system.

[679] See chapter VI.
[680] See sections 4.3.2 and 6.2.3.

This sets a framework within which a law or legal regime can be assessed insofar as the regime's objectives are framed in light of broader factors such as culture. Where a legal regulatory framework (embodying laws and legal regimes) achieves these objectives, such a framework may be considered "optimum". A qualification of this hypothesis, however, is that objectives can shift over time. Defining what the objectives are requires an inquiry into stakeholder behaviour. This is discussed in Chapter VI.

Second, the overall regulatory framework in Victoria as part of a broader national or federal setting is outlined. This is followed by a discussion of the wine regulatory framework, and some of the main laws that are encompassed therein. Requirements concerning labelling – in particular requirements that a winery or producer adhere to in order to avail the use of a wine GI on a label. This approach is also taken in discussing the wine regulatory framework in Virginia.

The overarching objective of this chapter is to identify the status of the current wine regulatory framework, and what the laws also legal regimes aim to do.

4.1 Victorian Wine Laws

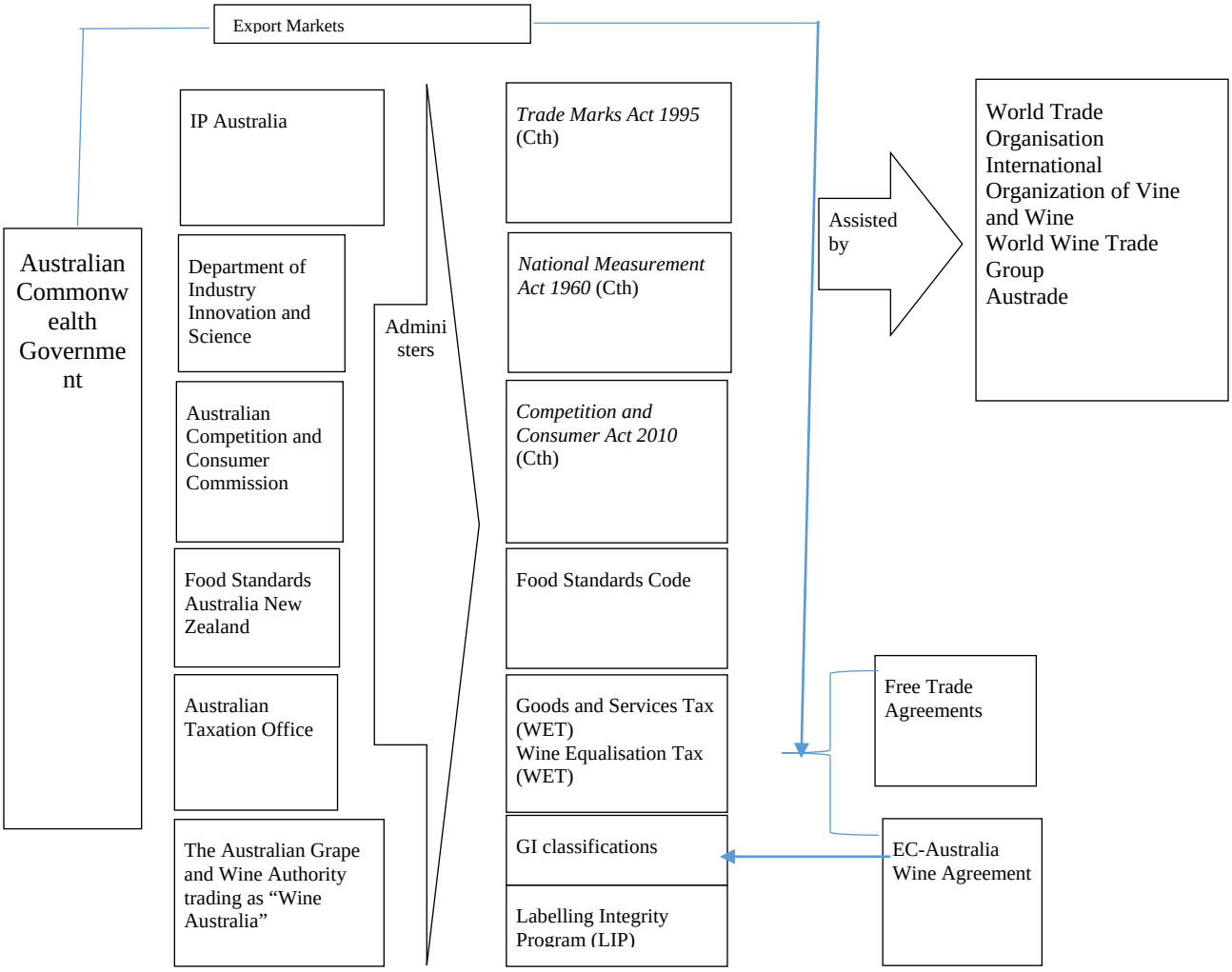
While there are similarities in the type of legal regimes that regulate the wine industry in the New World, the framework in which they operate is different from the Old-World states. This section discusses: (i) the laws that govern the classification of particular regions of a jurisdiction; (ii) to what degree those laws operate in the best interests of the jurisdiction, producers and consumers; and (iii) how these rules are administered.

4.1.1 Regulatory Framework of the Australian Wine Industry

The regulatory framework that governs the wine industry in Victoria is centralised at a national level but comprises collaborative efforts between government bodies such as the Australian Grape and Wine Authority (AGWA) and wine industry associations such as the Winemakers' Federation of Australia (WFA). The WFA is a recognised winemakers' organization representing the interests of all Australian wine producers, including non-members, and works in cooperation with the Australian government and Wine Grape Growers Australia (WGGA) to develop and implement policy, and represent the wine sector's interests.

The AGWA comprises both the Grape and Wine Research and Development Corporation and the Wine Australia Corporation (see Figure 1). Administrators of international obligations and arrangements pursuant to bilateral treaties, include Australia, the World Trade Organization (WTO). Independent organisations such as the OIV and World Wine Trade Group, also facilitate effective administration of wine laws and related obligations associated with the supply of wine.

Figure 1 National Wine Law Framework of Australia



Some of the domestic laws that can be classified as having a 'direct' impact on wine industry stakeholders, include:

- Classification and administration of GIs pursuant to the *Australian Grape and Wine Authority Act 2013* (Cth) (AGWA Act), and the *Australian Grape and Wine Authority Regulations 1981* (Cth) (Australian Wine Regulations);
- Labelling requirements, under the Label Integrity Program (LIP).

Direct federal laws that regulate region classifications, GI boundary determination, and the Label Integrity Program (LIP) are administered by Wine Australia.[681]

Other domestic, non-AGWA laws and legal regimes include:

- *Australia* New Zealand *Food Standards Code*
- *National Measurement Act 1960* (Cth)
- *Competition and Consumer Act 2010* (Cth)[682]
- *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (GST Act)
- *A New Tax System (Wine Equalisation Tax) Act 1999* (Cth) (WET Act)
- *Trade Marks Act 1995* (Cth)

At a state level (which are not included in Figure 1), these extend to:

- *Liquor Control Reform Act 1998* (Vic)
- *Wines Beer and Spirits Sale Statue 1864* (Vic)
- *Property Law Act 1958* (Vic)
- *Water Act 1989* (Vic)

All but the Food Standards Code, the *Liquor Control Reform Act 1998* (Vic), *Wines Beer and Spirits Sale Statue 1864* (Vic), and WET Act may be classified as 'indirect' wine laws.

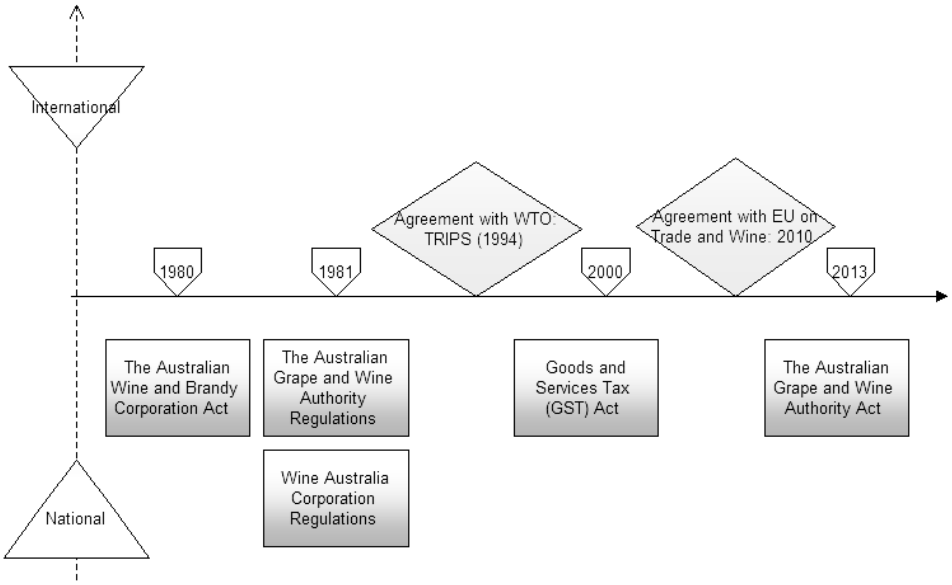
There are cooperatives and smaller organizations that fall outside the regulatory bounds of the above national legislation insofar as they do not administer the law. Rather, they actively assist

[681] *Australian Grape and Wine Authority Act 2013* (Cth); *Wine Authority Regulations 1981* (Cth).
[682] *Trade Practices Act 1974* (Cth) (repealed).

wineries. For example, the Australian Wine Research Institute (AWRI) assists entrepreneurial efforts of wine producers in Australia.

Direct wine regulation and formal classification of wine GIs[683] gained momentum in the 1980s and were embodied in the *Australian Wine and Brandy Corporation Act 1980* (Cth) (repealed). Since this dissertation is not so much a historical recollection of wine law development, figure 2 limits a chronology of direct wine laws regulating the Victorian wine industry to the period from 1980 onwards.

Figure 2 Chronology of Direct Wine Laws Regulating the Victorian Wine Industry from 1980



Source: Wine Australia

The present wine regulatory framework comprises a complex array of direct and indirect wine laws. For example, while consumer protection and product liability provisions of the Australian Consumer Law (CPL)[684] are relevant to misleading labelling and advertising, they are also set out for the purpose of wine products in Part VIB of the AGWA Act. In line with health policy and goals,[685]

[683] But see section 6.3.2.
[684] The Australian Consumer Law is contained in *Competition and Consumer Act 2010* (Cth) Sch. 2.
[685] Victorian Parliament Hansard.

alcohol may not be produced or sold in Victoria without a licence or permit being obtained from the State government.[686]

Recalling that this dissertation proposes an optimum wine regulatory framework for Virginia and Victoria, doing so requires identifying how Europe or the Old-World has influenced laws and legal regimes.

4.1.2 Europe's Influence

Regulation of the Victorian (and indeed Australia's) wine industry gained momentum in the 1980s. The *Wine and Brandy Corporation Act 1980* (Cth) (AWBC Act) provided for the replacement of the Australian Wine Board by the Australian Wine and Brandy Corporation. In second reading speech, Senator Durnack noted that:

> "several factors have been making for change in the wine industry, particularly increasing investment in the industry by large public companies. Also, **grape growers and cooperatives have been disturbed by the emergence in some seasons of problems in take-up of all grapes available**. In this climate there has been considerable questioning of the adequacy of the Board's structure to cope with the present-day needs of the industry..."[687]

Prior to the introduction of the AWBC Act, the Australian Wine Board, from 1936 to July 1981 was empowered to do:

> "…such things as it thinks fit for the purpose of improving the quality or promoting the sale, whether in Australia or elsewhere, of wine and brandy; and to make arrangements, with other persons, authorities or associations in Australia or elsewhere, likely to be conducive to the achievement of such a purpose."[688]

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[686] *Liquor Control Reform Act 1998* (Vic) s13(1) (wine and beer producer's license). See also, *Wines Beer and Spirits Sale Statue 1864* (Vic) Pt. 1.
[687] Commonwealth, *Second Reading Speech*, Senate, 4 December 1980, [367] (Senator Durnack).
[688] *Wine Overseas Marketing Act 1929* (Cth) s 5 (repealed); Commonwealth of Australia, Gazette No. 60, 21 June 1929, 1445 (outlining that the Board was able to prohibit the export of wine from Australia, "for the purpose of enabling the Board to effectively control the export and sale and distribution after export of Australian Wine."). See also, *Wine Overseas Marketing Act 1961* (Cth) (repealed) (under which the Boards' powers were extended to include the power to acquire any Australian wine and brandy for their promotion outside Australia and it was able to offer advances to owners of exported wines. It was empowered to do "such things as it thinks fit for the purpose of improving the quality or

Identified issues included regulating the oversupply of wine (which had previously occurred after the First World War),[689] and fostering the rapidly increasing appreciation of Australian wine both domestically and overseas.

Europe's influence on the regulation of the Victorian (also the Australian) wine industry became clear in the early 1990s. In 1993, the *Australian Wine and Brandy Corporation Act 1980* (Cth) was amended by the *Australian Wine and Brandy Corporation Amendment Act 1993* (Cth) (the 1993 amendments). The 1993 amendments introduced provisions establishing the Geographical Indications Committee (GIC) to determine GIs in relation to regions and localities in Australia. The precipitation of a more formal and centrally regulated framework regulating the wine industry in Victoria appears to have been born from the motivation of trade relations between Australia and the EU.

The purpose of the 1993 amendments was to enable an agreement between Australia and the European Community to enter into force (the EC-Australia Agreement).[690] The EC-Australia Agreement had been negotiated between Australia and the European Commission officials by that

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promoting the sale, whether in Australia or elsewhere, of wine and brandy; and to make arrangements, with other persons, authorities or associations in Australia or elsewhere, likely to be conducive to the achievement of such a purpose."); *Wine Overseas Marketing Act 1936* (Cth) No.94 (repealed) (changing the title of the Board to the Australian Wine Board, and altering the method of appointment of Board members, as they were now to be appointed by the Governor-General after nomination by the relevant section of the wine industry). The number of members and their areas of representation remained as stipulated by the 1929 Act until this was amended by the *Wine Overseas Marketing Act 1945* (Cth) No.23 (repealed), which increased the Board to eleven members holding office for a term of three years, being eligible for re-appointment). See further *Wine Overseas Marketing Act 1963* (Cth) No.62 (repealed) (allowing the members representing private and proprietary wineries and distilleries to be appointed from nominations by State associations affiliated with the Federal Wine and Brandy producers' Council of Australia); *The Wine Overseas Marketing Act 1930* (Cth) No.48 (repealed) (which established an Executive Committee of the Board. This consisted of the Chairman of the Board (as Chairman of the Committee), one member representing co-operative wineries and distilleries, two members representing proprietary and privately owned wineries and distilleries and one member representing the grape growers. The Executive Committee was elected annually by the Board and had "such powers and functions of the Board as the Board thinks fit". Three members of the Committee formed a quorum, questions being decided by a majority of votes with the Chairman having a casting and a deliberative vote. The accounts of the Board were open to inspection and audit by the Auditor General and the Board made an annual report to the Minister); *Australian Wine and Brandy Corporation Act 1980* (Cth) No.161 (repealed) (replacing the Australian Wine Board with the Australian Wine and Brandy Corporation).

[689] Australian Government, After the First World War, vines were planted in various soldier settlements which temporarily increased production. Overproduction though, and consequently lower prices for some grape varieties, meant that some vineyards couldn't compete economically and many vineyards collapsed.

[690] See *Australian Wine and Brandy Corporation Amendment Bill*, Second Reading Speech, 29 September 1993 Hansard at 1342.

time, although the formal Agreement was not completed until January 1994. The A-EC Agreement entered into force on 1 March 1994. Article 3(2) of the EC-Australia Agreement required that the Contracting Parties take all the general and specific measures necessary to ensure that the obligations laid down in the EC-Australia Agreement are fulfilled, and to ensure that the objectives of the EC-Australia Agreement are attained. Article 6 prescribes that the Contracting Parties agree to take all measures necessary, in accordance with the A-EC Agreement, for the reciprocal protection of the names referred to in Article 7 – being names used for the description and presentation of wines originating in the territory of the Contracting Parties. Article 7 provides that, as regards wines originating in Australia, the following names are protected:

I the name 'Australia' or other names used to indicate this country;

II the g**eographical indications** and traditional expressions referred in Annex II.[691]

Article 2 of the Australia-EC Agreement defines a number of expressions including:

> "geographical indication' shall mean an indication as specified in Annex II, **including an 'Appellation of Origin'**, which is recognized in the laws and regulations of a Contracting Party for the purpose of the description and presentation of a wine originating in the territory of a Contracting Party, or in a region or locality in that territory, where a given quality, reputation or other characteristic of the wine is essentially attributable to its geographical origin;"

The definition of a GI has undergone change in the 2013 amendments, to reflect a narrower definition.[692] It is likely that the definition will again undergo change, should the GI system be altered in the near future.

[691] See Annex II to the Agreement (referring to *'ZONE'*).

[692] See section 6.4 (discussing the integration of national protection of GIs to the international realm. International treaties such as The Paris Convention for the Protection of Industrial Property, 1883; The Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods, 1891 did contain provisions against false indications of origin. But neither these nor more specific treaties signed during the twentieth century – in particular Lisbon – had much effect outside a small number of jurisdictions that already favoured registered GIs: The Lisbon Agreement for the Protection of Appellations of Origin and their international Registration, 1958; the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), Articles 22-24. Thus, before the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and recent bilateral agreements, it fell to non-State actors to pursue the cause of the protection of GIs around the globe.

4.1.3 Geographical Indications

Despite these changes, unregistered GIs have been used in Australia at least since the 1860s.[693] As already discussed, the use of registered GIs commenced at the beginning of the 1990s when the AWBC Act was changed to enable Australia to comply with the EC-Australia Agreement.[694] Although this Agreement was principally aimed at protecting European GIs in Australia, Australia needed to register its own GIs to protect them in Europe, but principally increase wine exports. Unlike the system in France (i.e. AOC), Australia adopted a least intrusive regulatory system that met the minimum requirements of the agreement, to enable continued access to European markets.[695]

It follows from Article 2 that under the EC-Australia Agreement, a GI designates a geographical area to which the quality, reputation or other characteristic of the wine is essentially attributable.

The objects of the AGWA Act are set out in s. 3,[696] which are:

(a) to support grape or wine research and development activities; and
(b) to control the export of grape products from Australia; and
(c) to promote the consumption and sale of grape products, both in Australia and overseas; and
(d) to enable Australia to fulfil its obligations under prescribed wine-trading agreements and other international agreements."

Section 4 defines many expressions used in the legislation, including:

[693] See *Thomson v B Seppelt and Sons Limited* [1925] HCA 40.
[694] Agreement between the European Community and Australia on Trade in Wine [1994] OJ L 86/94, superseded by the Agreement between the European Community and Australia on Trade in Wine [2009] OJ L28/3 (entered into force 1 September 2010) (EC-Australia Wine Agreement or EC-Australia Agreement).
[695] Gary Edmond, 'Disorder with Law: Determining the Geographical Indication for the Coonawarra Wine Region' (2006) 27 *Adelaide Law Review* 59, 103-4. See also Administrative Appeals Tribunal (AAT) (2001). Nos. S200/182, 183, 186–227, 305 and 313, Decision and Reasons for Decision, Adelaide, October 2001.
[696] Compare, e.g., AWBC Act s 3 (repealed) (which contained greater detail).

> '"geographical indication", in relation to wine goods, means an indication that identifies the goods as **originating in a country, or in a region or locality i**n that country, where a given quality, reputation or other characteristic of the goods is essentially attributable to their geographical origin.'

Section 4 of the AWBC Act (repealed) was much broader, and defined "geographical indication", in relation to wine, as:

> (a) a word or expression used in the description and **presentation** of the wine to **indicate the country**, region or locality in which the wine originated; or
>
> (b) a word or expression used in the description and presentation of the wine to suggest that a particular quality, reputation or characteristic of the wine is attributable to the wine having originated in the country, region or locality indicated by the word…

Paragraphs (a) and (b) of the s. 4 definition of GI, describe two discrete features of a GI. First, an indication that identifies the goods as "originating" in a country, or in a region or locality in that region. This is narrower than the former reference to "indicate the country, region or locality…" in s. 4 of the AWBC Act (repealed) and suggests preference towards a more focused GI system. Objects (f)(i) and (ii) in s. 3(1) of the AWBC Act (repealed), and paras (a) and (b) of the s. 4 definition of GI contain two discrete features of a GI. First, the word or expression used as the identifying name for the region or location and, second, the geographical area which constitutes the region or locality. This is reinforced by s. 5D(b) which provides that, for the purposes of the Act, a wine is taken to have originated in a particular region or locality of Australia only if the wine is made from grapes grown in that region or locality.

Second, where a given quality, reputation or other characteristic of the goods is "essentially attributable" to their geographic origin.[697] On a broad interpretation, this may permit the use of "Australia" or "Made in Australia" as an expression capable of amounting to a GI under the s. 4 definition. Taking this one step further, those seeking to use a generic term such as Australia, or Victoria – provided that it identifies those goods as originating in that country – would be permissible for the purposes of GI classification. If so, then it could see toponyms, instead, recognised as a GI and formal recognition of 'rejected' trade marks because it is a general geographic term under the GI system.

[697] See sections 6.3.2 and 6.3.3 (regarding the term 'attributable').

Interpretation of the above must be cast in light of objectives of the Act. Part VIB (ss 40, 40A-40ZF), for example, was introduced by the 1993 amendments. Section 40A provides:

> "The object of this Part is to regulate the sale, export and import of wine:
> (a) for the purpose of enabling Australia to fulfil its obligations under prescribed wine-trading agreements **and other international agreements**; and
> (b) for certain other purposes for which the Parliament has power to make laws;
> and this Part is to be interpreted and administered accordingly."

It is an express requirement of the object clauses in both s. 3 and s. 40A, that the Act be interpreted and administered to fulfil Australia's obligations under, *inter alia*, the EC-Australia Wine Agreement. Australia's obligations under the Agreement are, therefore, not merely relevant as an aid to interpretation in the event of there otherwise being ambiguity in the language of the statute.[698]

Reference to "…and other international agreements" in s. 40A(a) was previously omitted in the 1993 amendments. Inclusion of this appears to recognise the relevance of free trade agreements (FTAs), the importance of agriculture in Australia,[699] and the relevance of the wine industry from an economic perspective.[700]

4.1.4 Determination of a GI

The Act outlines functions and duties of the AGWA and Australian Grape and Wine Authority Selection Committee, which are important actors in maintaining functional and effective operation of wine laws in Australia.

Section 40N provides for the establishment of the GIC. Under s. 40P, the function of the GIC is to make determinations of GIs for wine in relation to regions and localities in Australia,[701] and it

[698] Compare, e.g. *Minister for Immigration & Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287.
[699] See Mr Anthony Battaglene, Winemakers' Federation of Australia, *Committee Hansard*, Canberra, 4 February 2016, 1-2.
[700] See section 6.3.2 (explaining that the AGWA supports grape and wine research and development activities; controls the export of grape products from Australia; and promotes the consumption and sale of grape products).
[701] See *Beringer Blass Wine Estates Limited v Geographical Indications Committee* (2002) 125 FCR 155. See also *Beringer Blass Wine Estates Limited v Geographical Indications Committee* [2002] FCAFC 295. For an explanation of the trade mark and GI conflict in this case, see Stephen Stern, 'The Overlap between Geographical Indications and Trade Marks in Australia' (2001) 2 *Melbourne Journal of International Law* 1; Miranda Ayu, How does

has power to do all things necessary and convenient in connection with such function, including the ability to modify a region.

Other sections of Part VIB make provision for interested parties to apply to the GIC for the determination of a GI and specify the procedural steps that the GIC must follow leading up to the making of a final determination. The relevance of this provision may be viewed as diminished in light of the high number of wine regions in Victoria. Section 40T outlines the Committee's responsibility in determining a GI:

> "(1) In determining a geographical indication, the Committee must:
>
> (a) identify in the determination the boundaries of the area or areas in the region or locality to which the determination relates; and
>
> (b) determine the indication to be used to indicate that area or those areas.[702]
>
> (2) If the regulations prescribe criteria for use by the Committee in determining a geographical indication, the Committee is to have regard to those criteria.
>
> (3) When making a determination as a result of an application, the Committee may do either or both of the following:
>
> (a) determine an area or areas having boundaries different from those stated in the application;
>
> (b) determine an indication to be used to indicate the area or areas constituting the geographical indication that is different from an indication proposed in the application."[703]

The Regulations are complementary, and provide guidelines for description and presentation of wine, as well as the main principles of vine varieties' distinction. Section 40T, recognising the separate objects stated in s. 3, imposes two requirements on the GIC. It is to identify the boundary of the area or areas to which the determination relates, and it is to determine the indication (formerly referred to as "word or expression" (i.e. the name)) to be used to indicate that area or those areas. This dual function is to be borne in mind when considering Part 5 of the Regulations to which s. 40T(2) refers. Part 5 of the Regulations is set out in Appendix D. The note to reg. 25, which states that: "…[i]n determining a geographical indication under subsection 40Q(1) of the Act, the

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Australia Regulate the Use of Geographical Indication for Products other than Wines and Spirits?' (2006) 3 *Macquarie Journal of Business Law* 1. See further *Penola High School v. Geographical Indications Committee* [2001] AATA 844.

[702] This subsection formerly read: "(b) determine the word or expression to be used to indicate that area or those areas."

[703] This subsection formerly read: "(b) determine a word or expression to be used to indicate the area or areas constituting the geographical indication that is different from a word or expression proposed in the application."

Committee is not prohibited under the Act from having regard to any other relevant matters" makes it clear that the list of prescribed criteria to which the Committee is to have regard is not intended as an exhaustive list. The GIC may have regard to any other relevant matters.[704] However, the direction in reg. 25 requires that the GIC must have regard to each of the specified criterion and "give weight to them as a fundamental element" in reaching its decision.[705]

4.1.5 Label Integrity Program and Labelling Laws

GIs are also relevant to the marketing of wines, and consumer decision making.[706] The degree to which laws permit or mandate certain information to be depicted on labels can impact each of the above facets.[707] The LIP provisions were introduced in September 2010 to provide a more comprehensive system to ensure that Australian wine laws comply with treaty requirements, and also protect the integrity of Australian wine overseas.[708]

The LIP audit requirements by wineries, and which is monitored by Wine Australia, reflects the importance placed on consumer protection and avoidance of misleading consumers. The AGWA Act provides for a penalty of 2 years imprisonment or fines for failure to keep a record, making a misleading label claim, keeping a fraudulent record, or refusing to provide the record when supplying wine goods.[709] Records are checked at four different points, namely:

(i) at the winery where grapes are bought and sold;
(ii) at the cellar where the grapes are made into wine;
(iii) at the time when sales and purchases are made; and
(iv) at the wholesale desk when the wine leaves the cellar.

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[704] See, e.g., *Beringer Blass Wine Estates Limited v Geographical Indications Committee* (2002) 125 FCR 155.
[705] See *The Queen v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 333 (per Gibbs CJ) (explaining that soil and soil science are examples of matters which in the present case all parties have treated as other relevant matters to which regard should be had.)
[706] See section 6.1.2.
[707] Compare, e.g., Hinchliffe, above fn 552, 1031-5 (providing an analogy to Tobacco Plain Packaging, which is one example where legislatures have restricted the use of a trade mark and therefore the private rights of holders of that mark weighing health concerns in favour.)
[708] The LIP applies directly to wine and does not apply to other products such as tobacco. See respectively, Agreement between the European Community and Australia on Trade in Wine [1994] OJ L 86/94, superseded by the Agreement between the European Community and Australia on Trade in Wine [2009] OJ L28/3.
[709] A*ustralian Grape and Wine Authority Act 2013* (Cth), ss 39J, 39K.

Among the records that are to be kept by wine manufacturers or producers, are:

- the identity of the record keeper and everyone involved in supplying the wine goods;
- the quantity and quality of wine goods that are supplied;
- the variety, vintage, and geographical location of wine;
- as well as any other details concerning the wine production.[710]

The AGWA adopts a consultative approach to the industry, with temporary license suspension applied in the more serious cases.[711] Consumer protection and avoidance of misleading consumers has a strong presence in Australian statute. Although not administered by the AGWA, the Food Standards Code,[712] the *National Measurement Act 1960* (Cth) and the *Competition and Consumer Act 2010* (Cth) collectively govern wine labels. The US by comparison, lacks an equivalent nationally administered LIP. Labelling requirements are, instead, regulated at a State level.

Leaving aside restrictions in use of names as a result of the EC-US Wine Agreement,[713] and certificate of label approvals required when wine is exported, there is a level of discretion on what may appear on a wine label under US law when sold domestically in the US.

Title 27 CFR 4.25 defines an 'appellation of origin' for use on wine, and its use on a label (for both US wine and imported wine) is subject to meeting requirements under this regulation.[714] The Virginia Food Law is administered by the Virginia Department of Agriculture and Consumer Services. Pursuant to § 3.2-5100, administration of this regime is overseen by the Commissioner. Chapter 51, Art. 1 states at § 3.2-5101 that the Board is vested with discretion to adopt regulations,

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[710] *Australian Grape and Wine Authority Act 2013* (Cth). Winemakers' Federation of Australia and Wine Grape Growers Australia, *Proposal to merge Wine Australia Corporation (WAC) and the Grape and Wine Research and Development Corporation (GWRDC)* (August 2012). See also Wine Federation Australia website <http://www.wfa.org.au/> (providing record keeping templates and LIP Statement templates that can be downloaded under 'LIP Resources'. This may assist any claim made regarding variety, vintage, or geographical origin of wine can be validated through recorded traceability from the vineyard to the bottle).

[711] See Australian Grape and Wine Authority, *Regulator Performance Framework 2015-2016* (2016) 6 <https://www.wineaustralia.com/getmedia/>.

[712] See *Food Standards Australia New Zealand Act 1991* (Cth). See also *Food Standards Code 2013* (Cth).

[713] Agreement between the United States of America and the European Community on Trade in Wine, signed 10 March 2006 [2006] OJ L87 (entered into force 10 March 2006).; see also Tax Relief and Health Care Act of 2006 (enacted on December 20, 2006).

[714] See 27 CRF 4.25. See also Alcohol and Tobacco Tax and Trade Bureau, *Wine Appellations of Origin* <http://www.ttb.gov/appellation/>.

"fixing and establishing for any food or class of food: labelling requirements… and standard of identity; and a reasonable standard of quality…or tolerances or limits of variability."

Artistic works are protected under the copyright regime pursuant to the C*opyright* Act of 1976 (Title 17 USC), which protect original works of authorship that are fixed in some tangible form. For instance, a proprietor named Trumpet Wines may use imagery of a trumpet on its label. This artwork could be copyright protectable, depending on the circumstances of its creation. It may also serve as a trade mark, if it acquires a level of recognition that consumers would recognise the design as designating Trumpet Wines as the source of the product.[715]

Insofar as labelling requirements regarding what must appear on a wine label, for the most part, is governed at a national level in both Australia and the US. The TTB administers the Webb-Kenyon Act,[716] and the Alcoholic Beverage Labelling Act,[717] which prescribes a "Government Warning" on all alcoholic beverage labels.[718] In addition to the LIP, Standard 1.2.1 of the Australia New Zealand Food Standards Code sets out the requirements to have labels or otherwise information provided. Coupled with Standard 1.2.11, which sets out particular information requirements, the country of origin and GI is required to be stated on the label of an Australia wine product. Standard 1.2.7 (Nutrition, health and related claims) requires that "pregnancy health warnings" appear on wine products. These fulfil the consumer protection, and health related objectives of transposing information about wine. The *National Measurement Act 1960* (Cth) and the *Competition and Consumer Act 2010* (Cth) govern wine labels. In the event of misleading or deceptive conduct in the supply of a wine product, the appropriate forum to commence an action is the Victorian Civil and Administrative Tribunal (VCAT).[719]

4.1.6 The Code of Good Manufacturing Practice for the Australian Grape and Wine Industry

While not administered by Wine Australia, the Code of Good Manufacturing Practice for the Australian Grape and Wine Industry (the Code of GMP), which was prepared by The Australian

[715] See section 6.3.3.
[716] 27 U.S.C. § 122 (2006).
[717] 27 U.S.C. § § 213-219(a) (2006).
[718] 27 U.S.C. § 215(a). See also 2.4.5.
[719] *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 40.

Wine Research Institute and the Winemakers Federation of Australia's Wine Industry Technical Advisory Committee, outlines basic principles that should be followed in the production and packaging of 'wine' and 'wine products' to ensure that safe,[720] sound quality products reach the consumer. It is based on the code developed in New Zealand.[721]

Unlike the objectives of the LIP, the Code of GMP[722] does not appear to overtly facilitate trade and recognition of GIs. Keeping in mind that the Code is not law, but rather a guide, paragraph 3.1 implicitly supports the aforementioned by outlining that:

> "All acts, regulations, orders or notices relevant to the Australian wine industry shall be complied with at all times with respect to both production methods and presentation of the final product."

Aside from monitoring the compliance with LIP requirements, AGWA aims to increase and sustain demand for Australian wine industry in the areas of market development, knowledge development, trade and recognition of GIs.[723] Whereas, the objective of the Code is to provide a guide to facilitate the operation of a wine manufacturer's business in an acceptable, hygienic and safe manner.[724] The Code goes on to mention that it "can be considered as a broad code of conduct for grape growing and winemaking on which other particular procedures…appropriate to a specific site should be based…."[725] So, categorising "the wine industry [a]s a sector of the food industry", so that "…wineries can be considered as food processing premises", would be a farce. The TRIPS Agreement, for example, makes it clear that wine is separate from food – particularly in setting out minimum standards of GI protection.

Insofar as there is a code allowing individuals in the industry scope to adopt wine making practices – an evolving playing-field for New World producers[726] – it must be consistent and complement existing laws. That the Code applies primarily to the processing practices within the

[720] 'Safe' includes reference to the environment.
[721] Reeves and Fraser 1995
[722] GMP refers to a set of guidelines for practices and processes required for the safe manufacture of any product: see The Australian Wine Research Institute, *The Code of Good Manufacturing Practice for the Australian Grape and Wine Industry* (2nd ed., 2012) at [2] <https://www.awri.com.au/>
[723] Ibid.
[724] Ibid at [4].
[725] Ibid at [2].
[726] See section 1.3.5.

business itself and a Code of GMP suggests what is required rather than how they should be achieved is complementary to existing laws.

4.2 Constitutional Influence

Statue is considered 'constitutional' if it is brought about under a constitutional provision.[727] Further, unlike Victoria, there is provision in the US for treaties to lay claim to supremacy over national legislation.[728] Similar to Victoria, however, state law is secondary to national legislation. Whether a jurisdiction requires international treaties to be implemented into domestic laws in order to be considered 'law', is provided for in that jurisdiction's constitution.

The US Constitution, for example, has five aspects pertaining in a certain way to wine industry. First, the Commerce Clause – Article 1, Section 8, Clause 3 – and which empowers the US Congress to regulate commerce inside the country and beyond its borders. This clause enumerates powers granted to the federal government, whereas the Tenth Amendment specifies states' powers on this issue.[729] The second is the Equal Protection Clause – which guarantees equal protection of the laws to every person under the jurisdiction of any state. Third, is the First Amendment – guaranteeing freedom of speech throughout the USA, which is applicable mostly to the issues of advertising and promotion of wine. The earliest federal statute governing sales and pricing of wine is the Sherman Antitrust Act of 1890. However, the most significant and relevant piece of Constitutional legislation related to wine industry is the Twenty-first Amendment of 1933.[730]

The history of US Constitutional influence, and which impacts the Virginian wine industry indirectly, is long-standing, starting in 1890 with the passage of the Sherman Antitrust Act.[731] This federal statute is still in force by prohibiting anti-competitive business activities,[732] and it was reinforced in 1919 with the passage of the Eighteenth Amendment that ushered the onset of

[727] This is separate from the classification of direct and indirect laws: see section 1.1.4.
[728] See *Granholm v Heald* 544 U.S. 460 (2005).
[729] United States Constitution, Art. I, § 8, cl.3.
[730] Ibid.
[731] *Sherman Antitrust Act*, 26 Stat. 209, 15 U.S.C. §§ 1–7.
[732] Ibid.

Prohibition.[733] That Amendment, as mentioned, turned out to be a failure, only boosting the production and underground sales of alcohol. In 1933, the Twenty-first Amendment[734] was ratified to end Prohibition and establish the power of states to regulate importation, storage, production, and distribution of liquors within their boundaries. But, there are still some elements of the Prohibition that are implicitly present in Virginia.

This power granted to states in regard to wine industry regulation, however, was subject to several conflicting Supreme Court cases – for example, *Granholm v. Heald*[735] – which suggested different interpretations of the Amendment. In that case, Michigan and New York regulate the sale and importation of wine through three-tier systems requiring separate licenses for producers, wholesalers, and retailers.[736] These schemes allow in-state, but not out-of-state, wineries to make direct sales to consumers. This differential treatment explicitly discriminates against interstate commerce by limiting the emerging and significant direct-sale business. Influenced by an increasing number of small wineries and a decreasing number of wine wholesalers, direct sales have grown because small wineries may not produce enough wine or have sufficient consumer demand for their wine to make it economical for wholesalers to carry their products.[737]

The structure of the regulatory framework in the US that impacts the wine industry is reflected by the United States Constitution. The conflict formed between the Twenty-first Amendment and the Commerce Clause of the Constitution. In accordance with the Commerce Clause, all merchants in any US state should have a free and full access to markets of other states,

[733] Federal Trade Commission, 'The Antitrust Laws' (18 April 2014) <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws>.
[734] United States Constitution, Amendment 21 (1933).
[735] *Granholm v Heald* 544 U.S. 460 (2005).
[736] See section 1.1.4.
[737] See In Nos. 03—1116 and 03—1120, Michigan residents, joined by an intervening out-of-state winery, sued Michigan officials, claiming that the State's laws violate the Commerce Clause. The State and an intervening in-state wholesalers association responded that the direct-shipment ban was a valid exercise of Michigan's power under the 21st Amendment. The District Court sustained the scheme, but the Sixth Circuit reversed, rejecting the argument that the 21st Amendment immunizes state liquor laws from Commerce Clause strictures and holding that there was no showing that the State could not meet its proffered policy objectives through non-discriminatory means. In No. 03—1274, out-of-state wineries and their New York customers filed suit against state officials, seeking, inter alia, a declaration that the State's direct-shipment laws violate the Commerce Clause. State liquor wholesalers and retailers' representatives intervened in support of the State. The District Court granted the plaintiffs summary judgment, but the Second Circuit reversed, holding that New York's laws fell within the ambit of its powers under the Twenty-first Amendment. Here, respondents in the Michigan cases and petitioners in the New York case are referred to as the wineries, while the opposing parties are referred to as the States. The Supreme Court of the United States held that both States' laws discriminate against interstate commerce in violation of the Commerce Clause, and that discrimination is neither authorized nor permitted by the Twenty-first Amendment.

and its central purpose was protection of a free flow of goods between states coupled with prohibiting protectionist state regulations.[738] From the maximalist perspective of interpreting the Twenty-first Amendment, states have full control over alcohol industry regulation even when these duties overlap with other Constitutional provisions such as the Commerce Clause, the Equal Protection Clause, and the First Amendment. From the minimalist perspective, states' power is limited by the aforementioned Constitutional clauses.

A number of early Supreme Court decisions were mostly based on the maximalist interpretation of the Twenty-first Amendment, such as the *State Board of Equalization v Young*[739] and the *LaRue v California*[740] cases giving the Twenty-first Amendment supremacy over other Constitutional clauses and amendments.[741] The importance of this is that any change to the wine regulatory framework in the US would permit change at the State level, provided that it did not conflict with the goals of the US. However, the situation changed, with Supreme Court recognizing the supremacy of the Commerce Clause over the Twenty-first Amendment in more recent cases. For example, the *44 Liquormart, Inc. v Rhode Island*[742] case was settled in favour of the Commercial Clause's supremacy. In that case, Supreme Justices ruled that restrictions on alcohol violating the Commerce Clause cannot be qualified as protected by the First Amendment.

In 2005, two more cases acquired a great resonance in terms of application and boundaries of authority granted to states by the Twenty-first Amendment. *Granholm v Heald*[743] and *Swedenburg v Kelly*[744] challenged Michigan and New York laws discriminating against out-of-state wine producers because those restrictions violated the Commerce Clause of the Constitution.[745] Such decisions have brought about a fundamental legal change in terms of the Constitutional influence on wine law in the US so far; the *Granholm* case[746] has postulated that the Twenty-first Amendment does not nullify the Commerce Clause of the US, and state liquor regulations fall under the limitation and impact of the

[738] Todd Zywicki and Asheesh Agarwal, 'Wine, Commerce, and the Constitution', (2005) 1(1) *NYU Journal of Law & Liberty* 610, 611.
[739] *State Board of Equalization v Young* 299 U.S. 59 (57 S.Ct. 77, 81 L.Ed. 38).
[740] *LaRue v California* 409 U.S. 109 (1972).
[741] Ibid.
[742] *44 Liquormart, Inc. v Rhode Island* 517 U.S. 484 (1996).
[743] *Granholm v Heald* 544 U.S. 460 (2005).
[744] *Swedenburg v. Kelly* 544 U.S. (2005).
[745] Elizabeth Norton, 'The Twenty-First Amendment in the Twenty-First Century: Reconsidering State Liquor Controls in Light of *Granholm v. Heald'*, (2006) 67 *Ohio State Law Journal* 1464.
[746] A summative reference to the *Granholm v Heald* and *Swedenburg v Kelly.*

Clause. Therefore, in connection with these new decisions, state governments in the US cannot discriminate against out-of-state wineries.[747] Such a trend is now connected with large-scale US wine market liberalization, with wholesalers, retailers, and wineries throughout the country now urged to operate in the nationwide environment where they have to compete fiercely in terms of pricing, appeal to consumers, and wine quality.[748] This may also explain the absence of a GI regulatory framework in Virginia, and the US as a whole.

With regards to agriculture, the US Congress has the power to regulate agricultural production under Article 1, Section 8 of the USC.[749] Agricultural laws often overlap with other laws, such as labor laws, environmental laws, commercial laws, and so on.[750] The Tenth Amendment of the Constitution gives states the right to pass laws that promote the general safety and well-being of the public. The Tenth Amendment is the basis for states being able to enact their own agricultural laws as long as those laws are not in contravention of federal laws and regulations. *Granholm* is regarded as the most important legal decision in terms of wine industry legislation within the past 40 years, and it has ended state-induced protectionist laws securing the sufficient wine market share only for in-state wineries.[751]

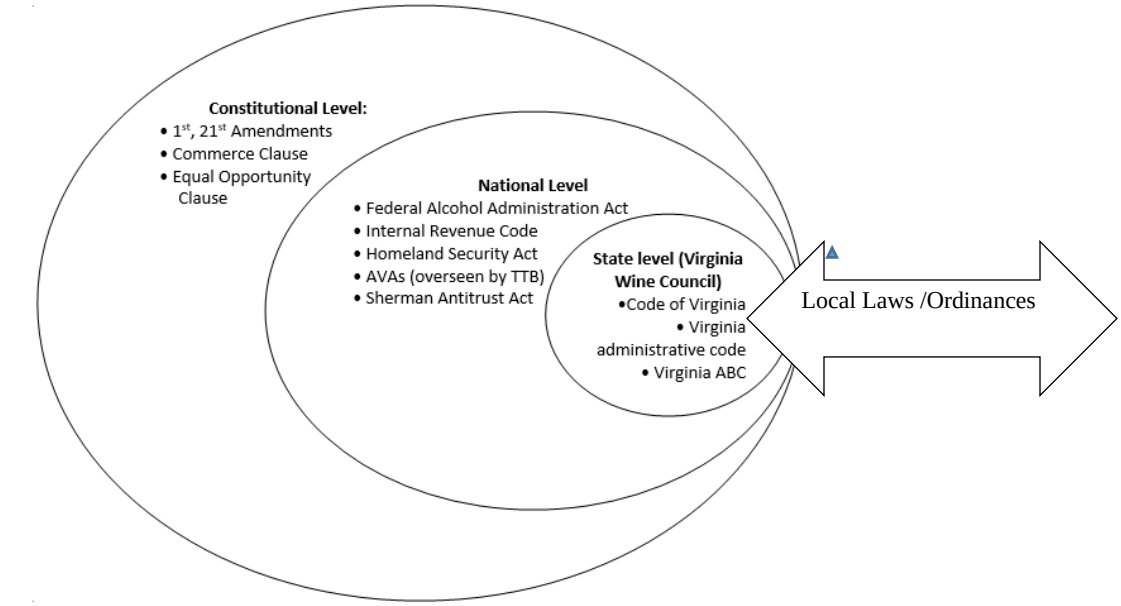
While direct and indirect wine laws in both Virginia and Victoria exist at a federal level, there are some notable state and local laws that govern the wine industry.[752]

[747] Ivy Brooke Erin Grey, 'Good Spirits or Sour Grapes?: Reaching a Tax Compromise for Dire-to-consumer Wine Sellers under Quill, the 21st Amendment, and the Dormant Commerce Clause in Light of Granholm v. Heald' (2008) *Houston Business and Tax Journal* 145, 145-6.
[748] John Hinman, 'U.S. Wine market Liberalization by 2015: Perfect Storm Forming' (2005) *Practical Winery & Vineyard Journal* (20 October 2015) <http://www.practicalwinery.com/novdec05/novdec05p5.htm>.
[749] See generally United States Department of Agriculture (USDA) website <http://ams.usda.gov> (it is apparent that programs and laws that pertain to farming are overseen by the Secretary of Agriculture, who represents the USDA in the President's cabinet.)
[750] In this dissertation. an "agribusiness" is one that involves producers or manufacturers of agricultural goods and services, such as fertilizer and farm equipment makers, food and fiber processors, wholesalers, transporters, and retail food and fiber outlets. In a loose sense, it can encompass vineyards and wineries.
[751] See also *Commonwealth Constitution 1901* (Cth), Ch. IV, sect. 92 (interstate trade).
[752] *Commonwealth Constitution 1901* (Cth), s 109. See also Ch IV, s. 92 (interstate trade).

4.3 Virginia

The regulatory framework governing the Virginian wine industry, like Victoria, comprises broader national laws, also state laws, that set out how wine regions in Virginia may be legally protected,[753] and made available to the public.[754] Taking into account the role of the United States Constitution in the US legal system,[755] the legal framework regulating the Virginia wine industry is set out in Figure 3.

Figure 3 Virginia's Wine Law Framework



Alcohol and Tobacco Tax and Trade Bureau (TTB) agents investigate alcohol permits for wineries; work in the enforcement of regulations of the alcohol industry; and prevent misleading labelling.[756] The Homeland Security Act[757] also transferred certain law enforcement functions from

[753] This includes direct laws, such as the Lanham Act (15 U.S.C. §§ 1051–1127) that defines federal trademark protection and trademark registration rules. Sales tax exists at a state level: see Virginia Code 2014, Title 58.
[754] See 27 U.S.C. §205(e) (labelling), (f) (advertising).
[755] Twenty-first Amendment to the *United States Constitution*.
[756] David H McElreath et al., *Introduction to Law Enforcement* (CRC Press, 2013) 131.
[757] Homeland Security Act of 2002.

Treasury to the Department of Justice and established the Bureau of Alcohol, Tobacco, Firearms and Explosives that currently investigates violations of alcohol laws.[758]

Unlike Victoria, however, Virginia (and, the US generally) does not formerly register GIs. Instead, in 1978, the Bureau of Alcohol, Tobacco and Firearms developed regulations to establish American Vinicultural Areas (AVA) based on distinctive climate and geographical features.[759] Virginia also has an additional 'local' tier in the form of ordinances, that apply to a particular wine region.

This section first outlines the history of Virginia's wine regulation, followed by components of the AVA system, and describes Virginia's 3-tier system of regulation. Second, state regulatory instruments are discussed before discussing the 'Dillon' rule and function of state supremacy. The third section discusses 3 region ordinances, and their limitations – as compared to each other. Even though Virginia does not a statutorily recognised GI regime there is, in addition to the AVA system, a trade marl regime regulated pursuant to the Lanham Act.

4.3.1 Regulatory History

Virginia's wine industry dates to the early seventeenth century when the first English settlers planted vines and made wine at the Jamestown Colony around 1608.[760] The first settlers made wine with grapes from England, but the colonists soon became determined to grow their own grapes on Virginia soil.[761] In 1623, the Virginia House of Burgesses enacted a law that required every householder to set aside a quarter-acre of land yearly for the purpose of growing grapes and making wine.[762] In 1769, the General Assembly passed legislation called "An Act for the Encouragement of the Making of Wine."[763]

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[758] Glenn A Fine, *Explosives Investigation Coordination between the Federal Bureau of Investigation and the Bureau of Alcohol, Tobacco, Firearms and Explosives* (DIANE Publishing, 2010) 8.
[759] 27 CFR Part 9 (American Viticultural Areas).
[760] Donald Hodgen, US Department of Commerce, Office of Health and Consumer Goods, *2005 U.S. Wine Outlook* (2005) 1 http://www.ita.doc.gov/td/ocg/outlook05_wine.pdf., at 5; see also Virginia Wineries Association, *A History of Virginia Wine* <http://www.virginiawines.org/>.
[761] Allene Li and Hilde Lee, *Virginia Wine Country* (1997) 11-12.
[762] Ibid at 12.
[763] Ibid at 14.

George Washington, Thomas Jefferson, and James Madison all contributed to the development of a wine industry in Virginia through their interest in viticulture and oenology.[764] Jefferson was the most active in establishing a Virginia wine industry. For example, in·1773, he allowed Italian winemaker Filippo Mazzei to plant vinifera grape plants on two thousand acres adjacent to Monticello.[765] Unfortunately, Jefferson and Mazzei's initial success was thwarted by the Revolutionary War and ultimately never reached fruition.[766]

In the 1960s and 1970s, Virginia experienced a rebirth of and new interest in its wine industry.[767] The 1975 Virginia Farm Winery Act was designed to stimulate the growth of the industry by providing tax incentives for wineries making wine from Virginia grapes and establishing a monetary fund for research, education, and promotion of Virginia wines.[768] The 1980 amendments allowed farm wineries to act as wholesalers and retailers, as well as producers, of Virginia wine. This legislation is certainly one reason that Virginia's wine industry has grown from a mere six wineries in 1979 to approximately 282 today.[769]

Virginia's acreage of grape crops increased from 1,418 acres in 1995 to 2,360 in 2004, an increase of 66%,[770] and in 2004, Virginian wineries produced 3,700 tons of total grapes.[771] In 2005, Virginia gained 100 bearing acres and its wineries produced 4,900 tons of grapes (4,650 tons for wine), making it the ninth largest state in total grape production and seventh for vinifera grapes.[772] As the number of acres in Virginia devoted to viticulture increases, especially considering the number of new wineries gained in 2005, and again in 2015, the production level will surely follow.

In 2005, in Virginia, ninety-seven registered wineries and over 300 independently-owned vineyards produced over 782,700 gallons of wine, making Virginia the sixth largest wine producing

[764] Ibid at 18-22.
[765] Ibid at 18-19.
[766] Ibid at 19.
[767] Ibid at 29.
[768] Kari Lomanno, Good Spirits: Virginia Wine Just May be the State's New Cash Crop (3 March 2003) *The Hampton Roads Business Journal* <http://www.insidebiz.com/output.cfm?ID=24l, 4979>.
[769] See section 1.2.3., Table 1.
[770] US Department of Agriculture, National Agriculture Statistics, *Virginia Commercial Grape Report* (2004) 4.
[771] Ibid, 5.
[772] US Department of Agriculture, National Agriculture Statistics, *Virginia Commercial Grape Report* (2005) 6.

state.[773] The Virginia wine industry provides jobs for over 1,000 individuals.[774] In 2002, production and sales of Virginia wine were estimated to generate between $45.8 and $69.2 million per year, and wine-related tourism contributed $26.5 million to the state's economy.[775]

Today, the economic impact has surely increased when one considers the dramatic increase in wineries since 2002 and the more than 300 wine festivals and events that now take place every year and draw hundreds of thousands of people to Virginia.[776] It has been estimated that 40% of Virginia's 600,000 annual visitors are wine tourists.[777] The potential for even larger growth can be realised as evidenced by Oregon's progressive laws governing farm winery wine tasting activities and the dramatic success of the industry in that state.

4.3.2 The AVA System – National Tier

The American appellation system, which set the basis for the current wine legislation in the US,[778] was created using the examples of Italy and France.[779] AVAs, in its attempt to implement an appellation system, introduced boundaries based on climatic zones, soil conditions, and topography. But, unlike France's AOC system, AVAs do not place restrictions on grape varieties or yields, and thus cannot guarantee high quality. As a result, the US has a dual system, comprising AVAs and appellations.

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[773] See Hodgen above fn 739, 2.
[774] Ibid. See also Center for Public Policy, *An Analysis of the Economic Impact of Virginia's Wine Industry*, Virginia Commonwealth University (Sept. 2002) (providing further reading on employment by the Virginia Wine Industry), <http://www.ita.doc.gov/td/ocg/outlook05_wine.pdf>.
[775] WineBusiness.com, 'Virginia Wine Industry Economic Impact Estimated at $95.7 Million' (1 November 2002) Wine Business Insider, 6 <http://www.humanitaswines.com/>.
[776] See Rebecca Penovich, *Go Local 2006: Virginia Wines Demonstrate Quality, Character*, Virginia Wine Guide, <http://www.virginiawineguide.com/wineTouring03/>; see also Virginia Wineries Association (VA), *Virginia Winery Festivals* & *Sponsored Events 2006* <http://www.virginiawines.org/events/index.html>.
[777] See VWA, ibid.
[778] Section 105(e) of the Federal Alcohol Administration Act (FAA Act), 27 U.S.C. 205(e), authorizes the Secretary of the Treasury to prescribe regulations for the labeling of wine, distilled spirits, and malt beverages. The FAA Act provides that these regulations should, among other things, prohibit consumer deception and the use of misleading statements on labels, and ensure that labels provide the consumer with adequate information as to the identity and quality of the product. The Alcohol and Tobacco Tax and Trade Bureau (TTB) administers the FAA Act pursuant to section 1111(d) of the Homeland Security Act of 2002, codified at 6 U.S.C. 531(d). The Secretary has delegated various authorities through Treasury Department Order 120-01 (Revised), dated December 10, 2013, to the TTB Administrator to perform the functions and duties in the administration and enforcement of this law.
[779] See Mendelson, *Wine in America*, above fn 44, 35-8.

The AVA system, it is understood, sought to distinguish smaller wine grape-growing regions and was in response to the need to comply with the international rules,[780] also to facilitate the US compete in export markets against wines from countries with more developed quality control methods.[781] The AVA system began in 1980, and has since expanded to include 234 AVAs across the US as of 31 December 2016.[782] Unlike the previous system that designated appellations based on state or county boundaries, the AVA System distinguishes smaller wine grape-growing regions.[783]

Section 4.25(e)(1)(i) of the Alcohol and Tobacco Tax and Trade Bureau Regulations (TTB regulations)[784] defines a viticultural area for American wine as a delimited grape-growing region having distinguishing features as described in Pt. 9 of the regulations and a name and delineated boundary as established in Pt. 9 of the regulations. Part 4 of the TTB regulations[785] allows the establishment of definitive viticultural areas and the use of their names as appellations of origin on wine labels and in wine advertisements.

Section 4.25(a)(1) of the TTB regulations[786] defines an appellation of origin for American wine as:

(i) The United States;
(ii) a State, or
(iii) two or no more than three contiguous States;
(iv) a county, or
(v) two or no more than three counties from the same State; or
(vi) a viticultural area.

Part 9 of the TTB regulations[787] sets out standards for the preparation and submission of petitions for the establishment or modification of AVAs, and lists the approved viticultural areas.[788]

[780] Including TRIPS.
[781] Michael Hall et al., *Wine Tourism Around the World* (Routledge, 2009) 266.
[782] See The Wine Institute, *American Viticultural Areas* (31 December 2016) <https://www.wineinstitute.org>
[783] Alcohol and Tobacco Tax and Trade Bureau, *American Viticultural Area* <http://www.ttb.gov/wine/ava.shtml>.
[784] 27 CFR 4.25(e)(1)(i).
[785] 27 CFR, Pt. 4.
[786] 27 CFR 4.25(a)(1).
[787] 27 CFR part 9.
[788] See §9.12(c) (setting out the rules for petitions that seek to modify an existing AVA by either changing the boundary or changing the name).

Between 2012 and October 2016, there were 4 new AVAs approved by, out of a total of 9 applications to, the TTB.[789] To be approved, a petition[790] for a new AVA must contain: "evidence that the geographical features of the area produce growing conditions which distinguish the proposed area from the surrounding areas."[791] Unlike the AOC system in France, AVAs can overlap political boundaries such as state and county lines as well as other AVAs, and may be referred to even if grapes are sourced from an adjoining AVA.

Section 4.25 sets out the eligibility requirements for the use of an appellation of origin. Section 4.25(b)(1) of the TTB regulations,[792] contains the requirements for labelling an 'American wine' with a State name as an appellation of origin.[793] For a wine labelled with a State appellation of origin, at least 75 percent of the wine must be derived from fruit or agricultural products grown in the State used as the appellation, and the wine must be fully finished in either the labelled State or in an adjacent State.

To monitor compliance with AVAs and control the production of wine in the US, the Homeland Security Act of 2002 (in 2003) split functions of the Bureau of Alcohol, Tobacco and Firearms (ATF) into two new organizations with separate functions.[794] The Alcohol and Tobacco Tax and Trade Bureau (TTB) under the Department of the Treasury[795] was designed to collect alcohol, tobacco, firearms, and ammunition excise taxes; protect the consumer, assist industry members to comply with federal tax, product, and marketing requirements associated with winemaking.[796]

Unlike France and Italy, however, the use of multi-State appellations of origin (which may consist of two or three contiguous States) is permitted. Where this is the case, § 4.25(d)(1) requires

[789] See Federal Reigster, *Approved AVAs* (21 July 2016) < https://www.federalregister.gov>.
[790] The TTB released an "American Viticultural Area (AVA) Manual for Petitioners (TTP P 5120.4 (09/2012) https://www.ttb.gov/wine/p51204_ava_manual.pdf.
[791] Code of Federal Regulations 2015. See also Part 4 of the TTB regulations (27 CFR part 4), which permits the establishment of definitive viticultural areas and the use of their names as appellations of origin on wine labels and in wine advertisements. A description of an AVA boundary must be based on identifiable features appearing on U.S.G.S. maps. For more information, see section VI of the manual.
[792] 27 CFR 4.52(b)(1).
[793] Labelling requirements for an imported wine are not discussed in this dissertation.
[794] Homeland Security Act of 2002.
[795] Ibid.
[796] John Okray, *Inside the World's Largest Legal Employer: Careers and Compensation with U.S. Federal Agencies* (Lawyerup Press, 2010) 110.

that all the fruit or other agricultural products used in the wine be grown in the States indicated in the appellation and that the wine must be fully finished within one of those States. Wine is considered to be "fully finished" if it is ready to be bottled, except that cellar treatment and blending that does not result in an alteration of class and type is still permitted. This appears to water-down the very notion of an indication of source.

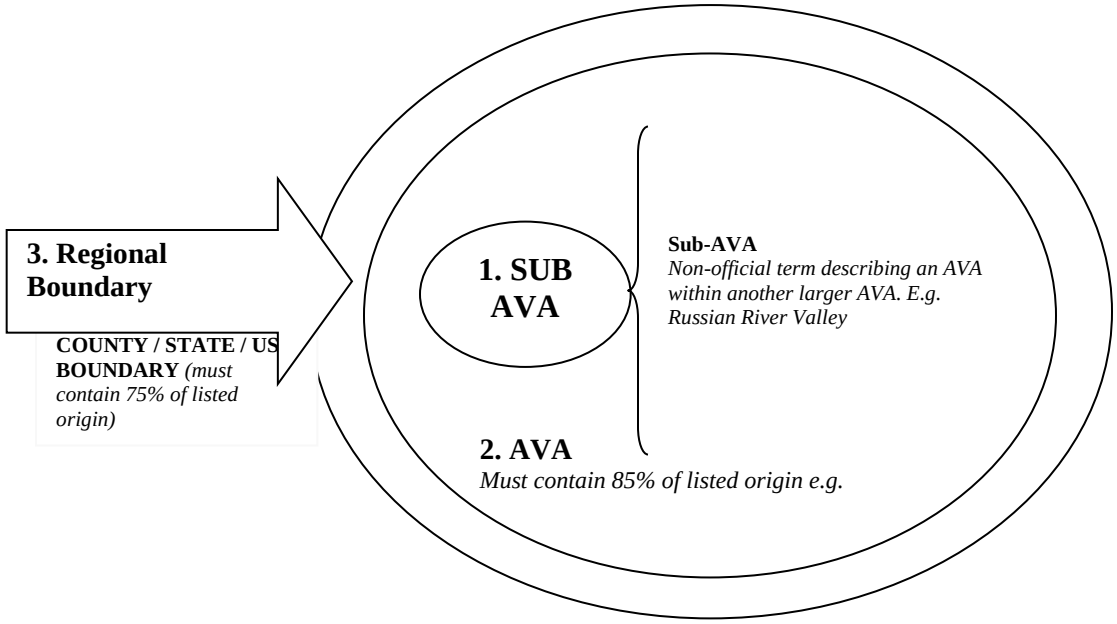
Section 4.25(e)(3) of the TTB regulations,[797] in part, sets forth the requirements for labelling American wine with an AVA as an appellation of origin. Under this section, at least 85 percent of the wine must be derived from grapes grown within the named AVA. Additionally, in order to use the name of an AVA that is located entirely within a single State (single-State AVA), the wine must also be fully finished within the State in which the labelled AVA is located. In the case of AVAs that cover two or more States (multi-State AVAs), the wine must be fully finished[798] within one of the States in which the AVA is located.

As depicted in Figure 4, an AVA must contain 85% of listed origin (e.g. Williamsburg). The AVA falls within a general Regional Boundary (e.g. county, state of US Boundary), which must contain 75% of listed origin (e.g. Virginia, Sonoma County of the US). AVAs may also contain sub-AVA's, which is a non-official term describing an AVA within another larger AVA (e.g. Russian River Valley and Oakville District (both in California)). Virginia does not yet have sub-AVAs.

[797] 27 CFR 4.25(e)(3).

[798] T.D. ATF-53, published in the Federal Register by TTB's predecessor agency, the Bureau of Alcohol, Tobacco and Firearms (ATF) at 43 FR 37672 (23 August 1978. Prior to publication of that Treasury Decision, ATF did not have codified definitions for "appellation of origin" or "viticultural area," and there was no systematic approach to designating a region as a "viticultural area": see ibid. The ATF regulatory requirements for the use of an appellation of origin on a wine label prior to T.D. ATF-53 stated that: (1) At least 75 percent of the wine be derived from fruit or other agricultural products grown in the named region; (2) the wine be fully manufactured and finished within the State containing the named region; and (3) the wine be made in compliance with the named region's laws and regulations.

Figure 4 Classification Requirements for AVAs (US)



In order for a wine to be labelled to have come from a certain AVA region, therefore, it must include at least 85% of the grapes from that particular region, without complying with any restrictions of the winemaking techniques.[799]

Recent changes to the use of AVA names as appellations of origin on wine labels appears to have broadened their system of protecting indications of origin or source, pointing to a further departure from a system of GIs, and a greater shift towards protection of rights under the trade mark system. Illustrative of this shift arose recently in Oregon.[800] In 2016, former § 4.25(e)(3)(iv) was removed. Amendments to regulations at § 4.25(e)(3)(iv) comprised allowing wines that meet the requirements of § 4.25(e)(3)(i) and (ii) to be labelled with a single-State AVA name as an appellation of origin if the wine was fully finished either within the State in which the AVA is located or within an adjacent State. Preference to commercial aspects appears principal.

[799] 27 CFR, Pt. 9; Jim E O'Connor, Rebecca J Dorsey and Ian Madin, *Volcanoes to Vineyards: Geologic Field Trips Through the Dynamic Landscape of the Pacific Northwest* (Geological Society of America, 2009) 2.
[800] There are no known shifts in Virginia as at the date of submitting this dissertation.

For example, Notice No. 142 in the Federal Register proposed establishing "The Rocks District of Milton-Freewater" AVA in Umatilla County, Oregon.[801] The Rocks District of Milton-Freewater is an AVA that is located near the Oregon-Washington State line, approximately 10 miles south of the city of Walla Walla, Washington. The AVA is also located within the larger Walla Walla Valley and Columbia Valley AVAs, both of which cover portions of Washington and Oregon.

The effect of removing the requirement in § 4.25(e)(3)(iv) meant that wines labelled with an AVA appellation of origin need not only be fully finished within the same State as the AVA. For example, those that used grapes grown within The Rocks District of Milton-Freewater but fully finish their wines using custom crush facilities across the State line in Walla Walla, Washington, did so because there are no such facilities nearby in Oregon.

The TTB has stated that:

> "Vintners would have a greater choice in both where they fully finish their wines and what appellation of origin they use."

Providing justification that:

> "…Grape growers within a single-State AVA may have more buyers for their grapes if vintners in adjacent States are allowed to label their wines with the AVA name."[802]

The TTB, being empathetic towards commercial needs, took the view that since The Rocks District of Milton-Freewater AVA is a single-State AVA located in Oregon, under current TTB wine labelling regulations, none of these individual would be able to use that AVA name as an appellation of origin, even if 85 percent of the grapes in their wines came from The Rocks District of Milton-Freewater AVA – because their wines are fully finished in Washington. Although, their wines could be labelled with the Columbia Valley or Walla Walla Valley AVA names as appellations or origin because The Rocks District of Milton-Freewater AVA is located within both of those AVAs, and both the Columbia Valley and Walla Walla Valley AVAs are multi-State AVAs that cover portions

[801] Federal Register 6931 Vol. 80, No. 26 (9 February 2015) <https://www.gpo.gov/fdsys/pkg/FR-2015-02-09/pdf/2015-02552.pdf.> See also 79 FR 10742; T.D. TTB-127 (which formally establishes The Rocks District of Milton-Freewater as an AVA).
[802] Ibid.

of Oregon and Washington. Additionally, their wines could be labelled simply with the political appellation "Oregon," since wines labelled with a State appellation of origin may be fully finished in an adjacent State.

The AVA system was introduced to provide consumers with additional information on the wines they may purchase by allowing vintners to describe more accurately the origin of the grapes used in the wine. This seems far from the reality. This apparent broadening occurs because the TTB, while reinforcing a description of the source of the chattel (or grapes), seeks not to interfere with methods of production. This is not an ideal approach. Wine production is, after all, an art and therefore a contributing factor to a region's reputation.[803] Still, identifying elements that magnify a region's reputation is quite the opposite to the act of confusing regions with each other in a bid to merely produce a product.[804]

4.3.3 Virginian AVAs

This dissertation focusses on AVAs which, in Virginia, comprise:

- Monticello AVA,
- Middleburg AVA,
- Northern Neck George Washington Birthplace AVA,
- North Fork of Roanoke AVA,
- Rocky Knob AVA,
- Virginia's Eastern Shore AVA, and
- Shenandoah Valley AVA.[805]

Vision 2020 – Blueprint for Virginia Wine recommended "establishing more AVA's in Virginia" to increase marketing and exposure of the Virginia wine industry.[806] There are two problems with this. The first is that, historically, vinters are reluctant to introduce change. Second, there seems little purpose in establishing more AVAs, when reference to a single state AVA name as

[803] See Chapter I, fn 166.
[804] See section 6.3.1; n6.3.3.
[805] Virginia Wine, 'AVAs of Virginia' <https://www.virginiawine.org/>.
[806] Above fn 19.

an appellation is a thing of the past.[807] If an AVA must comprise "geographical features of the area" and "produce growing conditions which distinguish the proposed area from surrounding areas", then either:

- Permitting a single state AVA name as an AOC, if the wine was fully furnished either in the state in which the AVA is located, or in an adjacent state is invalid; or
- If valid, then the AVA system is invalid for want of a more generalised state indication of source.

This seems to allude at a double-standard. An AVA alludes to the importance of terroir specific characteristics of a region. The ability to label, with a single-State AVA name as an appellation of origin if the wine was fully finished either within the State in which the AVA is located or within an adjacent State, seems counterintuitive to the underlying objectives of an AOC.[808]

It seems possible to incorporate the above into an effective resolution through allowing states on an individual basis to introduce laws giving preference to a modified AVA system. But, s. 4.25(e)(3)(iv) should be plugged into the TTB regulations. A better solution would be to introduce sub-AVAs, which could simultaneously encourage an upward trend of quality wine, and associated reputation.

Going forward, any legislative change should be framed to facilitate long-term economic stability and sustainability of the Virginian wine industry. Any changes to AVAs should be discussed and supported by the local wine producers to facilitate administrative efficiency and compliance.[809]

[807] See above.

[808]

[809] Jerry Patchell, *The Territorial Organization of Variety: Cooperation and competition in Bordeaux, Napa and Chianti Classico* (Ashgate Publishing, Ltd., 2012) 29.

4.3.4 State Regulation

Following the repeal of Prohibition,[810] Congress allowed each state to regulate the production and sale of wine in their own state.[811] This decision led to the development of a three-tier distribution system between the producer, wholesaler, and consumer (see Figure 1, Chapter I),[812] where each step is, leaving aside the operation of federal taxes, supplementarily regulated by state and local laws.

Virginia has its own shipping laws[813] and distribution scheme.[814] It also has one of the 22 franchise laws, which affect the structure of the wholesale market, but do not relate to technical aspects of the wine production.[815] For example, there are restrictions on how wine can be sold.[816] While the Code of Virginia regulates a wide variety of issues and procedures, ranging from wine shipping to consumption,[817] it does not prescribe or mandate particular winemaking practices.

4.3.4.1 Third Parties and Administration

There are three main state statutes that regulate the wine industry, and that may be classified as direct wine laws, including: (i) the Virginia Farm Winery Zoning Act; (ii) the Virginia Alcoholic Beverage Control Act ("ABC Act"); and (iii) the Virginia Right to Farm Act. Together, these legislative instruments suggest that the General Assembly intended to reserve the power to regulate the business of a farm winery unto itself. The collective effect of these instruments indicate that the General Assembly adopted a state-wide policy to encourage economic growth, and limit local restrictions, on the Virginia wine industry.

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[810] Ibid.
[811] Ibid.
[812] The original reason for the three-tier system and the mandated use of a wholesaler between supplier and retailer, as well as for the Franchise Laws (see Virginia Franchise Code, § 4.1-404. Primary area of responsibility), was to assure that no producer so completely controlled a market or a retailer by becoming the primary source of supply. If anything is true today about the wine and spirits marketplace it is that the chance of any one supplier dominating a retailer or a market by controlling supply is virtually nil. The choices that consumers have today are incredibly diverse, whether we are talking about large or small production products. If a retailer can no longer find the brand of $8.99 Chardonnay they tend to sell a great deal of, chances are there are another 10 or 20 producers of similar or better quality $8.99 Chardonnay willing to fill the gap. Although, the original premise for the three tier system has been completely dismantled by the proliferation of products. This discussion is beyond the scope of the present dissertation.
[813] (¶7122)(C.V. §4.1-112.1).
[814] Gustavo Ferreira, *A Comparative Analysis between Virginia's and North Carolina's Wine Industries* (Virginia Cooperative Extension, 2012) 3.
[815] Anda Lincoln and Brad Lincoln, *21 Questions about Opening a Winery in the United States* (Lulu.com, 2010) 58.
[816] See section 4.3.4.2 – 4.3.4.4, below.
[817] Code of Virginia 2015.

While the General Assembly granted localities the power to regulate land uses under the Zoning Enabling Act, it did not grant localities the power to micromanage the affairs of either business or agricultural uses. Nor did it grant localities the power to pass ordinances that conflict with the general statutory and policy frameworks set out elsewhere in the Code of Virginia.

Several organizations in Virginia support local winemakers in developing their businesses, although not in the sense of a Consortia as Italy does.[818]

The Virginia Wineries Association (VWA), for example, grew out of the need to create a wine community with a unified approach to the industry growth and that would share ideas and resources to public benefit. Established in 1983, this non-profit organization promotes viticulture practices and techniques that ensure the highest quality of wine among its member-wineries; provides education among consumers; and assists ongoing research.[819] Another organization that promotes the interests of vineyards and wineries in Virginia through research, education, and marketing is the Virginia Wine Board formed in 1984. Its agents collaborate with international, national, regional, and state organizations on their work related to Virginia's wine industry. The Virginia Vineyards Association, established in 1979, supports the viticultural interests of the state; promotes cultivation of various species of grapes; and helps maintain cooperative relationships with local, state, and federal government agencies.[820] The Virginia Wine Council (VWC), created in 2008,[821] aims at providing wine producers and state and local governments with an opportunity to improve state legislation and find a balance between the reasonable business activities of wineries and the appropriate level of regulation.[822]

[818] See ibid.
[819] Hudson Cattell, *Wines of Eastern North America: From Prohibition to the Present—A History and Desk Reference* (Cornell University Press, 2013).
[820] Virginia Vineyards Association, *About* (12 May 2017) <http://www.virginiavineyardsassociation.com/about/>.
[821] Virginia Wine Council (VWC), *About the Virginia Wine Council* (1 January 2017) <http://www.virginiawinecouncil.org/about.html>.
[822] Ibid. See, however, 6.6.2.

4.3.4.2 Regulation of Virginia Farm Wineries

Passed initially in 2006 (and forming party of the zoning chapter of the Code of Virginia), the Virginia Farm Winery Zoning Act is the foundation for local regulation of Virginia farm wineries.[823] The opening lines outlines that:

> "[i]t is the policy of the Commonwealth to preserve the economic vitality of the Virginia wine industry while maintaining appropriate land use authority to protect the health, safety, and welfare of the citizens of the Commonwealth."[824]

The underlying impetus for the Act was to fight the 'micromanaging rules' of local governments, and to prevent wineries going out of business.[825] The passage of the Farm Winery Zoning Act was a step by the General Assembly to protect the flourishing Virginia wine industry by preventing overregulation at the local level.

Localities were, under the Act, left with their skeleton power to regulate land use for the welfare of residents. The General Assembly established, however, a higher burden for regulations in addition to setting forth a clear state-wide policy objective.[826] Localities may, pursuant to the general zoning enabling statute, regulate:

> "[t]he use of land, buildings, structures, and other premises[;]. . . [t]he size, height, area, bulk, location, erection, construction, reconstruction, alteration, repair, maintenance, razing, or removal of structures; [and] [t]he areas and dimensions of land, water, and air space to be occupied by buildings."[827]

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[823] Virginia Code Ann § 15.2-2288.3 (Repl. Vol. 2012).
[824] Ibid. § 15.2-2288.3(A) (Repl. Vol. 2012).
[825] Delegate David Albo, the sponsor of the Farm Winery Zoning Act, has stated the act grew from "a number of wineries who were being put out of business by micromanaging rules from local governments. Wineries rarely make a profit on just selling wine. Their volume and price point don't make it profitable alone. They rely on eco-tourism." E-mail from the Hon. David Albo, Member, Virginia House of Delegates, to author (1 February 2017, 9:25am) (on file with author).
[826] The heightened burden is that localities may only regulate farm winery activities when they have a substantial impact on the public welfare.
[827] Virginia Code Ann § 15.2-2280 (Repl. Vol. 2012 & Cum. Supp. 2013).

Absent is the ability to directly regulate the operations of the business that occupies the land. Local zoning regulations would likely be upheld, provided that there is a rational basis for the regulation.[828]

The standard for regulating wineries under the Farm Winery Zoning Act, however, is higher than that for the typical zoning statute. First, a locality must consider the economic impact of any proposed restrictions on the licensed farm winery impacted by such restrictions.[829] Second, a locality may only regulate "usual and customary" activities at a farm winery if they cause a "substantial impact on the health, safety, or welfare of the public."[830] While this statute leaves localities free to regulate the traditional size, area, and type of land use, it specifically forbids them from regulating the activities of farm wineries absent a "substantial impact" on the public.[831] Any regulations, therefore, that purport to regulate the actual business activities of a farm winery which do not have an identifiable "substantial impact" on the public welfare will likely be void as ultra vires.

The Virginia Farm Winery Zoning Act establishes a relatively simple legal test to determine if a local regulation is *ultra vire*s. First, localities are forbidden from regulating certain activities. Specifically, localities may not regulate:

> (1) [t]he production and harvesting of fruit" or the "manufacturing of wine;"
> (2) "[t]he on-premises sale, tasting, or consumption of wine during regular business hours";
> (3) "[t]he direct sale and shipment of wine" to customers, wholesalers, or the ABC Board;
> (4) the storage and wholesale of wine; or,
> (5) "[t]he sale of wine-related items that are incidental to the sale of wine.'[832]

Since these activities are specifically exempted from local regulation, any ordinance that attempts to regulate them will be void as *ultra vires*.

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[828] See, e.g., Bd. of Supervisors v. McDonald's Corp., 261 Va. 583, 591, 544 S.E.2d 334, 339 (2001); Cnty. Bd. of Arlington v. Bratic, 237 Va. 221, 229-30, 377 S.E.2d 368, 372 (1989).
[829] Virginia Code Ann § 15.2·2288.3(A) (Repl. Vol. 2012).
[830] Ibid. The statute specifically provides that "usual and customary" activities are those that are usual and customary for farm wineries throughout the entire Commonwealth, not simply those that are usual and customary for a particular county, region, or farm winery. Ibid.
[831] See ibid.
[832] Virginia Code Ann § 15.2-2288.3(E)(l)-(6) (Repl. Vol. 2012).

Second, localities may only regulate certain activities at farm wineries in the same manner that they generally regulate other citizens. The land use laws are therefore not overtly narrow or bias. Localities may not regulate:

> (1) "private personal gatherings held by the owner of a licensed farm winery differently from private personal gatherings [held] by other citizens," and
> (2) "noise, other than outdoor amplified music" differently than noise regulated "in the general noise ordinance."[833]

If any locality seeks to regulate these activities differently from other citizens or businesses, such action is void as ultra vires.

Third, localities must permit "usual and customary" events at farm wineries "without . . . regulation unless there is a substantial impact on the health, safety, or welfare of the public."[834] By mandating that events be permitted "without local regulation," the statute essentially places the heightened burden of proof on the locality to show that an event will have a "substantial impact" on the public.[835]

Fourth, any other local regulations on events and activities at farm wineries must:

> "…be reasonable and shall consider the economic impact on the farm winery . . . , the agricultural nature of such activities and events, and whether such activities and events are usual and customary for farm wineries throughout the Commonwealth..."[836]

The test under section 15.2-2288.3 in condensed form is essentially:

(1) has the locality attempted to regulate a specifically protected activity;
(2) has the locality regulated private gatherings or general noise differently from the rest of the public;
(3) has the locality failed to show that a usual and customary event has a substantial impact on the general welfare; and

[833] Ibid. § 15.2-2288.3(A), (D) (Repl. Vol. 2012).
[834] Ibid.
[835] Ibid.
[836] Ibid.

(4) are regulations on activities and events other than those covered in steps (1) through (3) unreasonable, or do they fail to consider the economic impact on the farm winery, their agricultural nature, or their customary nature?

If the response to any of these questions is yes, the locality has acted contrary to the Virginia Code and, therefore, ultra vires.[837]

4.3.4.3 Virginia Alcoholic Beverage Control Act

Under the Code of Virginia, the Virginia Alcoholic Beverage Control Board (ABC Board or the Board) exercises exclusive control over the regulation of alcoholic beverages in the Commonwealth.[838] Included within this grant is the exclusive authority and discretion to license farm wineries for operation in Virginia. Before the ABC Board decides to issue or deny a license, the interested parties may petition for an internal hearing within the agency. The Board will then determine whether to issue a license, and that determination is final, subject only to an appeal taken to the Court of Appeals of Virginia.[839]

Final regulations of the ABC Board have the effective force of law.[840] Moreover, reiterating that the laws of the Commonwealth are supreme and pre-empt local ordinances, the ABC Act further states that no locality shall:

> "…adopt any ordinance or resolution which regulates or prohibits the manufacture, bottling, possession, sale, wholesale distribution, handling, transportation, drinking, use, advertising or dispensing of alcoholic beverages in the Commonwealth."[841]

The ABC Board recently and unequivocally upheld these provisions in the Virginia Code in *In re Paradise Springs Winery, LLC*.[842] In that hearing, the ABC Board determined that a local ordinance could not be used to prohibit a farm winery from opening in Fairfax County because that

[837] While local ordinances are discussed below ,the level of inquiry into potential for any part of an ordinance to be deemed ultra vires is beyond the scope of this dissertation.
[838] Ibid.§ 4.1·103 (Rep!. Vol. 2010).
[839] Ibid.§ 4.1-207, 4.1-222 (Repl. Vol. 2010 & Cum. Supp. 2013).
[840] Ibid.§ 4.1-lll(A) (Cum. Supp. 2013).
[841] Ibid. § 4.1-128(A) (Repl. Vol. 2010 & Supp. 2013). This prohibition is subject to two minor exceptions involving taxation and regulating hours between 12:00 PM on Saturday and 6:00 AM on Monday. See ibid.§ 4.1-205 (Repl. Vol. 2010); Ibid.§ 4.1-129 (Repl. Vol. 2010).
[842] In re Paradise Springs Winery, LLC, Appl. #056973 Alcoholic Beverage Control Bd. (Sept. 3, 2009)

ordinance was inconsistent with the ABC Act.[843] The ordinance essentially established a higher burden on farm wineries for obtaining a zoning permit than the ABC Board required for obtaining a farm winery license.[844] Because this ordinance presented a situation wherein the county could potentially deny a farm winery the ability to operate after that farm winery was already licensed to operate by the Commonwealth, it was invalid in this instance.[845] As the Supreme Court of Virginia would later hold in an unrelated case, a locality may not "forbid what the legislature has expressly licensed, authorised, or required."[846]

4.3.4.4 Virginia Right to Farm Act

In addition to the Farm Winery Zoning Act and the ABC Act, the Right to Farm Act is further evidence of a state-wide policy to foster the growth of Virginia farm wineries. While the Right to Farm Act does not affect the processing and retail operations of farm wineries, as the other acts do, it does protect production activities at farm wineries. Quite simply, the Right to Farm Act's goal is "to limit the circumstances under which agricultural operations may be deemed to be a nuisance."[847] In relevant part, the Act defines agricultural operation as "any operation devoted to the bona fide production of crops... including the production of fruits."[848]

The Act achieves its goal of limiting nuisance status for agricultural operations by prohibiting localities from adopting ordinances or regulations that would require special permits for:

> "…any production agriculture . . . in an area that is zoned as an agricultural district or classification."[849]

The Act also states that so long as agricultural operations follow "existing best management practices and comply with existing laws and regulations of the Commonwealth,"[850] those operations cannot be deemed a nuisance. The Act does, however, still allow localities to adopt the customary

[843] Ibid. at 25-26.
[844] Ibid. at 8-9, 25-26.
[845] See ibid. at 25-26.
[846] Blanton v. Amelia Cnty., 261 Va. 55, 64, 540 S.E.2d 869, 874 (2001) (quoting King v. Cnty. of Arlington, 195 Va. 1084, 1091, 81 S.E.2d 587, 591 (1954)) (internal quotation marks omitted).
[847] Virginia Code Ann § 3.2-301 (Repl. Vol. 2008 & Cum. Supp. 2013).
[848] Ibid. § 3.2-300 (Repl. Vol. 2008 & Cum. Supp. 2013). The Act further defines agricultural operation to include a number of production activities irrelevant to the scope this dissertation. See ibid.
[849] Ibid. § 3.2-301 (Repl. Vol. 2008 & Cum. Supp. 2013).
[850] Ibid. § 3.2-302 (Repl. Vol. 2008).

setback and area requirements that apply to land.[851] This distinction between general regulatory power and the power to specifically regulate land is critical. As discussed below, the Supreme Court of Virginia has consistently recognised that the General Assembly intended for localities to have the power to identify where types of land uses may be located, but not to regulate the operations undertaken on the land.[852]

While not a section of the Virginia Right to Farm Act, an important provision in the Virginia Uniform State-wide Building Code also protects agriculture operations in the Commonwealth. Specifically, "farm buildings and structures [are] exempt from the provisions of the Building Code."[853] A "farm building or structure" is defined as a building or structure that is "primarily" used for any of a variety of agricultural purposes, including:

> "…storage, handling, production, display, *sampling or sale* of agricultural . . . products produced in the farm."[854]

In an advisory opinion, the Virginia Attorney General opined that these provisions:

> "…indicate[] that the General Assembly contemplated that some non-specified uses would be made of these buildings."[855]

That is, if a farm building is occasionally used for an event, such as a wedding reception, that building would still primarily serve as a farm building, and be exempt from the Building Code.[856] These code provisions are particularly important to farm wineries which derive such a substantial portion of their profits from on-site tastings, sales, and agritourism activities.[857] Furthermore, they reinforce the notion that the General Assembly has actively promoted a state-wide policy of encouraging the growth and success of Virginia farm wineries.

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[851] See ibid. § 3.2-301 (Repl. Vol. 2008 & Cum. Supp. 2013).
[852] See City of Norfolk v. Tiny House, 222 Va. 414, 422, 281 S.E.2d 836, 841 (1981) (The New York Court of Appeals recently reached a similar decision, holding that "zoning power is not a general police power, but a power to regulate land use."). See also, Sunrise Check Cashing v. Town of Hempstead, 986 N.E.2d 898, 900 (N.Y. 2013).
[853] Virginia Code Ann § 36-99(B) (Repl. Vol. 2011).
[854] Ibid. § 36-97 (Repl. Vol. 2011 & Cum. Supp. 2013) (emphasis added). Other uses include animal shelters, business offices, and storage structures. See ibid. § 36-97(1)-(5) (Repl. Vol. 2011 & Cum. Supp. 2013).
[855] Virginia Attorney General (2010) 10-071 at [2] <http://www.oag.state.va.us/>
[856] See ibid.
[857] See Virginia Wine Board, The Economic Impact of Wine Grapes on the State of Virginia-2010 (2012) 7 <http://www.virginiawine.org>; e-mail from the Hon. David Albo, above fn 804.

4.3.5 Local Regulation

Localities regulate land uses through various mechanisms, but most notably through the use of zoning ordinances. These ordinances are established not because the localities possess the inherent power to zone, but rather because the General Assembly has granted localities that power.[858] Virginia localities possess only those powers which the General Assembly grants to them; any step beyond those granted powers is invalid.[859]

Local governments are the governing bodies closest to the citizens of Virginia. They, therefore, have an important role to play in the regulation of that ultimately local concern—land and its use. For this reason, localities have the power to regulate land and land uses within their borders.[860] Local citizens and local governments have the most interest in the use of their land and the first-hand knowledge necessary to effectively regulate their land. Numerous cases have reinforced the power of localities to zone; however, this power is not without its limits.[861] While a locality does have the power to regulate the use of land, it cannot warp that power into a general regulatory power over individuals and businesses—such a power, within reasonable limits, is reserved to the state under its general police power.[862]

Virginia courts have consistently held that local ordinances must fall when they conflict with state law. While ordinances may regulate within an area that state law regulates, they:

> "…must not . . . contravene the general law, nor . . . be repugnant to the policy of the [s]tate as declared in general legislation."[863]

As Virginia follows the Dillon Rule, whenever a locality enacts an ordinance that goes beyond those powers granted by the General Assembly, that ordinance is void.[864] In other words, the

[858] Virginia Code Ann § 15.2-2280 (Repl. Vol. 2012 & Cum. Supp. 2013).
[859] See, e.g., City of Richmond v. Confrere Club of Richmond, 239 Va. 77, 80, 387 S.E.2d 471, 473 (1990).
[860] See, e.g., City of Norfolk v. Tiny House, Inc., 222 Va. 414, 423, 281 S.E.2d 836, 841 (1981).
[861] See, e.g., ibid. at 422-24, 281 S.E.2d at 841 ("Local governments have been granted the authority to adopt and enforce zoning ordinances to ensure the orderly use of land.").
[862] See, e.g., Loudoun Cnty. v. Pumphrey, 221 Va. 205, 207, 269 S.E.2d 361, 362 {1980); Allen v. City of Norfolk, 196 Va. 177, 180-81, 83 S.E.2d 397, 399-400 {1954)
[863] City of Lynchburg v. Dominion Theatres, Inc., 175 Va. 35, 42, 7 S.E.2d 157, 160 (1940) (quoting 43 C.J.S. Municipal Corporations § 219 (1927)) (internal quotation marks omitted)

baseline for local power in Virginia is established by the Code of Virginia. If the locality exercises a power that the Code of Virginia has not expressly granted, that cannot be reasonably implied from express powers, or is not essential and indispensable, that locality has acted ultra vires and its actions are invalid.[865] Furthermore, the Supreme Court of Virginia has stated that local ordinances, specifically zoning ordinances, must be reasonable in scope. In *Board of Supervisors of James City County v. Rowe,*[866] the Supreme Court of Virginia emphasised an earlier holding that:

> "[t]he mere power to enact an ordinance . . . does not carry with it the right arbitrarily or capriciously to deprive a person of the legitimate use of his property."[867]

Specifically, the landowners in *Rowe* argued that building area setback requirements enacted by James City would severely restrict their ability to develop and utilise their land.[868] The Court agreed, noting that collectively the setback requirements deprived the landowners the legitimate use of their property.[869] Therefore, even though a locality may enact zoning ordinances, those ordinances must not unreasonably curtail the owner's use of his land.

4.3.5.1 Fauquier County Ordinance

Virginia's Fauquier County has a very detailed set of ordinances related to farm wineries that was updated in July 2012.[870] Unlike the ordinances in Albemarle and Loudoun, the Fauquier ordinance seeks to directly regulate the business activities of farm wineries. The Fauquier ordinance specifically permits uses established by the Virginia Farm Winery Zoning Act, but only during county-defined business hours.[871] It also expressly allows light food service during defined business hours and two special events per month, during defined business hours and limited to thirty-five attendees.[872]

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[864] See City of Richmond, 239 Va. at 79-80, 387 S.E.2d at 473.
[865] See, e.g., Ticonderoga Farms v. Cnty. of Loudoun, 242 Va. 170, 173-74, 409 S.E.2d 446, 448 (1991) ("The Dillon Rule ... (provides that] 'local governing bodies have only those powers that are expressly granted, those that are necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable."' (quoting Tabler v. Bd. of Supervisors, 221 Va. 200, 202, 269 S.E.2d 358, 359 (1980))).
[866] 216 S.E.2d 199 (1975).
[867] 216 Va. 128, 140-41, 216 S.E.2d 199, 210 (1975) (second alteration in original) (quoting Bd. of Supervisors v. Carper, 200 Va. 653, 662, 107 S.E.2d 390, 396 (1959)) (internal quotation marks omitted).
[868] See ibid.
[869] See ibid.
[870] Fauquier County (Virginia), Codified Ordinances §§ 3-318, 5-1810, 6-102, 6-400, 15- 300 (2013).
[871] Ibid. § 6-401(1)-(7).
[872] Ibid. § 6-401(8)-(9).

Unlike Albemarle County, Fauquier County does not permit, by right, uses related to wine sales. All ordinances attempt to regulate lighting, setbacks, parking, and land area.[873] These regulations are seen to be traditional zoning regulations which affect the land, rather than the business on the land.[874]

Unlike the ordinances in Albemarle and Loudoun, however, Fauquier's ordinance also attempts to establish a number of explicit restrictions that directly regulate the business operations of farm wineries. For example, the ordinance establishes regular business hours for the wineries as 10:00 a.m. to 6:00 p.m.[875] Extended hours are permissible in certain months if the winery first obtains an administrative permit from the county.[876]

The Fauquier ordinance also expressly prohibits a number of additional uses at farm wineries,[877] and strictly regulates the hosting of events.[878] Unlike Albemarle County, which allows up to two hundred attendees at winery events by right, the Fauquier ordinance generally allows an absolute maximum of two hundred attendees at events, eighteen times per year, and only with a special use permit.[879] Not only does this ordinance likely suffer from legal problems regarding state control and pre-emption, but it has also likely contributed to Fauquier County's increasingly smaller impact on the Virginia wine industry.[880]

As of the date of writing this chapter, The Virginia Governor's Secretary of Agriculture and Forestry:

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[873] Ibid. § 6-402.

[874] While these regulations may be considered traditional zoning regulations, they could still suffer from an important legal deficiency: The extent to which they regulate setbacks, parking, and buildable areas could likely be considered unreasonable. When enacting zoning ordinances, local governments must always remember the Supreme Court of Virginia's admonition that "[t]he mere power to enact an ordinance ... does not carry with it the right arbitrarily or capriciously to deprive a person of the legitimate use of his property." Bd. of Cnty. Supervisors v. Carper, 200 Va. 653, 662, 107 S.E.2d 390, 396 (1959); see also Bd. of Supervisors v. Rowe, 216 Va. 128, 140-41, 216 S.E.2d 199, 210 (1975) (quoting Bd. of Cnty. Supervisors, 200 Va. at 662, 107 S.E.2d at 396

[875] Fauquier County (Virginia), Codified Ordinances § 15-300.

[876] Ibid. § 5-1810.1.

[877] Ibid. § 6-403.

[878] Ibid. § 5-1810.2.

[879] Ibid. § 5-1810.2(6). Larger wineries are permitted to have up to 250 guests 24 times a year as well as one event with 500 guests once a year. Ibid.

[880] Ibid.

> "…is aware of one potential corporate investor in the Virginia wine industry that has stricken Fauquier County from the county listing of where it would consider buying or building a winery . . . due, at least m part, to the passage of the winery ordinance in that County." [881]

The current Fauquier ordinance (and its predecessors) have been the subject of intense controversy from approximately 2005 to today.[882] Most recently, the Virginia Attorney General issued an advisory opinion finding that, in part, the ordinance was:

> "…an invalid exercise of local authority because it exceeds the locality's delegated zoning authority and is pre-empted by state law governing alcoholic beverages."[883]

The opinion begins by first recognizing that localities have broad powers to zone, but that the Commonwealth follows the Dillon Rule, requiring that ordinances conflicting with state law be deemed invalid.[884] While conceding that certain provisions in the Fauquier Ordinance may be consistent with the Virginia Farm Winery Zoning Act, the Attorney General determined that significant portions of the ordinance went beyond the scope of power delegated to the county.[885] Specifically, the Attorney General stated:

> "To the extent that the process of obtaining a Zoning Permit imposes obligations and burdens, including fees, upon the farm winery applicant and allows Fauquier County the ability to restrict through its review and potential denial of the zoning permit application those activities, the Fauquier County Zoning Ordinance exceeds the locality's zoning authority".[886]

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[881] Travis Hill, email correspondence received on 17 November 2016 (on file with author).
[882] See, e.g., Susan Svrluga, *Fauquier County Passes Rules After Contentious Debate Over Wineries*, Washington Post (July 14, 2012), <http://articles.washingtonpost.com/>. See also Linda Mckee, A Tale of Two Lawsuits' Wines and Vines (26 February 2013) <http://www.winesandvines.com> (stating that "by 2005, the farm wineries in Fauquier County, Va., west of Washington, D.C., were limited by local regulations that threatened to stifle their ability to grow .... Fauquier County officials began to discuss a revised farm winery ordinance as early as 2008, and county supervisors have held numerous work sessions and public hearings on different versions of a potential ordinance."). In the days leading up to the passage of the Fauquier Ordinance, the Virginia Secretary of Agriculture & Forestry sent a letter to the Fauquier Board of Supervisors discussing his concern that the proposed ordinance would hamper the wine industry in Fauquier and that provisions of the ordinance were in conflict with state law. See Letter from Todd Haymore, Secretary of Agriculture and Forestry Office of the Governor of Virginia to Holder Trumbo, Jr., Chairman, Fauquier County Board of Supervisors (21 January 217) (on file with author).
[883] Virginia Attorney General (2013) 12-063 at [l] <http://www.oag.state.va.us>.
[884] See ibid. at [1]-[2].
[885] See ibid. at [2]-[3].
[886] Ibid. at [3].

In essence, the opinion reinforces existing case law by declaring that localities cannot expand their specifically delegated power to zone into a general police power over businesses.[887] The concession that some provisions of the ordinance may be consistent with state law should not be read as inherent approval of those provisions. This concession was made without undergoing any of the factual questions posed by the Farm Winery Zoning Act.[888] One problem is that the Attorney General specifically states that his office does not offer opinions to resolve factual disputes such as those posed by certain sections of the Fauquier ordinance. This leaves the door open to litigation and dispute over the application of much of the Fauquier ordinance.

4.3.5.2 Albemarle County Central Ordinance

Virginia's Albemarle County has a very detailed farm winery ordinance that is one of the most supportive of agribusiness in the Commonwealth. The Albemarle ordinance was passed in 2009 and was a response to the Virginia Farm Winery Act of 2006.[889]

Following the passage of the Farm Winery Zoning Act, Albemarle sought to revise its winery ordinance, which had become unenforceable under the new legislation.[890] Original drafts saw the county trying todefine what a farm winery is, to control operational hours at farm wineries, and to define usually done events as those involving a maximum of fifty people.[891]

Concerned that these attempts were in violation of the Farm Winery Zoning Act, the Virginia Wine Council proposed an alternative ordinance that sought to strike a balance between the concerns of the county, local citizens, and farm wineries.[892] After working with the Virginia Wine Council, the county redrafted the ordinance, dropping the provisions governing business hours and redefining farm wineries.[893]

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[887] See ibid. at [2]; City of Norfolk v. Tiny House, Inc., 222 Va. 414, 414, 424, 281 S.E.2d 826, 841 (1981)
[888] See Virginia Code Ann. § 15.2-2288.3(A) (Repl. Vol. 2012).
[889] Telephone Interview with Matthew Conrad, Deputy Chief of Staff & Deputy Counselor to the Governor, Office of the Governor of Virginia (20 January 2017). See also email from Travis Hill, above fn 860 ("Albemarle went through some growing pains initially where wineries were finding it hard to operate under the rules the County was trying to set, but now, for the most part, what I'm hearing is that the County found the proper balance between the wineries and the County's interest in protecting public health, safety and welfare after working collaboratively with winery owners.").
[890] See Telephone Interview with Matthew Conrad, ibid.
[891] See Ibid.
[892] See Ibid.
[893] See Ibid.

The final ordinance, presented a common ground for all interested parties was the product of fruitful collaboration among local planning officials, a commercial friendly board of supervisors, and the Virginia Wine Council.[894] Albemarle's ordinance specifically allows a variety of land uses by right, including: the uses expressly provided for by the Virginia Code;[895] the sale, tasting, and consumption of wine within the winery's normal course of business;[896] and events with two hundred or fewer attendees.[897]

Albemarle County also specifically provides for uses related to wine sales.[898] Specific allowance for both of these potentially expansive uses were not given in either the Loudoun County or Fauquier County ordinance.[899] Wineries are allowed to host more than two hundred guests at a time, provided they first obtain a special use permit.[900] Albemarle only narrowly restricts wineries by regulating sound and yard sizes consistent with the other portions of its zoning ordinance.[901] The only uses that are expressly prohibited are restaurants and helicopter rides.[902] Albemarle's very accommodating winery ordinance has seemingly contributed to a vibrant local wine industry.

4.3.5.3 Loudoun County

Similar to Albemarle's ordinance, northern Virginia's Loudoun County has a relatively brief winery ordinance that leaves farm wineries with a broad discretion to manage their own affairs.

Most of Loudoun's winery ordinance concerns regulating lot size, building area, landscape buffers, access, parking, and lighting.[903] These regulations are akin to traditional zoning practices, burdening the land on which a farm winery is situated, rather than its business operations. The only

[894] Ibid.
[895] These uses include: the production and harvesting of grapes; the sale, wholesale, shipment and storage of wine in accordance with Title 4.1; and private personal gatherings held by the winery's owner. See ALBEMARLE COUNTY, VA., CODE ch. 18, § 5.1.25(a) (2013); see also VA. CODE ANN. § 15.2-2288.3(E) (Repl. Vol. 2012).
[896] Note that this seems to be a subjective element defined by a particular winery's business operations: see Albemarle County, Virginia Code, ch. 18, § 5.1.25(a)(2) (2013).
[897] Ibid. ch. 18, § 5.1.25(b)(2)
[898] Ibid. ch. 18, § 5.1.25(b).
[899] Fauquier County, Virginia Codified Ordinances § 6-401 to -403 (2013); Loudoun County, Virginia Zoning Ordinances § 5-625 (2013).
[900] Ibid. ch. 18, § 5.1.25(c). Contrast this broad allowance to the narrow allowance provided in the Fauquier County Ordinance. Fauquier County, Virginia Codified Ordinances §§ 5-1810.2, 01 (2013).
[901] Albemarle County, Virginia Code ch. 18, § 5.1.25(e),(f).
[902] Ibid. ch. 18 § 5.1.25(g).
[903] Loudoun County, Virginia, Zoning Ordinances § 5-625 (2013).

regulation that directly regulates the operations of wineries is a provision that limits operational hours to between 10:00 a.m. and 10:00 p.m.[904]

Travis Hill, the Deputy Secretary of Agriculture, stated:

> "[G]rape growers and winemakers are going to want to know that they and their businesses are welcome additions to the community. If they see areas that make it more difficult to succeed as a going concern, ... they'll avoid those areas, despite good growing conditions."[905]

The twelve-hour time period, despite serving as a limitation, is still broad and seems to be consistent to the usual hours of wineries throughout Virginia.[906] Furthermore, Loudoun and Albemarle County are regarded as promoting an environment that encourages collaboration among the local government, agriculture generally, and farm wineries specifically. Such collaboration has been described as 'promot[ing] economic development and attract various agricultural operations' to those counties.[907]

4.3.6 State Supremacy

A common problem that threatens farm wineries is overregulation at the local level. Such overregulation causes uncertainty as to the valid scope of local ordinances and raises the threat that government bodies may become micromanagers. This threat is not merely perceived but is in fact very real. Utilizing their power to zone, Virginia localities have at various times attempted to specifically regulate the business activities of farm wineries. Most recently, and quite controversially, Fauquier County passed amendments to its winery ordinance ("Fauquier Ordinance").[908] While the Fauquier Ordinance is nominally a zoning ordinance, it regulates the business operations of farm wineries by establishing operating hours, requiring various administrative licenses, and prohibiting certain functions.[909]

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[904] Ibid. § 5-625(A)(3).
[905]Travis Hill above fn 8604.
[906] The Farm Winery Zoning Act generally prohibits regulations that disallow usual and customary activities at farm wineries. See Virginia Code Ann. § 15.2-2288.3(A) (Repl. Vol. 2012).
[907] E-mail from Travis Hill, above fn 860.
[908] See, e.g., Susan Svrluga, 'Winery Rules Passed After Much Debate in Fauquier' (16 July 2012) *Washington Post*, at C12; Richard Leahy, 'Fauquier Wineries Reflect on New Restrictive County Ordinance" (15 July 2012) *Richard Leahy's Wine Report*, 1.
[909] Fauquier County (Virginia), Zoning Ordinance §§ 3-318, 5-1810.1, 6-102, 6-400, 15- 300.

One way that Virginia has dealt with inconsistencies brought about by overregulation and their complex tri-level regulatory framework is through adherence to the 'Dillon Rule'.[910] The effect of this Rule means that whenever a local regulation has not been expressly granted, cannot be reasonably implied from express grants, or is not an essential and indispensable local action, then that regulation is invalid. Virginian courts have consistently held that where local ordinances and state legislation come into conflict, the local ordinances must fail. As localities are considered administrative departments of the state, the laws of the Commonwealth are supreme, pre-empting local regulations and ordinances.[911] This pre-emption covers not only state legislation, but also state level regulations and decisions promulgated by state agencies.[912]

Similarly, if a locality attempts to adopt a regulation that is in conflict with the Code of Virginia or general state policy, that regulation is pre-empted and, therefore, invalid.[913]

In *Tabler v. Board of Supervisors of Fairfax County*,[914] the Supreme Court of Virginia held that a local ordinance establishing a cash refund for non-alcoholic beverage containers was invalid. In this case, the court found the General Assembly did not intend to convey the power to establish cash refunds to localities.[915] Finding no language in the Code of Virginia that specifically allowed localities to establish a cash refund, the court looked to proposed legislation to determine if such a power was implicitly granted.[916] The court noted that bills banning or taxing non-refundable

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[910] Dillon's Rule is the cornerstone of American municipal law. Under Dillon's Rule, a municipal government has authority to act only when :
(1) the power is granted in the express words of the statute, private act, or charter creating the municipal corporation;
(2) the power is necessarily or fairly implied in, or incident to the powers expressly granted; or
(3) the power is one that is neither expressly granted nor fairly implied from the express grants of power, but is otherwise implied as essential to the declared objects and purposes of the corporation.
The Dillon rule is used in interpreting state law when there is a question of whether or not a local government has a certain power. Judge Forest Dillon, the chief justice of the Iowa Supreme Court expounded this famous rule, which was quickly adopted by state supreme courts around the nation.

[911] See Virginia Code Ann. § 1-248 (Repl. Vol. 2011); see also City of Winchester v. Redmond, 93 Va. 711, 713, 25 S.E.2d 1001, 1001-02 (1986).

[912] See Dail v. York Cnty., 259 Va. 577, 585, 528 S.E.2d 447, 451 (2000) ("A local ordinance may be invalid because it conflicts with a state regulation if the state regulation has 'the force and effect of law."' (quoting Bd. of Supervisors v. Pumphrey, 221 Va. 205, 207, 269 S.E.2d 361, 362-63 (1980))).

[913] See City of Lynchburg v. Dominion Theatres, 175 Va. 35, 42-43, 7 S.E.2d 157, 160 (1940).

[914] 221 Va. 200, 204, 269 S.E.2d 358, 361 (1980).

[915] Ibid.

[916] Ibid. at 202-04, 269 S.E.2d at 359-61

beverage containers were rejected by the General Assembly over the course of several years.[917] Finding no explicit language conveying a refund power to localities and a general state policy disfavouring the ban or taxation of non-refundable containers,[918] the court refused to "imply powers that the General Assembly clearly did not intend to convey."[919]

In *City of Lynchburg v. Dominion Theatres, Inc.*,[920] the Supreme Court of Virginia held that a local ordinance prohibiting the exhibition of indecent movies was in conflict with state licenses authorizing the exhibition of such movies. In that case, Dominion Theatres had obtained a license from the Division of Motion Picture Censorship for the State of Virginia for showing a film titled *The Birth of a Baby*.[921] Lynchburg, however, attempted to prohibit the theatre from showing the film as a city ordinance prohibited the exhibition of indecent movies. The court recognised that the state had codified laws relating to movie censorship and granted the power to issue licenses.[922] Since the state had occupied this field of law, the court stated that "what the legislature permits the city cannot suppress without express authority therefor" and, in so doing, held that the local ordinance was in direct conflict with state law and policy.[923] Any ordinance that attempted to prohibit showings in contravention of the Division's permits was, therefore, in conflict with state law and void.[924]

The Supreme Court of Virginia has rigorously applied this pre-emption analysis whenever local ordinances and regulations come into conflict with the Code of Virginia or with policy set forth by the General Assembly. Whenever a local ordinance of any kind is irreconcilable with the Code of Virginia, the ordinance must fail. Therein, where the General Assembly has shown an interest in exclusive regulation, localities cannot overregulate,[925] and courts will not confer implied powers on localities that "the General Assembly clearly did not intend to convey."[926] Virginia statutes, regulations, and case law all suggest that the General Assembly clearly intended to exercise near exclusive control over all matters affecting the farm winery business in the Commonwealth.

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[917] Ibid. at 203-04, 269 S.E.2d at 360--61.
[918] Ibid. at 202, 204, 269 S.E.2d at 360--61. See also Blanton v. Amelia County 261 Va. 55, 65-66, 540 S.E.2d 869, 875 (2001)
[919] Ibid.
[920] 175 Va. 35, 43, 7 S.E.2d 157, 160 (1940).
[921] Ibid. at 37, 7 S.E.2d at 158.
[922] Ibid. at 40-43, 7 S.E.2d at 159-60.
[923] Ibid. at 42-43, 7 S.E.2d at 160.
[924] Ibid.
[925] See Tabler v. Bd. of Supervisors, 221 Va. 200, 202, 269 S.E.2d 358 (1980).
[926] Ibid at 359-60.

Accordingly, while localities have a broad range of powers, when the General Assembly has shown intent to control a given field of law, its word is final.

In *City of Norfolk v. Tiny House*,[927] the Supreme Court of Virginia held that the General Assembly, in passing the ABC Act, did not intend to usurp the power of localities to regulate the *location* of establishments selling alcoholic beverages through valid zoning permits.[928] The court began its analysis by noting that the Code of Virginia specifically grants localities the power to adopt zoning ordinances.[929] The court in that case found that this grant of power was not displaced by the ABC Act, which granted the ABC Commission the authority to regulate matters concerning alcoholic beverages.[930] The court held that the zoning power allowed localities to regulate the *location and concentration* of establishments selling alcoholic beverages, the ABC Act notwithstanding.[931] The court noted, however, that:

> "[t]he General Assembly intended to grant the ABC Commission exclusive authority to control the 'manufacture, bottling, possession, sale, distribution, handling, transportation, drinking, use, advertising or dispensing of alcoholic beverages in Virginia."[932]

Further emphasizing this point, the court noted that Norfolk's ordinance was "not a prohibition measure," but rather merely an attempt to prevent the clustering of "adult uses."[933] Norfolk's ordinance was "not designed to prevent or control the use of alcohol or *to regulate the business of those who dispense it*."[934] That power, the court noted, "is the exclusive province of the ABC Commission."[935] As the Norfolk ordinance only sought to regulate the location of establishments selling alcoholic beverages, it was a valid exercise of the city's zoning power.[936]

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[927] 281 S.E.2d 836 (Va. 1981).
[928] 222 Va. 414, 422, 281 S.E.2d 836, 841 (1981).
[929] Ibid. at 417, 281 S.E.2d at 838 (citing Virginia Code Ann §§ 15.1-427 to -503.2 (Repl. Vol. 1981)
[930] Ibid. at 421, 281 S.E.2d at 840.
[931] Ibid. at 422, 281 S.E.2d at 841.
[932] Ibid, at [84].
[933] Ibid. at 424, 281 S.E.2d at 842.
[934] Ibid. (emphasis added).
[935] Ibid.
[936] Ibid.

Therein, a zoning ordinance that regulates the business of alcohol distribution is invalid.[937] The scope of a zoning ordinance is limited to the regulation of land, not to the regulation of business itself. Any local ordinance, therefore, that purports to regulate the business activities of a farm winery is likely void as *ultra vires*.

Moreover, similar to the ordinance at issue in *Tabler*, there is no direct language in the Code of Virginia that explicitly authorises localities to have general regulatory power over wineries. That power has been reserved to the ABC Board whose regulations "have the effect of law."[938] The explicit language of the Code of Virginia denies localities the general power to regulate businesses dispensing alcoholic beverages. Section 4.1-128 recognises only two instances in which a locality may directly regulate businesses dispensing alcoholic beverages. First, localities may issue licenses for taxation purposes.[939] Second, localities may prohibit the sale of beer or wine between noon on Saturday and 6:00a.m. on Monday.[940] By the Code's explicit language, these are the only instances that localities may directly regulate businesses dispensing alcoholic beverages.[941] These specifically enumerated exceptions and the general grant of authority to the ABC Board show that the General Assembly intended for the ABC Board, not localities, to have the general authority to regulate businesses dispensing alcoholic beverages. As the General Assembly enumerated exceptions to this general power, it clearly did not intend for localities to have full regulatory power over such businesses.

Furthermore, *Tabler* rejects any notion that the courts, absent a specific intent by the General Assembly, should imply powers for localities that go beyond grants in the Code of Virginia. As there is no specific intent granting localities a general regulatory power over businesses dispensing alcoholic beverages, localities lack that power. Indeed, in *Tiny House*, the Supreme Court of Virginia specifically recognised that the general power:

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[937] Ibid.
[938] Virginia Code Ann.§ 4.1-lll(A) (Cum. Supp. 2013); see also ibid.§ 4.l-128(A) (Repl. Vol. 2010 & Cum. Supp. 2013) (explicitly stating that no locality shall "adopt any ordinance or resolution which regulates or prohibits the manufacture, bottling, possession, sale, wholesale distribution, handling, transportation, drinking, use, advertising or dispensing of alcoholic beverages in the Commonwealth').
[939] Ibid.§ 4.1-205 (Repl. Vol. 2010).
[940] Ibid.§ 4.1-129 (Repl. Vol. 2010).
[941] Ibid.§ 4.1-128 (Repl. Vol. 2010 & Cum. Supp. 2013).

> "…to prevent or control the use of alcohol or *to regulate the business of those who dispense it* . . . is the exclusive province of the ABC Commission."[942]

Any local zoning ordinance that would not simply govern the clustering and location of farm wineries is therefore likely void.[943] The Code of Virginia explicitly denies localities a general regulatory power over businesses dispensing alcoholic beverages, and the Supreme Court of Virginia has recognised the ABC Board's exclusive authority over such regulations. The Commonwealth, therefore, has shown clear intent to reserve for itself the general authority to regulate farm wineries – establishments that are in the businesses of dispensing alcoholic beverages.

4.4 Concluding Comments

Both Virginia and Victoria are presently assessing how best to support the long-term viability of the wine industry in their respective jurisdictions. Some common identified objectives in Strategic Vision Reports undertaken in both jurisdictions include:

- Promote the industry through supporting tourism[944]
- Recognised region for quality wines[945]
- Strengthen industry structure and coordination.[946]

This chapter spoke to the last objective. The need to have a coordinated regulatory framework that is capable of resolving conflicts between inconsistencies at different levels of regulation is important. The Dillon Rule is such an example.

Ordinances can be beneficial for the wine industry because of their ability to factor unique qualities and trends of a particular region. Out of the three ordinances examined, for example, the

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[942] City of Norfolk v. Tiny House, Inc., 222 Va. 414, 424, 281 S.E.2d 836, 842 (1981) (emphasis added).
[943] See County of Chesterfield v. Windy Hill, 263 Va. 197, 204-06, 559 S.E.2d 627, 631-32 (2002) ("We hold that the ABC Commission's exclusive authority to license and regulate the sale and purchase of alcoholic beverages in Virginia does not preclude a municipality from utilizing valid zoning ordinances to regulate the location of an establishment selling such alcoholic beverages." (quoting Tiny House, 222 Va. at 423, 281 S.E.2d at 841) (internal quotation marks omitted)).
[944] Victorian Wine Industry Strategy above fn 13, 15; Virginia Wine Industry Strategy, above fn 27, 4.
[945] Victorian Wine Industry Strategy, ibid, 4 and 12 (one of the objectives highlighted is to maintain a sustainable export market); Virginia Wine Industry Strategy, ibid, 4 (an objective is to improve overall reputation of quality wines).
[946] Victorian Wine Industry Strategy above fn 13, 19; Virginia Wine Industry Strategy, above fn 27, 4-5.

Albemarle Ordinance is a model ordinance, which is very accommodating towards the wine industry, and caters towards the interests of both wineries and local government.

Equally, there needs to be effective administration of a legal regulatory framework. This is discussed further in Chapter VI. Virginia, for example, has infrastructure that can be drawn upon to facilitate a coordinated effort between the wine industry, government and consumers to administer a 'valid' law insofar as law (as opposed to 'order') is relevant, to meet ongoing stakeholder interests.

This begs the question of whether ordinances should exist at a county level or, in the case of Virginia, whether such an ordinance apply to an AVA (but not a sub-AVA). It is possible, however, for the TTB to reclassify an AVA as an existing county, in which case, ordinances can be a value-enhancing tool for that wine region. Such a framework model could also be utilised in Victoria – although, not to each 22 present wine GIs.

The regulatory framework governing Victorian wineries exists primarily at a federal level and may be described as more centrally administered. Regimes that implicitly impact farming practices also exist at a State level, and include the *Water Act 1989* (Vic), *Plant Health and Plant Products Act 1995* (Vic). While Victorian wineries are subject to a formal labelling requirement because of the Label Integrity Program (LIP), Food Code and consumer protection legislation (i.e. the *Competition and Consumer Protection Act 2010* (Cth)), inefficiencies in the regulatory framework are apparent in the administration of regimes. For example, Victoria has 22 wine GIs which is far too many given that the total land area comprising Victoria is 87,807 square miles – wine regions occupying only a fraction of this total area, and in concentrated areas. Consistent with the strategic direction referred to in the Victorian Wine Industry Strategy,[947] is a consolidated approach to the number of wine GIs as a possible option. This would require the GIC drawing on their power to amend a wine GI under subsections 40P(c) and (d) of the AGWA Act.

Another option is to retain the present GI system but introduce an overlay super-GI regime that would operate in conjunction. This appears permissible under s. 3 of the AGWA Act, which casts the net for classifying a wine GI as "originating in a country…region or locality in that country." To facilitate effective administration of a wine regulatory framework in Victoria, there

[947] Victorian Wine Industry Strategy above fn 13, 10.

needs to be a coordinated effort of internal relations between laws in Australia's legal system.[948] Interpretation of what a GI is should be consistent with consumer protection laws, advertising and labelling laws under the AGWA Act, and Food Code. The LIP could provide a useful administrative avenue to coordinate this effort, and therein reduce an advertising distortion effect.

Each of these strikes at the need for a regulatory framework to cater towards stakeholder interests. The legal regimes and wine laws within this framework should therefore addressing recent trends and issues such as economic sustainability, environmental sustainability, culture preservation or enhancement, quality, but without compromising broader social interests such as health.

[948] See section 2.3.2.

CHAPTER V

TAXATION OF THE WINE INDUSTRY

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CHAPTER V
TAXATION OF THE WINE INDUSTRY

Although taxation may be classified as an indirect law in its application to regulating the wine industry, it has profound importance to the economic sustainability and growth of the wine industry.[949] This Chapter discusses how existing taxes impact the wine industry, and their prohibitive versus permissive impact – with a focus on wineries and producers of wine.[950] Since this dissertation proposes an optimum regulatory framework for the Virginian and Victorian wine industry, national tax laws in those respective jurisdictions[951] are discussed. What is not discussed in detail, however, are the national tax laws in France and Italy. Since wine is a global commodity and consumption good that forms part of a supply chain, broader EU Directives (e.g. the Common Agricultural Policy) is instead discussed.

Outlined first is the nexus between taxation and the wine supply chain, with particular focus on demographics of production and consumption of wine, also the net and economic cost of not only setting up but running a winery. It is the latter primarily that provides a canvas for the impact of imposition of taxation along the wine supply chain. Second, the global demographics of imports and exports of wine to and from US, Australia, France and Italy, is outlined. It is hypothesised that tariffs impose a negative effect on the wine industry of the exporting country or jurisdiction, which may be counterbalanced by trade agreements. Third, the domestic tax regimes of the analysed jurisdictions are outlined. Discussed is how they achieve a balance between norms identified in Chapter II, government revenue-raising objectives, and interests of society and the wine industry *in toto*. The final section proposes what taxes and regimes should be modified to accommodate a greater balance between the goals of regulators, governments and the wine industry.

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[949] See Kazimierz Opalek, in section 2.1 (discussing the justification of the internal validity of law (in this context, a "wine law")). See also Victorian Wine Industry Strategy above fn 13, 10; Virginia Wine Industry Strategy, above fn 27, 1.

[950] Unless otherwise specified, terms used interchangeably are "wineries", "vineyard", "firms", "producers" and "wine farms". Distinguishing between all of these terms would also be necessary where the focus is purely on economic measures and impacts of regulatory changes affecting the wine industry: see Hinchliffe, above fn 219 and fn 552. This level of inquiry is beyond the scope of this dissertation.

[951] See Kelsen in sections 2.1 and 2.1.2 (discussing the scope of a valid legal system. All jurisdictions' legal systems within the context of this dissertation are classified as *im groben und ganzen* "effective"). See also Austin D. Sarat, 'Redirecting Legal Scholarship in Law Schools' (2000) 12 *Yale Journal of Law and Humanities* 129, 134. C.f. Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, 1965) 10.

5.1 Purpose and Function of Taxation

Taxation allows for the optimum allocation of available resources in the state.[952] The redistributing of income and wealth is achieved through collecting revenue to stabilise and stimulate the economy.[953] In so doing, taxation serves as a revenue-raising function with the purpose of maintaining a state or jurisdiction's basic institutions and social sphere.[954] The way that a tax is imposed, however – insofar as it is applied progressively, at a flat rate, the tax base of a particular tax regime, can result in tax serving a prohibitive function – the underlying purpose being to discourage certain behaviours. This begins with looking at the purpose or objective of tax is, generally, and with regards to a particular tax regime in the context of the wine industry.

5.1.1 Taxation for Raising Revenue

Taxes have consistently been levied on wine producers and industry in imperial Rome, medieval England, and in contemporary winemaking countries.[955] Today, part of revenues collected through taxation goes to funding various education, public health, social security, and defence programs, as well as to supporting the country's infrastructure.[956] The history of all tax policies rests on the need to raise sufficient funds to pay for these services, and therefore maintain that jurisdiction's public institutions.[957] For example, increases in income tax rates (or modifying the taxable income thresholds in a progressive income tax regime) are tied to increases in government spending on military operations or are designed to reduce negative consequences of inflation or economic crisis.[958]

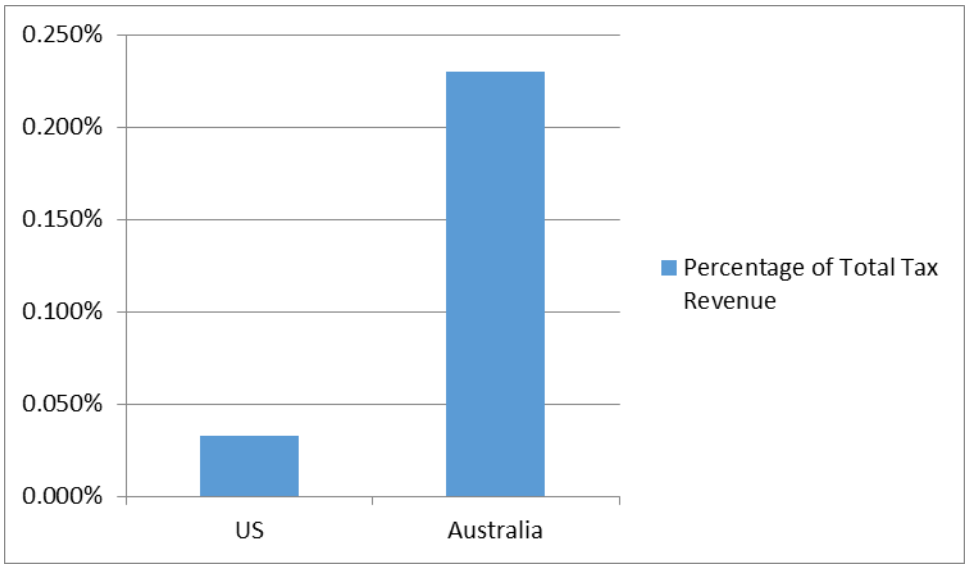
To serve a revenue distribution function, governments look to ways of generating revenue. For example, in the context of the wine industry, an analysis of taxable income[959] as the tax base in

[952] Ibid.
[953] John G Head and Richard E Krever, *Tax Reform in the 21st Century: A Volume in Memory of Richard Musgrave* (Kluwer Law International, 2009) 288.
[954] Ibid.
[955] William F Shughart, *Taxing Choice: The Predatory Politics of Fiscal Discrimination* (Transaction Publishers, 1997) 247.
[956] See Michael Kobetsky, *International Taxation of Permanent Establishments: Principles and Policy* (Cambridge University Press, 2011) 15.
[957] Sarah Hinchliffe and Eu-Jin Teo, *Taxation Law in Context* (Oxford University Press, 2012) 23.
[958] Blanca Moreno-Dodson and Quentin Wodon, *Public Finance for Poverty Reduction: Concepts and Case Studies from Africa and Latin America* (World Bank Publications, 2008) 58.
[959] See *Income Tax Assessment Act 1997* (Cth) ss. 4-10 and 4-15; 26 US Code §63.

the income tax regime and sourced by entities in a particular industry (e.g. the wine industry). To see the impact, however, of a particular industry on total revenue may motivate (or discourage) a government to modify the way in which tax is applied to that industry to support its growth, for example.

A comparative analysis of the total tax revenue on wine (based on USD as at 31 December 2015), from all applicable tax regimes applied to the wine supply chain (i.e. from the point of sale of a wine product, including sales taxes, and portion of income tax from sale of wine) comprised $1.07 billion total tax revenue on wine out of a total of $3,249 billion revenue. In Australia, total tax revenue on wine (in USD) for the same period was $0.792 billion of a total $344 billion revenue. This translated as a percentage of 0.033 percent of tax revenue from wine sales versus total tax revenue, in the US, and 0.23 percent in Australia (see Figure 1).

Figure 1 Wine Tax Revenue versus Total Tax Revenue



Source: OECD and Australian Bureau Statistics[960]

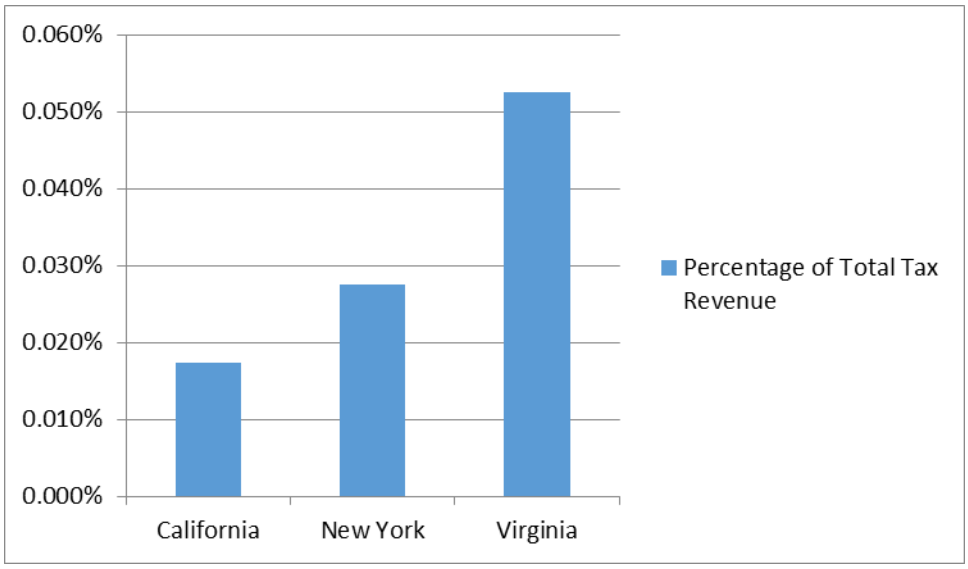
This indicates that, for the US, the wine industry does not generate a high percentage of tax revenue compared to income tax applied to individuals.[961] Whereas, the wine industry in Australia,

[960] See OECD <http://www.oecd.org>; Australian Bureau of Statistics, *Taxation Revenue, Australia 2014-2015* http://www.abs.gov; United States Census Bureau, Income 2015 <https://www.census.gov>.
[961] See ibid.

while smaller compared to other sources of revenue, is still sizable compared to revenue from other agri-businesses.[962]

Breaking this down further, is a comparison between state tax revenue on wine versus total state tax revenue between California, New York and Virginia (see Figure 2).

Figure 2 State Tax Revenue on Wine as a Percentage of Total State Tax Revenue



Source: United States Census Bureau[963]

The above shows that the total tax revenue by state for the 2016 year of income for California was $151 billion, of which $26.1 million was from wine sale revenue. In New York, total tax revenue was $71.6 billion, of which $19.7 million was from sale of wine. Virginia's state tax revenue on wine was $9.4 million of a total $17.99 billion of total tax revenue for the state. The wine revenue percentage of total tax revenue was greatest for Virginia, at 0.053 percent for this period, as compared to 0.017 percent for California and 0.028 percent for New York.

If viewed as a small source of actual overall revenue based on trends, governments may not see urgency in implementing changes to tax legislation as it applies to, here, the wine industry. A

[962] See United States Department of Agriculture, *National Agricultural Statistics Service 2015* (2015) <https://www.nass.usda.gov>. A discussion of this point is, however, beyond the scope of the present dissertation.
[963] See New York Tax website, *Tax Collection 2015* https://www.tax.ny.gov; Virginia Tax, Annual Report for Financial Year 2015 <http://www.tax.virginia.gov/>; Census <https://factfinder.census.gov/>; California State Board of Equalization <http://www.boe.ca.gov>.

more relevant point to make, however, is that governments should take a more pragmatic view of the revenue source capabilities of the industry if certain changes were implemented through a tax system. As a commodity that forms part of a wine supply chain, governments should pay closer attention to the needs of wine industry stakeholders to support their economic sustainability, and long-terms sustainability of the wine industry in that jurisdiction.

5.1.2 Distribution of Economic Resources

One of the key themes of a tax system is that there is equitable distribution of economic resources. The effect of this is that those entities requiring support are capable of accessing it. Supporting the wine industry assists in the generation of revenue through business or corporate taxes, property taxes, sales tax, and income tax, at each point of the supply chain framework. The present dissertation focusses on peculiar features of the tax regime as it applies to Virginian and Victorian wineries, and what needs to change.

The aim of raising revenue, as mentioned, is closely connected with a desire to achieve acceptable distribution of revenue.[964] An acceptable distribution means that taxation be used as a mechanism to transfer benefits and payments to those members of society that are most in need for support which, in turn, facilitates social equality. On a broad application, equitable distribution of economic resources is achieved by having a system of state-provided social services such as social security, public schools and roads.[965] But, equitable distribution of economic resources can also target particular industries. For example, the Wine Equalisation Tax (WET) regime was introduced in Australia in 2004, applied at the last wholesale sale of wine (usually the sale from the last wholesaler to the retailer), to facilitate a more level playing field in the Australian wine industry.[966] The ability to claim Research and Development (R&D) tax offsets or credits, and that a taxpayer can avail themselves of specific deductions,[967] are also examples of a tax system's equitable function. A tax regime can be structured to achieve acceptable distribution of revenue, either through a progressive tax rate structure or regressive structure. An example of a regressive structural application of tax is a flat tax, where that tax disproportionally affects a particular class of tax payers, thus leading to

[964] Mitchell A Polinsky, *Handbook of Law and Economics* (Elsevier, 2007) 652.
[965] Jane Frecknall-Hughes, *The Theory, Principles and Management of Taxation: An Introduction* (Routledge, 2014) 4.
[966] *A New Tax System (Wine Equalisation Tax) Act 1999* (Cth) s. 2-5. See also Australian Taxation Office, *Wine Equalisation Tax: The operation of the wine equalisation tax system* (WETR 2009/1) 2.
[967] See generally *Income Tax Assessment Act 1997* (Cth) s 8-5; 26 US Code §162.

vertical inequity.[968] The income tax regime, as it applied to individuals in the US and Australia, is an example of a progressive taxation regime. The tax brackets and rates are assessed each year (usually announced at a national or federal budget release) and modified to take effect at the start of the following tax year. A progressive tax structure that is monitored and updated to ensure its relevancy ensures vertical equity between taxpayers with different tax bases, and therefore a fairer distribution of revenue resource.[969] Having a transparent tax system is key to effective administration and facilitating voluntary tax compliance.[970]

For a tax to have a functional purpose, it is necessary to assess the needs of stakeholders and tailor or modify tax legislation or tax regimes to accommodate this. Only then can a tax regime or tax function efficiently within a wine regulatory framework.[971]

5.1.3 The Protective Role of Taxation

A tax regime can also function to encourage or discourage activities. One of the underlying purposes of taxation in wine law is the protection of local products in a highly competitive international market. The main tool in this case is the use of tariffs, which are taxes imposed on wines imported from foreign countries when they enter the domestic market.[972]

Tariffs which, in the absence of a Free Trade Agreement (FTA) or Preferential Trade Agreement (PTA), apply are such an example. Tariffs are introduced with the main purpose of raising government revenues, improving the balance of trade, and protecting the local wine industry.[973] For example, countries aiming to boost their wine industries establish high tariffs to allow local producers develop their businesses without much pressure. They may also be reluctant to enter into FTA. In such situations, tariffs also prevent the loss of jobs and tax revenue that could

[968] Hinchliffe and Teo, above fn 957, 9.
[969] Ahmed Faisal and Absar M Alam, *Business Environment: Indian and Global Perspective* (PHI Learning Pty. Ltd., 2014) 150.
[970] See *Taxation Administration Act 1953* (Cth) s. 8C. See also Australian Taxation Office, *Tax Compliance Program Framework* <http://www.ato.gov.au>; Internal Revenue Service, Compliance <http://www.irs.gov/compliance>.
[971] Penelope Carroll, Philippa Howden-Chapman and Paul Perry, 'The Widening Gap: Perceptions of Poverty and Income Inequalities and Implications for Health and Social Outcomes' (2011) 37 *Social Policy Journal Of New Zealand Te Puna Whakaaro* 1, 3.
[972] Gary J Allen and Ken Albala, *The Business of Food: Encyclopedia of the Food and Drink Industries* (ABC-CLIO, 2007) 363.
[973] See section 5.3.1.

result from the sudden influx of imported wines. Tariffs are applied on wines either ad hoc or for longer periods to protect domestic enterprises.[974]

There are two types of tariffs, including *ad valorem* tariffs and specific-value tariffs.[975] The first type of tariffs is a tariff on the value of the product. For example, if a bottle of wine costs $2,000, and the *ad valorem* tariff is 10 percent, then the tax that should be payed is $200. *Ad valorem* tariffs are effective because they rise automatically with inflation and because they tax different quantities of products at the same percentage rate. In other words, a tariff of 10 percent on wine would produce increasing revenues as the quantity and price of imported wine rise.[976] Specific-value tariffs are linked to such product characteristics are weight, surface, or volume. Unlike *ad valorem* tariffs, specific-value tariffs should be constantly adjusted to reflect inflation and market changes.[977] Sometimes, these two types of tariffs are used simultaneously.

Tariffs play a crucial role in the global wine industry.[978] A lack of tariffs may speed up international trade through allowing free exchange of goods. Where tariffs apply, the may shift excess profits from foreign to domestic economies. However, tariffs may also be disadvantageous if they lead to monopolies of local industry by creating global trade barriers for entry of products into a country. Where tariffs lead to monopolies of domestic industries, they feed into decrease in the quality of products produced domestically, primarily because of the lack of competition. Moreover, restrictive tariffs do not allow consumers to get access to high-quality foreign products or make prices for such products too high. To prevent overt trade distortion WTO rules on tariffs and trade are used worldwide to regulate the levels of tariffs and eliminate disruptive or unlawful taxation policies. Moreover, WTO's Agreement on Safeguards (SA) allows WTO members to impose temporary tariffs to react to sudden, unforeseen changes in markets and protect local industries.[979] For example, in countries with undeveloped, 'infant' wine industries,[980] tariffs provide temporary protection and allow producers to grow strong enough to work in a competitive market.

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[974] Colin Barrow, *The 30 Day MBA in International Business: Your Fast Track Guide to Business Success* (Kogan Page Publishers, 2011) 43.
[975] Shughart, above fn 934, 288.
[976] See generally, Robert M Dunn and John H Mutti, *International Economics* (Routledge, 2004).
[977] Shughart, above fn 934, 289.
[978] See section 5.3.1, below.
[979] Philipp Scheuermann, *Normative Conditions to Make WTO Law More Responsive to the Needs of Developing Countries* (Herbert Utz Verlag, 2010).
[980] See section 2.4.2.

Therefore, on the one hand, trade protectionism in the form of tariffs may be useful in some countries, especially in those aiming to boost their own production. On the other hand, however, taxation though tariffs may be viewed as inefficient economically, as it has the potential to slow down international trade and does not allow the free exchange of goods.[981]

5.1.4 Influencing Consumer Behaviour

Aside from serving a protective function and a means for raising revenue, taxation has also been used as a mechanism to influence consumer behaviour.[982] There are a number of tax initiatives that influence consumer behaviour, insofar as it encourages or discourages perception of wine or the decision to [not] buy wine.

The first is what may broadly be descried as a 'sin tax', which imposes an additional excise tax, the objective of which is to discourage people from buying and using unhealthy products such as alcohol or tobacco.[983] The main argument behind the concept of a sin tax is that adults should be able to decide to engage in unhealthy behaviours. But, those who do engage in these activities should pay a higher price through taxes to help defray the costs of regulating the provisions and consequences of their choice.[984] The main negative externalities are increased medical insurance premiums, road fatalities and injuries, and the effect on social security funding of premature death.[985]

Scholarship has confirmed that there is a close connection between toughened alcohol taxation, and reduced levels of alcohol consumption.[986] A study by Wagenaar et al. provides strong evidence that taxes on beverage alcohol are inversely related to drinking, and that raising prices through taxes is an efficient way to reduce drinking and encourage more healthy lifestyles.[987] Sornpaisarn et al. studied binge drinking among Thai adolescents and young adults. Researchers found that a 10 percent increase of the alcohol taxation rate was associated with a 4.3 percent reduction in the levels of lifetime drinking among Thai population. Sornpaisarn et al. concluded that

[981] But see, section 2.4.1.
[982] See also section 6.2.
[983] George Schieber et al, *Health Financing in Ghana* (World Bank Publications, 2012).
[984] Carole L Jurkiewicz and Murphy J Painter, *Social and Economic Control of Alcohol: The 21st Amendment in the 21st Century* (CRC Press, 2007) 85.
[985] See Dale M Heien, 'Age Higher Alcohol Taxes Justified' <http://object.cato.org/>.
[986] Peter Achterberg, 'International; Policy Overview: Alcohol' (2007) *EUPHIX* 12, 12.
[987] Antonio Wagenaar et al, *Effects of Beverage Alcohol Taxes and Prices on Drinking: A Metaanalysis of 1003 Estimates from 112 Studies* (2009).

raising taxation on alcoholic beverages may prevent youth from initiating drinking, thus reducing the harmful effects of alcohol consumption.[988] Another research study conducted in Canada provided longitudinal estimates suggesting that a 10 percent increase in the minimum price of alcoholic beverages reduced its consumption by approximately 16 percent compared to other drinks.[989] Specifically, wine consumption fell by nearly 9 percent, which is a significant achievement that would consequently reduce public health burdens[990] associated with heavy alcohol consumption.

Although sin tax is introduced predominately to protect abusers of a product (here, wine), moderate drinkers also have to pay more because it is impossible to differentiate between the two groups at the point of sale. This is because the imposition of a sin tax applies to the wine (likely at a flat rate of tax) and does not discriminate between buyers or consumers of wine. The imposition of an addition 'sin' tax on wine results in an overall price mark-up of the wine.

Elder et al. found that increasing alcohol excise taxes is a highly effective strategy for reducing unhealthy alcohol consumption and related harms.[991] That study looked at statistical evidence across different time periods, countries, study designs, analytic approaches, and outcomes, which clearly demonstrates the positive influence of strict taxation policies on consumer behaviour.[992] These results, summarised in Figure 3,[993] show that as taxation on alcohol increased, there is a direct impact on consumers from a fiscal perspective because of the overall increased price of the alcoholic beverage.

Other studies have demonstrated that comprehensive (i.e. tax legislation is transparent and accessible) and consistent taxation policy can potentially reduce alcohol consumption, and this effect

[988] Bundit Sornpaisarn et al, 'Can Pricing Deter Adolescents and Young Adults from Starting to Drink: An Analysis of the Effect of Alcohol Taxation on Drinking Initiation among Thai Adolescents and Young Adults' (2015) 5 *Journal of Epidemiology and Global Health* 4, 45-57.
[989] Tim Stockwell et al, 'Does Minimum Pricing Reduce Alcohol Consumption? The Experience of a Canadian Province' (2011) 107 *Addiction*, 912-920.
[990] See ibid. See also Sarah Hinchliffe, 'Hospital Responses to Major Threats – Nuggets in Disguise for Internal Auditors' (2017) 32(2) *Internal Auditing* 2, 4.
[991] Randy W Elder et al, 'The Effectiveness of Tax Policy Interventions for Reducing Excessive Alcohol Consumption and Related Harms' (2010) 38(2) *American Journal of Preventive Medicine* 217, 218.
[992] Ibid.
[993] See Appendix V, Figure 3 "Causal Relationship between Increased Alcohol Taxes and Decreased Alcohol Consumption".

is more pronounced over a long time.[994] For example, when comparing the sensitivity of consumption to changes in price, economists use the term 'price elasticity of demand.' Economists compute the price elasticity of demand as the percentage change in the quantity demanded divided by the percentage change in price,[995] and is applied to assess how much the quantity of a demanded product (e.g. alcohol) responds to a change in price. According to this approach, demand for alcoholic beverages is highly sensitive, or 'elastic' to price changes. As a result, price elasticity of demand underlines that higher alcohol prices may have a positive impact on consumers' health and decrease alcohol-related problems.[996]

Arnett revealed that low alcohol prices were associated with increased alcohol consumption, while higher prices significantly decreased the levels of college drinking.[997] Similarly, increases in alcohol prices in bars across England, Arnett argued, reduced consumption by young adults, who are most sensible to pricing. But, the vertical decrease of consumption of wine where taxation is applied or increased, is not universal. A study by Room et al. found that decreased alcohol taxes in Nordic countries such as Denmark and Sweden did not influence alcohol consumption to a statistically significant rate.[998] By comparison, Italy, Spain, and Slovakia, countries with Europe's lowest excise taxes, have enjoyed comparatively low rates of heavy episodic drinking than countries with tougher taxation policies.[999]

Furthermore, multiple studies have showed that heavy drinkers are least responsible to price changes, which means that raising taxes does not help to protect these people's health.[1000] Consumers with addictive behaviour, for example, would turn to other alcoholic beverages as substitutes. A sin tax, because it does not target a particular group, would be unlikely to result in an overall decrease of excessive alcohol consumption, and health concerns derived from this. It would, however, negatively affect the wine industry due to reduced sales, or a shift in consumer preference (being those who

[994] Xin Xu and Frank J Chaloupka, 'The Effects of Prices on Alcohol Use and Its Consequences' (2011) 34 *The Journal of the National Institute on Alcohol Abuse and Alcoholism* 2, 3.
[995] See Gregory N Mankiw, *Principles of Economics* (Cengage Learning, 2008).
[996] Ibid.
[997] Jeffrey Jensen Arnett, *The Oxford Handbook of Emerging Adulthood* (Oxford University Press, 2015) 535.
[998] Robin Room et al, 'What Happened to Alcohol Consumption and Problems in the Nordic Countries When Alcohol Taxes Were Decreased and Borders Opened?' (2013) 2 *International Journal of Alcohol and Drug Research* 1, 77-87.
[999] International Center for Alcohol Policies, *If Alcohol Prices Increase, Will It Reduce Binge Drinking?* <http://www.icap.org/>.
[1000] Nick Steward, 'Tax is a Blunt, Ineffective Instrument to Reduce Alcohol Related Harm' *Oxford Economics* (22 April 2015) <http://spirits.eu/>.

purchaser cheaper wines) to focus on selecting the most cheaply priced wine. This would in-turn disincentives the wine industry to produce quality wine and negate an associate reputation for quality of a wine region.[1001]

Following on from the above, sin taxes and increases in alcoholic beverage taxation in general fall disproportionately on moderate consumers who are low- to middle- income earners, and those who may be financially less-well off and who tend to engage in unhealthy behaviours. For example, the Adam Smith Institute highlighted that sin taxes deter moderate users rather than heavy users, whose demand for alcohol is always high and constant.[1002] It is hypothesised that a sin tax would not lead to a noticeable shift in consumer preference for those seeking quality wine and remain committed to this despite price increases. Notwithstanding issues of affordability, excise taxes still disproportionately affect low to medium income earning consumers – indicating that such a tax would lead to vertical discrimination.[1003]

Further, Adam Smith Institute noted that 'alcohol taxes' do not discourage drinkers from consuming alcohol beverages, but rather induce them to use black market, where products are generally of poor quality.[1004] This, in turn, leads to deteriorated health and negates the objective of a sin tax. His opinion is consistent with 'rational choice theory' which explains how taxation influences consumer behaviour.[1005] This theory, also referred to as 'standard consumer theory',[1006] postulates that individuals act rationally when they seek to maximise their benefit.[1007] In other words, consumers rank preferences over all goods, make consumption choices based on this assessment, and do to maximise their utility.[1008] In this sense, individuals will pursue the desired object or service subject to such economic constraints as time, income, or capital.

[1001] See section 6.6.1.
[1002] Peter Boyle et al, *Alcohol: Science, Policy and Public Health* (OUP Oxford, 2013).
[1003] Christopher Snowdon, 'Aggressively Regressive', *IEA Current Controversies Paper No. 47* (October 2013) 2 <http://www.iea.org.uk/>.
[1004] Adam Smith Institute, *The Wages of Sin Taxes: The True Cost of Taxing Alcohol, Tobacco and Other "Vices"* (14 May 2012) <http://www.adamsmith.org/>.
[1005] Catherine Herfeld, 'The Potential and Limitations of Rational Choice Theory: An Interview with Gary Backer' (2012) 5(1) *Erasmus Journal for Philosophy and Economics* 73, 78-9.
[1006] Ibid.
[1007] Klaus Rennings et al, *Sustainable Energy Consumption in Residential Buildings* (Springer Science & Business Media, 2012) 7.
[1008] See Jonathan Levin and Paul Milgrom, 'Introduction to Choice Theory' (September 2004) <http://web.stanford.edu/>.

5.1.5 General Recommendations

The alcohol industry plays a part in generating federal and national tax revenue.[1009] While taxation is a mechanism of cost-effective response to the heavy burden of alcohol use compared to other prevention policies and programs,[1010] measures such as the sin tax may be ineffective in achieving their objective, or even discriminatory. The answer to address this is to separate regulation of the product, and regulation of consumer behaviour. Retaining a minimum drinking age (either 18 or 21 years old) in the absence of a sin tax is most beneficial for consumers and the wine industry, alike.

In relation to developing countries (which are not discussed), however, Anderson, Chisholm, and Fuhr suggested that increasing the proportion of taxed alcohol could be a more effective pricing policy than a simple increase in tax. These scholars go onto explain that a simple increase in excise tax only encourages further smuggling, illegal production, and cross-border purchases.[1011]

The concept of a sin tax should not be dismissed altogether. Rather, a more coherent approach is required to positively affect consumer behaviour.[1012] Stockwel et al. proposed a model to address this, including that it would be useful to (1) set taxes depending on the ethanol content of beverages, which would encourage consumption of less unhealthy beverages; (2) set minimum prices on alcohol drinks to reduce the number of cheap alcoholic beverages favoured by heavy drinkers and young adults; (3) use alcohol taxation revenues for raising funds for alcohol consumption prevention programs; and (4) index all tax rates to the cost of living.[1013]

[1009] The Virginia wine industry also plays a role in generating revenue at a State level through State and Local Taxes, as does the Victorian wine industry through state land tax, and local council rates, but this is not discussed in the present dissertation.
[1010] Dan Chisholm et al, 'Reducing the Global Burden of Hazardous Alcohol Use: A Comparative Cost-effectiveness Analysis' (2004) 65 *Journal of Studies on Alcohol* 6, 782–793. See also Christopher Reynolds, *Public Health and Environment Law* (Federation Press, 2011) 21.
[1011] Peter Anderson, Dan Chisholm and Daniela Fuhr, 'Effectiveness and Cost-effectiveness of Policies and Programmes to Reduce the Harm Caused by Alcohol' (2009) 373 *Lancet* 2234, 2238.
[1012] Tim Stockwell et al, 'The Raising of Minimum Alcohol Prices in Saskatchewan, Canada: Impacts on Consumption and Implications for Public Health' (2012) 102(12) *American Journal of Public Health* 103, 104.
[1013] Ibid, 104.

5.2 Taxation and the Wine Supply Chain

As a consumption good,[1014] wine products[1015] present governments with revenue raising opportunities through the tax system.[1016] The first is through the application of direct taxes, such as income taxes – applied to assessable income generated by a winery. The second are sale-related or consumption-based taxes, such as the Goods and Services Tax (GST), Wine Equalization Tax (WET),[1017] and Value-Added Tax (VAT) or other sales tax. The third category refers to indirect taxes on imports, such as tariffs. Other categories include capital gain tax regimes, which is beyond the scope of present discussion. This section outlines the tax regimes that apply at the producer level of the supply chain.

5.2.1 What is 'Tax' and what are regime limitations?

Taxation is a rather broad term. A 'taxation system' or 'tax system' comprises: income tax regimes, capital gains tax regimes,[1018] sales or value-added-tax regimes, property taxes, and other local taxes. Unlike the IP system, taxation is a creature of statue, and therefore is unique to its own jurisdiction. For example, under Australian tax law, winnings from gambling or win-falls are not treated as income – unless such income is treated as profits from an income-producing activity.[1019] Whereas, in the US, the IRC does not formerly endorse the income earning activity concept. Instead, win-falls are indeed treated as income, and therefore subject to federal (also, State) income tax.[1020] Italy, France, Australia and the US recognise trade marks as 'private rights' capable of protection,[1021] not all jurisdictions will impose a wine equalization tax (WET) in the same way that Australia

[1014] Gordon Rausser, Joseph Swinnen, and Peter Zusman, *Political Power and Economic Policy: Theory, Analysis, and Empirical Applications* (Cambridge University Press, 2011) 44.
[1015] This is limited to "wine".
[1016] The tax system is best described as a dualist system (see section 2.1, discussing the difference between monism and dualism).
[1017] See section 5.5.1.
[1018] In Australia, however, the capital gains 'tax' forms part of the income tax regime: see *Income Tax Assessment Act 1997* (Cth) ss. 6-5 and 100-1. See also 26 US Code Subchapter P (Capital Gains and Losses).
[1019] See *Income Tax Assessment Act 1997* (Cth) s 6-5 ('ordinary income').
[1020] See John Munsie, 'A Brief History of the International Regulation of Wine Production' (2002) *Harvard Law School*.
[1021] Kim Munholland, 'Mon docteur le vin': Wine and Health in France, 1900-1950' in Mack P. Holt. (ed.), *Alcohol a social and cultural history* (Berg, 2006) 81.

does.[1022] The point being made here is that each jurisdiction's tax system is distinct – even from regime to regime. Therefore, what is considered an appropriate tax regime for one jurisdiction may, due to themes identified in legal transplantation theory, be incapable of direct transplantation into another jurisdiction.[1023]

Some of the more common tax regimes that impact a winery[1024] – sales-related taxes, tariffs, and income tax – are discussed in this chapter. There are, of course, other tax regimes that are imposed on a winery, including capital gains tax (e.g. from selling a winery, in whole or in part), environmental taxes (e.g. the litter tax), also property taxes – which are usually imposed at a State level.[1025] Regarding the latter, due to the acreage of wineries, there is tremendous revenue raising opportunity for States. At the same time, governments must be mindful of other incentives and effects on the industry as a result of imposition of tax regimes.

For example, the impact of global climate change and the accelerating depletion of natural resources,[1026] have led to an increase in discussions about the role of business in reversing negative environmental trends.[1027] While not comprehensively discussed in this dissertation, it may be observed that the organizational challenge for existing wineries and entrepreneurship in the wine industry is to better integrate social and environmental performances into what may be described as the economic logic of business.[1028] This alludes to the core motivation in environmental entrepreneurship is to earn money through contributing to solving environmental problems.[1029] Even though the concept of sustainable entrepreneurship is still poorly defined, Cohen and Winn,[1030]

[1022] Ibid, 82.
[1023] See section 2.4.2.
[1024] It is noted that some jurisdictions, e.g. the US, distinguish between a winery and a producer of wine: see Virginia Wine Industry Strategy, above fn 27, 1.
[1025] In the US, income tax is also imposed at a state level in addition to at a national level. The imposition of local taxes or levies may also apply, but are not discussed in this dissertation.
[1026] See section 1.4.2.
[1027] Francesco Caracciolota, Mario D'Amico et al, 'Private vs. Collective Wine Reputation' (2016) 19(3) *International Food and Agribusiness Management Review* 191, 195 (recognising a need for the wine industry to have a greater focus on economic, environmental and social value creation, as opposed strictly profit maximization). See also OIV - International Organization of Vine and Wine, *Guidelines for Sustainable Vitiviniculture: Production, Processing and Packaging of Products* (Resolution CST 1/ 2008) <http://www.oiv.int/oiv/cms/>.
[1028] Frank Figge, Tobias Hahn, Stefan Schaltegger, Marcus Wagner, *The Sustainability Balanced Scorecard as a Framework to Link Environmental Management Accounting with Strategic Management* (Springer, 2002), 4-5.
[1029] Ibid, 25.
[1030] Boyd Cohen and Monkia Winn, 'Market imperfections, opportunity and sustainable entrepreneurship' (2007) 22 *Journal of Business Venturing* 29, 34-5.

drawing from Venkataraman's definition of entrepreneurship,[1031] have described sustainable entrepreneurship "as the examination of how opportunities to bring into existence 'future' goods and services are discovered, created, and exploited, by whom, and with what economic, psychological, social and environmental consequences".[1032] Sustainable entrepreneurship is viewed as the driving force of sustainable development, in which economic, social and environmental goals are combined within the firm's organizational logic.[1033]

Before launching into a descriptive analysis of taxes that exist within the four jurisdictions discussed in this dissertation, an outline of the costs involved in setting up and maintaining a winery is necessary. The next section summarises findings from a case study of two wineries – one in Virginia, and the other in Victoria – with a particular focus on return on investment on a 2,000-case winery as compared to a 5,000-case winery. For the purposes of this case study, figures were reflected in USD as of 31 March 2017. While this case study analysis will be used as the foundation of future research, it provides (for present purposes) a key insight into the role of taxation in establishing a winery, maintaining a winery – both in the short and long-term, opportunities for and effects of price-mark-ups on the consumer.

5.2.2 The Impact of Taxation on Wineries – An Industry Level Case Study in the New World

Running a winery is not an easy feat, nor is establishing a winery – including the transition from a vineyard (or wine farm) to a winery.[1034] A hypothetical study based on publicly available information about wineries in Victoria and Virginia[1035] was undertaken – one Winery in the Gippsland wine GI in Victoria (Firm A), and a second winery in Williamsburg, Virginia (Firm B). The information available was on the firms' respective websites, and acreage from Google Earth. Both firms were de-identified for the purpose of this dissertation, and ethics approval not needed. The average output of Firm A from 2005 to 2014 was 2,000 cases per year of vintage, and 4,000 cases per year of vintage for Firm B. Initial cash flow assessments indicated that both wineries had a

[1031] Scott Shane and Sujay Venkataraman, 'The Promise of Enterpreneurship as a Field of Research' (2000) 25(1) *The Academy of Management Review* 217, 221.
[1032] Cohen and Winn, above fn 1009, 35.
[1033] Marylyn Parrish, *Reflections on adult learning in cultural institutions* (Wiley, 2010) 37-8.
[1034] See Gitman, Lawrence and Jeff Madura, 'Introduction to Finance' (Addison-Wesley, 2001) 19-20.
[1035] See Hinchliffe, above fn 552.

positive cash flow starting in year three, although this did not form part of the analysis in the present context.

Data was gathered from interviewing owners of each of these wineries over a 13-month period. For comparative purposes, dollar amounts were expressed in USD, and it is noted that the imposition of the Goods and Services Tax (GST) in the case of Firm A neutralised in its imposition along the supply chain up until the point of sale of a wine to a consumer, due to the availability of input tax credits.[1036] Since sales tax, in the case of Virginia, and the GST in the case of Firm A applies at different rates, the wholesale cost of wine excluded these taxes.

It was first necessary to identify total investment costs and output (per case of wine) for each winery. Firm A's investment costs (comprising overhead costs from 1985, expressed as NPV, to 31 January 2016) was $636,582.15. Firm B's investment cost (from 1988 to 31 January 2016) was $907,756.45.[1037] Start dates were selected based on when each firm was established.[1038] Investment costs included all of the initial costs to construct and operate a winery, including equipment costs, construction costs, and land costs such as cultivation (but excluding taxation). The equipment capacity between both firms was similar indicating that expansion by Firm A would be possible.

Table 1 Total Investment Costs by Equipment Category and Winery Size US($)

Cost Category	**2,000**	**4,000**
Receiving and Delivery Equipment	$58,023.75	$91,319.75
Cellar Equipment	$36,987.00	$52,986.00
Material Handling (e.g. tractors)	$51,520.00	$68,752.00
Refrigeration System	$34,187.00	$69,872.00
Fermentation & Storage	$49,800.45	$74,775.75
Tasting Room	$3,675.95	$42,843.95

[1036] *A New System (Goods and Services Tax) Act 1999* (Cth), s 9-10.
[1037] These amounts are in present-day terms.
[1038] For the purpose of this dissertation, "established" means that their first vintage was produced.

Plant & Office	$402,388.00	$507,207.00
Total Investment	$636,582.15	$907,756.45

The per unit investment costs (not considering its components, including office and farm) showed that economies of size existed among both wineries. The largest difference was between both firms was that their per-case cost for the 2014 vintage year was $98.21 and $142.01 respectively. Firm B had twice the output of Firm A in the same year, while the investment costs were 2.14 times as much as Firm A's. Variables affecting this were two expansions to Firm B's vineyards between 2004 and 2006, and renovations to their commercial cellar door. While Firm A had a cellar door, it was comparatively smaller, since their target audience of wines were restaurants located primarily in Victoria, and boutique wine retail stores. The average cost of Firm A's wines in 2014 was $17.00 (wholesale cost, excluding GST and WET), while Firm B's was $21.00 (wholesale cost, excluding state sales tax). This considers trade discounts offered.

Packaging and preparation costs were the highest of variable [operating] costs comprising 42 percent for Firm A, and 28 percent of total per-case cost for Firm B. Labour costs (classified as a variable cost, since employees were on a casual employment contract) were higher for firm B at 42 percent and accounted for a high variable cost. The remainder of variable costs for both firms, for the purpose of this study, comprised cultivation costs (excluding labour). The labour costs for Firm A were significantly lower, since it was a family operation, and accounted for 24 percent of costs. Of this amount, 8 percent was for assisted labour at vintage. Both firms sourced grapes only from their farm, so there were no costs to purchase grapes.

Table 2 Total Variable Costs and Winery Size US($) 2014

Cost Category	**2,000**	**4,000**
Packaging and Preparation of Wine (ex. labour)	$82,496.40	$215,855.20
Labour Costs	$47,140.80	$238,576.80
Running costs (incl. utilities)	66,782.80	113,608.00

Total Variable Cost	$196,420.00	$568,040.00
Per Unit		
$/Case	$98.21	$142.01
$/Gallon	$41.30	$59.72
$/750 ml	$8.18	$11.83

On the assumption that 80 percent of wine cases from that vintage is sold at the above price (but, excluding tax credits or remittance obligations) – i.e. 1,600 cases for Firm A, and 3,200 cases for Firm B – then net income (based on accounting standards, 2014 cost figures, and assuming a first-in-first-out basis), would be $105.79 per case for Firm A, and $61.99 per case for Firm B.

Table 3 Net Income Per Case (Accounting Standards)

	2000	**4000**
80% sold	1600	3200
Average wine sale amount	17	21
Income($)	27200	27200
Income($)/Case	204	204
Expenses($)/Case	$98.21	$142.01
Net Income	**$105.79**	**$61.99**

While acknowledging that the above data is based on a small sample size, it raises several issues for the wine industry. The first being the impact of a high rate of income tax on a wine firm on their net income for tax purposes.[1039] Second is the impact on consumer preference of a wine through sales tax mark-ups, which was discussed above. Third, due to the significant investment outlay for a wine firm and the delay in recouping that investment outlay, should the tax system – in addition to general tax credits available to businesses within that jurisdiction – be tailored for the wine industry? Fourth, the effect of ongoing economic sustainability of wine firms within a jurisdiction if the majority of wine firms in a jurisdiction were unable to avail themselves of tax rebates. If a rebate

[1039] Note, that unlike net income for accounting purposes, net income for tax purposes forms part of an entity's taxable income (as it does not consider tax credits or tax offsets), and is the tax base for imposition of income tax. Deductions and classifications of income under the income tax regimes of the US and Australia vary. See further, Hinchliffe and Teo, above fn 957, Ch. 2.

were associated with a wine firm's land size, then since the majority of wine firms in Victoria and Virginia (based on grape-producing land size), such a rebate should in an effort to sustain the wine industry in that jurisdiction, cater to the majority.[1040] If a rebate is available on a portion of a tax applied to an 'assessable dealing' (e.g. the price for which a producer sells the wine, excluding wine tax and GST) – as it does for the purposes of the WET[1041] - then other factors concerning the produced product,[1042] are relevant for the purposes of such a rebate. Fifth, how do tariffs impact the wine industry in these jurisdictions?

To retain a social distributive function, it is necessary to identify stakeholder interests which, for a wine firm is ongoing economic sustainability, and the ability to compete in a global environment.

5.3 Global Demographics as a Broader Theme in Tax

A wine firm seeks to remain competitive domestically as well in a global market. There are two facets to this: the first being that firms can be affected by taxes at a firm level (as outlined in section 5.2); second, taxes function in addition to marketing and can promote or discourage tourism. For example, New Jersey is a good tourist shopping destination for clothing since sales tax is not imposed on such items. Third, broader trade considerations and the imposition or otherwise of tariffs, can equally impact the competitiveness of the wine industry in a particular jurisdiction. Therein, in addition to local challenges of establishing and maintaining a winery, as a global commodity, the wine industry inevitably is a subject of the import as well as export market.

Outlined below is a snapshot of some key exporting and importing trends in Italy, France, Virginia and Victoria. The underlying objective is to identify who their respective wine market is, and then how the imposition of taxes (with a focus on tariffs) impact the wine industry of those supplying (i.e. exporting) jurisdictions. In addition to the brevity of discussion concerning PTAs, is the breadth of statistic results in Appendix V. One particular limitation of the perceived increase of total wine exports from 2005 through 2015 from the US, however, is that it does not extract the impact of the 2008 global financial crisis (GFC). Although this is primarily a law, and not an

[1040] See Appendix I, Table 1.
[1041] See e.g., *A New Tax System (Wine Equalisation Tax) 1999* (Cth), ss. 19-5 and 19-20.
[1042] Ibid.

economic nor accounting dissertation, the element of wine supply chains woven throughout this dissertation requires acknowledgement at the very least of the impact of broader economic considerations on the industry. Unless otherwise stated, tabulated data, is generalised (for lack of available data of a specific region) from the perspective of a country, state or territory.

5.3.1 Exporting Opportunities

The EU accounts for nearly 60 percent of the world's export market for wine, valued at $12 billion in 2013 (excluding intra-EU trade).[1043] Major export destinations for EU wine include the US (28 percent, in 2013), Switzerland (10 percent), Canada (9 percent), Japan (9 percent), China (9 percent), Hong Kong (7 percent), Russia (6 percent), and Singapore (3 percent).[1044] Australia accounted for another approximately 8- to 9- percent of annual exports.[1045] The US accounted for 7 percent of wine exports in 2013.[1046] Other wine-exporting nations include New Zealand, Argentina, and South Africa, each with another 4- to 5- percent 4 percent-5 percent of annual global exports.[1047]

As of 31 March 2015, the US accounted for 18.9 percent of total French exports.[1048] This was followed by the UK at 18 percent, and Australia having 2 percent of the market for French wine exports as of this date. Wine exports from the US, by comparison, were valued at $1.6 billion in 2013, accounting for about 7 percent of the global wine trade.[1049] About 40 percent of US wine exports in 2013 went to the EU, with another 2 percent to other European (non-EU) countries.[1050]

[1043] Market shares are based on 2014 data (excluding intra-EU trade): see, GAIN Report 2014, above fn 26, 2-3.
[1044] See GAIN Report 2014, ibid 12.
[1045] See, Statista, *Consumer Goods and FMCG Australia* (2013) <http://www.statista.com>; Australian Bureau of Statistics (ABS) <http://www.abs.gov.au>. See also Jeffrey Munsie, 'A Brief History of the International Regulation of Wine Production' (Research Paper, Harvard Law School, 2002).
[1046] International Organisation of Vine and Wine, *Statistical Report on world vitiviniculture*, OIV <http://www.oiv.int/oiv/info/enizmiroivreport>.
[1047] See Bligh Grant et al, 'The Australian wine industry at the crossroads: a comparison of performance across major wine exporting countries in 2000' (2015) 21(1) *Australasian Journal of Regulatory Studies* 1, 1. See also Euan Fleming, Stuart Mounter et al, 'The New World challenge: Performance trends in wine production in major wine-exporting countries in the 2000s and their implications for the Australian wine industry' (2014) 3(2) Wine Economics and Policy 115, 117-8; Kim Anderson and S. Nelgen, *Global Wine Markets, 1961 to 2009: A Statistical Compendium* (University of Adelaide Press, 2011).
[1048] See Appendix V, Figure 4 "French Wine Exports Outside Europe – 2015". See also Global Agricultural Information Network, *Wine Annual Report and Statistics* (IT1504-2015), USDA Foreign Agricultural Service (27 February 2015) 5 (GAIN Report 2015).
[1049] See Appendix V, Figure 5 "French Wine Exports to Canada, US, UK and Australia – 2015"; Harry Paul, *Science, Vine and Wine in Modern France* (Cambridge University Press, 1996) 12. See also GAIN Report (2014) above fn 26, 5.
[1050] Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Harvard University Press, 1965) 17.

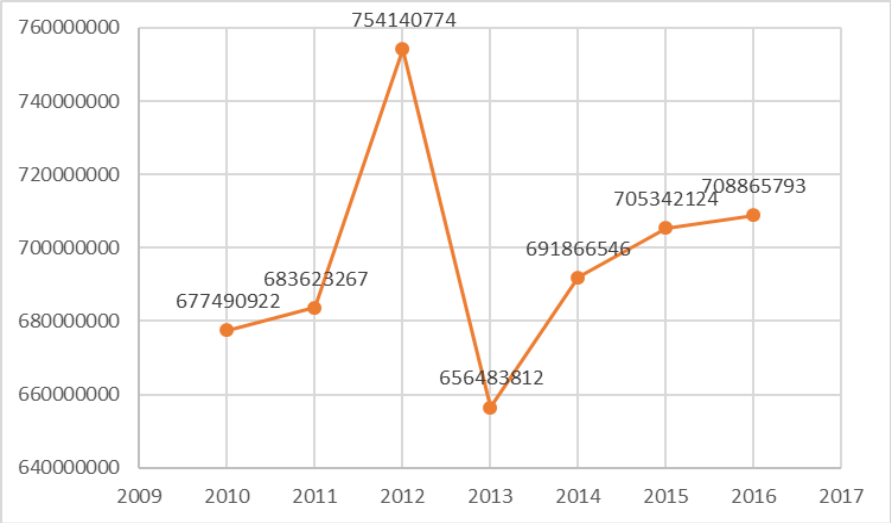
Nearly 30 percent of US wine exports were shipped to Canada (decreasing to 20 percent in 2016),[1051] and another 12 percent combined total share went to China (5 percent), Hong Kong (6 percent, increasing to 10% in 2016).[1052] The remaining roughly 10 percent of US exports (increasing to 18.5% in 2016) went to a range of countries throughout Asia, Australia, Latin America, the Middle East, and Africa.[1053]

This trend has followed up to and including the year 2016, where the US continued to be a major exporter of wine, with about 7 percent of global exports in 2016.[1054] In countries surveyed, a bilateral trade-agreement between the US and that other jurisdiction exists.[1055] In the absence of trade liberalization measures (e.g. in the form of a Preferential Trade Agreement (PTA), or Free Trade Agreement (FTA)), however, the imposition of import tariffs apply at full force.[1056] Export percentages between Europe and the US would be facilitated by the proposed Transatlantic Trade and Investment Partnership (TTIP), which appears to be at a standstill under the present US government administration.

Already, there is capacity for the wine industry to accommodate this, as indicated by a steady increase in wine production in the US as a whole from 2010 to 2016.[1057]

[1051] Statista, Wine export value share of the United States in 2016, by country of destination <http://www.statista.com>; Statista, Wine export value share of the United States in 2015, by country of destination <http://www.statista.com>
[1052] Ibid.
[1053] See Appendix V, Figure 6 "US Wine Exports by Destination". See Wine Institute, Resources No. 07082016 (2016) and No. 02162012 (2012) <http://www.wineinstitute.org/resources/>
[1054] See Wine Institute, *Press Releases* (1 May 2017) <http://www.wineinstitute.org>.
[1055] See section 5.2.2.
[1056] Ibid. For a list of PTAs in force, see World Trade Organization, 'Regional Trade Agreements' <http://wto.gov>.
[1057] See Figure 7 "Total Production (gallons) US".

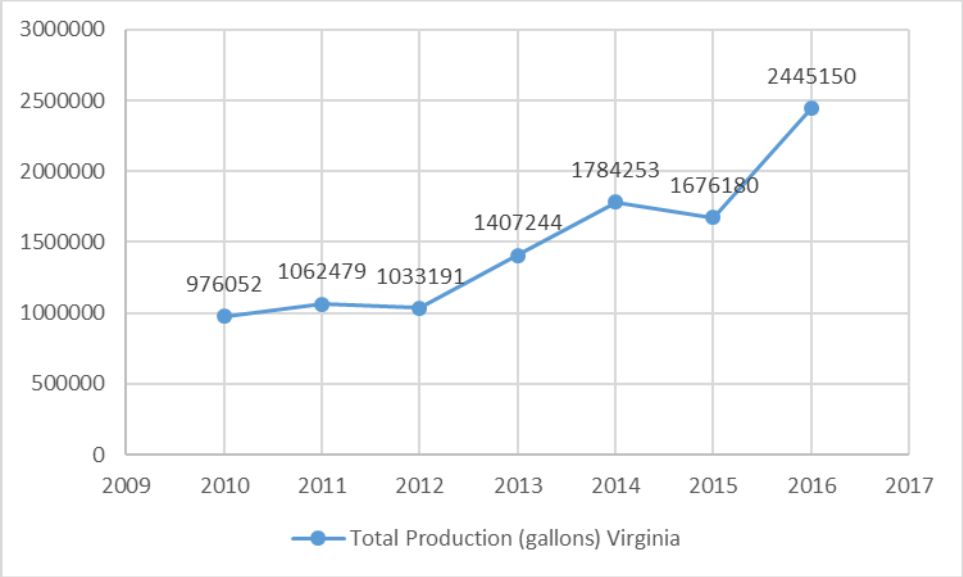
Figure 7 Total Production (gallons) United States



Source: United States Census Bureau[1058]

This increase of production is echoed by the Virginian wine industry over the same period, and is set out in Figure 8, below.

Figure 8 Total Production (gallons) Virginia



Source: United States Census Bureau[1059]

[1058] See Census <https://factfinder.census.gov/>; California State Board of Equalization <http://www.boe.ca.gov>; See also TTB, Statistics for 2010 to 2016 <https://www.ttb.gov/statistics>.

[110] See Appendix V, Figure 9 "Virginia versus US Production". See also TTB, Statistics for 2010 to 2016 <https://www.ttb.gov/statistics>.

The proportional increase of wine production in Virginia from 2010 to 2015 is comparable to the US total. Expressed as a percentage of total US production, Virginia yielded 0.26 percent in 2015, 0.14 percent in 2010 and 0.14 percent in 2005.[1060] For governments, this translates to greater revenue sources as a result of employment taxes, sales taxes and excise. At the same time, if total wine production in a given year exceeds the level of demand in that jurisdiction because of oversupply, then producers find themselves in a position of seeking to offload their product at discounted prices. While potentially appealing for a consumer seeking a cheap drop, it may give an impression that the wine's qualities are compromised.[1061] More about this point, later. From a revenue perspective, this may lead to losses, and tax loss carryovers for wineries in future years which impact broader revenue raising functions of the tax system.

There are two way of dealing with this. The first is the 'scape goat' solution, where exporting opportunities of surplus wines be made to jurisdictions with no tariffs imposed because of trade liberalization measures.[1062] As Figure 11 outlines, there has been a noticeable increase of total Australian Exports of Wine from 2010 to 2015, indicating that there was an oversupply of wine in Australia.[1063] In 2015, 11 percent of exports were derived from Victoria.[1064] Such countries would be those with free trade agreements (FTAs). It is referred to as this because the non-imposition of tariffs encourages use of trade measures to deal with domestic oversupply. The second is to address oversupply at a domestic level.[1065] This strikes at the heart of identifying the function that a tariff should achieve as it applies to wine. Of the two objectives identified above, ideally the purpose of no tariff as it applies to wine should be to open up export and import markets to avail consumers of

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[1060] See Appendix V, Figure 10 "Virginia Production Percentage of Total US Production". See also TTB, Statistics for 2010 to 2016 <https://www.ttb.gov/statistics>. See also See Appendix V, Figure 17 "Total US Wine Exports (in dollars). See further, Wine Institute, *Statistics* <http://www.wineinsitute.org>.

[1061] See section 6.6.3.

[1062] See World Trade Organization, 'World Trade Report 2011: The WTO and Preferential Trade Agreements: From Co-existence to Coherence' (2011), 8, 94 (emphasis added), in which the WTO agrees and states th*at*:

> The standard theory on the effects of PTAs suggests that preferential trade agreements increase trade between member countries . . . In the traditional Vinerian analysis, preferential trade opening allows some domestic production to be replaced by imports from more efficient firms located in preference-receiving countries, leading to welfare gains (trade creation)

See also, Australian Government, Productivity Commission, 'Research Report on Bilateral and Regional Trade Agreements' (2010), xxi; Kyle Bagwell and Robert Staiger, 'Multilateral Tariff Cooperation during the Formation of Customs Unions' (1997) 42(1) *Journal of International Economics* 91, 93; Ralph Ossa, 'A "New Trade" Theory of GATT/WTO Negotiation', Working Paper 16388 (National Bureau of Economic Research, 2010).

[1063] See Appendix V, Figure 11 "Total Australian Exports of Wine".

[1064] See Appendix V, Figure 12 "Exports from Western Australia and Victoria (2015)". See Wine Victoria website.

[1065] See section 5.4.

choice, and to keep the industry competitive insofar as quality wine is concerned.[1066] It should not encourage a glut of poor-quality wine.

5.3.2 Importing Patterns

Similar patterns with regards to importing exist. The concern with high imports of wine compared to domestic output, is that local industry can be harmed because of overt competition of imported products.

For instance, excluding intra-EU trade, the EU accounted for nearly 16 percent ($3.3 billion in 2013) of the world's import market for wine.[1067] The US is the largest importer of wine, accounting for 25 percent of global imports, valued at $5.2 billion. The US' status as the world's largest wine importer contributes to its status as a net wine importing country, as wine imports (valued at $5.2 billion) outpaced exports (valued at $1.6 billion) by more than three to one.[1068] In 2013 this resulted in an estimated US trade deficit in wine of about $3.7 billion. In contrast, the EU is a net wine exporter, as exports (valued at $12 billion) outpaced imports (valued at $3 billion), resulting in an estimated EU trade surplus in wine of about $9.0 billion in 2013.[1069]

The US deficit in wine trade with the EU is even more pronounced. In 2013, the EU exported wine valued at $3.6 billion to the US, whereas US wine exports to the EU were valued at $0.6 billion, resulting in a US deficit in wine trade with the EU of $3 billion.[1070] This difference exists despite much lower per capita consumption of wine in the US – reported at about 10.5 litres per person – compared to per capita consumption in most European countries of about 25-45 litres per person (depending on the country).

[1066] See section 6.6.4.

[1067] Antonio Niederbacher, 'Wine in the European Community' Periodical 2/3-1983, *Office for Official Publication of the European Communities*, Luxembourg (1983). See also Vicente Pinilla and Ana Serrano, 'The Agricultural and Food Trade in the First Globalization: Spanish Table Wine Exports 1871 to 1935 – A Case Study' (2008) 3(2) *Journal of Wine Economics* 132, 138-9.

[1068] Andy Smith et al, *Vin et politique. Bordeaux, la France, la mondialisation* (Presses de Sciences Po, 2007) 24-5.

[1069] Edouard Barthe, 'Député du vin: 1882-1949' in G. Gavignaud-Fontaine (ed) *Vin et république, 1907-2007*: *colloque, Montpellier* (Pepper-L'Harmattan, 2007) 126-132.

[1070] See Appendix V, Figure 14 "US Imports of Wine from Europe". See also Provence Wine US, *Market Facts* <http://www.provencewineusa.com>; Europa, *Agriculture Statistics*, 3-5 < https://ec.europa.eu/agriculture>; "Global Trade Atlas data" by Harmonized System (HS) convention for HS 2204, Wine of Fresh Grapes in Renee Johnson, *The US Wine Industry and Selected Trade Issues with the European Union* (25 July 2016) 3 < http://nationalaglawcenter.org>

Over the last decade, the volume of wine imports in the Australian market has trended upwards from 23 million litres to around 85 million litres, accounting for almost one fifth of the market.[1071] Over half of wine imports into Australia are sourced from New Zealand, which specialises in lower cost white varieties such as sauvignon blanc. The average value of imported wines from New Zealand is AU$5.60 per litre, while France is the next most important source with an average value of AU$15.50 per litre.[1072] This should be seen as an opportunity for the Victoria wine industry to capitalise on a market that seeks quality wine,[1073] particularly in light of the average unit price of New Zealand wine imports into Australia over the past decade falling from AU$10 to AU$6 per litre.[1074] The US, by comparison, is only a small supplier of wine to the Australian market, with imports valued at around US$4 million in 2014.[1075]

Regarding the latter, exporters of US wine to Australia remain disadvantaged by the current WET system.[1076] While US exports face a zero rate of import duty under the AUSFTA, US wine exporters must pay an unrebated excise on wine sold in Australia equivalent to 29 percent of the wholesale price. Domestic wine producers must also pay this tax, but unlike companies that export US wines, domestic winemakers are eligible for a rebate of the tax. When combined with a stronger US dollar relative to the Australian currency in 2017, wine exports from the US to Australia are likely to be severely and negatively impacted.

The effect of the above should be viewed in the context of demand, or consumption, also trends that align with a consumer's perspective of 'value' and 'quality' wine.[1077] In the US, wine imports account for about one-third of annual consumption.[1078] This indicates that there is a stronger demand for domestically produced wines. By comparison, around one third of Australia's wine production is consumed domestically, with the rest exported.[1079] This gives rise to several observations. The first is that the reduced demand of domestic wines is because consumers prefer higher quality wines. Second, and related to the first point, is that although Australians drink an average of 20 litres of wine annually, and consumer wine preferences have shifted from bulk wine

[1071] See GAIN Report (2015) above fn 1027, 6.
[1072] Ibid, 6.
[1073]Ibid.
[1074] Ibid.
[1075] Ibid, 7.
[1076] See section 5.5.1.
[1077] See sections 6.2 and 6.5.1.
[1078] Wine Institute, *International Trade Barriers Report for U.S. Wines* (2013) <https://www.wineinstitute.org>.
[1079] See ibid.

towards premium wine product,[1080] consumers may be unaware of distinguishing factors that classify a 'quality' Australian wine. They may therefore opt for a comparably priced wine from France, even though a wine may be of poorer quality to a domestically sourced wine, for the mere fact that French wine has a reputation for being 'the best'. This assumption is consistent with an increase of imports from France from 2005 to 2015,[1081] coincidentally following amendments to the EC-Australian Wine Agreement.[1082]

Already, there has been a negative impact on local industry with domestic Australian wine sales as a percentage of import share from 2008 to 2014 reflect parallel results with respect to domestic sales, and imports.[1083] There was no data that could be sourced to indicate a similar impact for the US or Virginian wine firms.

5.3.3 General Recommendations

Both the Vision 2020 Report for Virginia, and Victoria's Wine Industry Strategy,[1084] highlight the desire to "increase growing export capability".[1085] The answer does not lie in trade barriers and imposition of unreasonable tariffs, nor the scrapping of PTAs and FTAs. Trade liberalization are facilitators of exported wine. If the objective of exporting is to remove from Australia and the US surplus wine, then there appears little incentive for such wine to be quality. The better objective is that, to enhance the reputation of a jurisdiction in overseas markets, such wine should be quality.

Reduced or limited tariffs through trade liberalization measures merely create opportunities for Victorian and Virginia wines to gain international market access. But market irritabilities, such as

[1080] See section 1.3.5 (discussing wine oenology).
[1081] See Appendix V, Figure 16 Australian Wine Exports by Country, 2011-2014 (ML)." See also University of Adelaide, *Wine Economic Database: Wine History* <http://www.adelaide.edu.au/wine-econ/>; World Top Exports website <http://www.worldstopexports.com/>; Europa, *Wine Statistics* <https://ec.europa.eu/agriculture>.
[1082] See Figure 15, Appendix "Australia Imports of Wine from Europe". See also University of Adelaide, *Wine Economic Database: Wine History* <http://www.adelaide.edu.au/wine-econ/>; World Top Exports website <http://www.worldstopexports.com/>; Europa, *Wine Statistics* <https://ec.europa.eu/agriculture>.
[1083] See Figure 13, Appendix "Domestic wine sales and import share (2008 – 2014)". See also Australian Winemakers Federation, *Vintage Reports 2008 and 2014* <http://www.wfa.org.au>; Australian Bureau of Agriculture and Resource Economics (ABARES), *Data* <http://www.agriculture.gov.au/abares>.
[1084] See section 1.1.2.
[1085] See Victorian Wine Industry Strategy, above fn 13, 4; Virginia Wine Industry Strategy, above fn 27, 4.

labelling, blending rules and mark-ups resulting from imposition of taxes along the supply chain, even given the presence of trade liberalization measures may have a prohibitive function for export markets. Iain Sandford and Maree TanKiang identified, along this line, that:

> "… there are perennial trade irritants. These frequently arise from regulatory divergences between Australia and the EU, particularly relating to the marketability of imported products in respective domestic markets".[1086]

The answer to building long term economic sustainability of Virginia and Victoria wine industries is addressed at a local level.[1087] Since taxation affecting Victoria wineries is primarily regulated at a federal level (i.e. the GST, WET, income tax regimes), any change should be geared towards long term economic sustainability of the wine industry in Australia, generally. The Victorian wine industry can benefit from more state-specific initiatives, such as access to grants from an industry fund, which could be funded from an industry tax, or from broader federal tax revenue. Such an industry fund would, as a primary initiative, promote local tourism. For example, tourism-boosting grants that promote local tourism marketing initiatives and events that benefit the state and regional economy; market cost-sharing grants that would partially reimburse expenditures for [approved] marketing projects to assist small wineries in the promotion of wine products through advertising; sustainable agriculture research and education grants that would support sustainable agricultural projects that include eco-friendly methods of energy conservation, pest management, and crop diversity. Other grants could include socially disadvantaged producer grants that fund wineries in which at least 75 percent of members identify with a minority group; vineyard management grants that promote new and innovative technologies that transform the way grapes are grown. Such funds could facilitate scoping of niche markets first tested locally in a domestic market, and such reputation then marketed to export markets. This is consistent with the Victorian Wine Industry Strategy's reference to the need to "increase visitation and expenditure within Victorian wine regions".[1088]

In 2016, the Australian Government committed to providing $50 million over 4 years to the Grape and Wine Research Institute to promote Australian wines overseas and wine tourism,

[1086] Iain Sandford and Maree TanKiang, 'Resolving and Defusing Trade Disputes: The Potential for Creativity in the Australia-European Union Relationship' (2011) 65(4) *Australian Journal of International Affairs* 469, 481.
[1087] See section 6.6.
[1088] Victorian Wine Industry Strategy, above fn 13, 15.

benefiting all participants. This is a positive step in the right direction, giving potential for small to medium wineries to begin accessing the lucrative export market.

The Virginian Wine Industry Strategy does not explicitly mention refer to export market, but rather identifies the need to enhance Virginia to be better known for quality wines, broadly.[1089] It seems that, like Victoria, consumers are unaware of what Virginian wine have to offer insofar as their value enhancing attributes[1090] or distinguishing features compared to Old-World wines.[1091] One way of addressing this deficiency is to impose an industry tax, the funds of which can be applied to educate the public about domestic wines through television advertisements and social media. There are, of course, limitations to this depending on who administers the distribution allocation of such a fund. For example, if a federal body in Australia, then there would be limits on the ability to advertise through social media, and what is said.

While a detailed discussion of trade relations, political considerations and global trade issues are beyond the scope of this dissertation,[1092] an appreciation of the need for any reform or change to taxation laws requires acknowledging the broader global trade profile.[1093] The issue of enhanced market access of Victoria and Virginia wine, therefore rests within the hands of a jurisdiction.

[1089] Virginia Wine Industry Strategy, above fn 27, 3.
[1090] See J. Rollo, 'The Potential for Deep Integration between Australia and the European Union: What Do the Trade Statistics Tell Us?' (2011) 65(4) *Australian Journal of International Affairs* 394, 396, 400.
[1091] See Table 1, Chapter VI Appendix.
[1092] See however, Catherine Ashton, High Representative of the European Union for Foreign Affairs and Security Policy and Vice-President of the European Commission, 'Remarks with Australian Foreign Minister Kevin Rudd following Launch of Negotiations on an EU-Australia Framework Agreement', Speech 11/720 (Canberra, 31 October 2011). For the joint statement, see Catherine Ashton, High Representative of the European Union for Foreign Affairs and Security Policy and Vice-President of the European Commission, 'European Union-Australia Ministerial Consultations', Memo 11/752 (Canberra, 31 October 2011). See further Hermann Nicolaj, '50 Years', paper presented at the Centre for European Studies, The Australian National University (Canberra, 16 January 2012) 4.
[1093] See section 6.6.1 (regarding discussion of supply and demand).

5.4 Tax Laws Impacting Virginian Wineries

Tax laws implicitly distinguish between wineries capable of production, and those vines not in production. Guided by the desire to raise revenues, as well as committed to promoting healthy lifestyle, Virginia uses taxation to support the state's infrastructure and curtail excessive drinking.[1094]

From a tax administration perspective, most taxes that are imposed at each stage of the wine supply chain framework exists at a federal level. State taxes and levies (e.g. the Wine Industry Fund) rest with state tax authorities.

At a federal level, the Department's Alcohol and Tobacco Tax and Trade Bureau (TTB) administers two principal laws related to alcoholic beverages — the Internal Revenue Code (IRC) and the Federal Alcohol Administration (FAA) Act. The IRC governs the taxation and production of wine. The internal revenue laws are designed primarily to protect and secure the government's tax revenue. The IRC regulations are designed to ensure that no alcoholic beverage subject to tax escapes taxation.

The TTB also enforces the Webb-Kenyon Act,[1095] and the Alcoholic Beverage Labelling Act,[1096] which prescribes a "Government Warning" on all alcoholic beverage labels.[1097] The U.S. Treasury Department, through the monitoring and oversight activities related to the exercise of its tax authority, has a long and intimate involvement with the alcoholic beverage industry in America. This explains why the Treasury rather than the Department of Agriculture or the Food and Drug Administration has the primary responsibility for regulating the alcoholic beverage industry. This responsibility presently resides with the TTB.

[1094] See Chapter III.
[1095] 27 U.S.C. § 122 (2006).
[1096] 27 U.S.C. § § 213-219(a) (2006).
[1097] 27 U.S.C. § 215(a).

5.4.1 Health and Consumption

There is a need to differentiate between regulation of a product and prohibiting certain behaviour. Virginia appears, historically, to have confused the two.

The infamous Prohibition Strategy[1098] did not work, so the government uses taxation as a prohibitive measure.[1099] In the US, wine sales taxes comprises state sales taxes and city or county rates.[1100] Taxation of alcoholic beverages in Virginia is regulated by the Alcoholic Beverage Control Act, which provides guidelines concerning the distribution of tax on wine and other alcoholic beverages, as well as issues concerning refunds and adjustments. Chapter 4.1-234 of the Code of Virginia states that:

> "In addition to the taxes imposed pursuant to Chapter 6 (§ 58.1-600 et seq.) of Title 58.1, a tax of 40 cents is levied on each litre of wine sold in the Commonwealth."[1101]

In Virginia, the combined average of these taxes is equal to 4.95 percent.[1102] In addition to sales tax, another consumption tax imposed on a "manufacturer, wholesaler, distributor or retailer" of wine in Virginia is the litter tax – imposed at a rate of $10,000 per business establishment.[1103] Litter tax is one of the few areas where Virginia wine industry is at disadvantage compared to other states, as its litter tax is disproportionately high.[1104]

Even though there are limitation on Virginian wineries from selling from their cellar door – particularly after the federal court decision in *Bolick v. Roberts,*[1105] a percentage of proceeds generated by Virginia's ABC stores are allocated to the state's general fund and state agencies to be

[1098] See Chapter II.
[1099] Yekaterina Zelikman, 'The Effect of Alcohol Tax on Alcohol Consumption, Drunk Driving and Binge Drinking' 1 (12 March 2014) <http://www.krannert.purdue.edu/>.
[1100] State and Local Taxes are not discussed in this dissertation.
[1101] Code of Virginia 2015 <http://law.lis.virginia.gov/vacode>.
[1102] Federation of Tax Administrators, 'State Tax Rates on Wine' 2015 http://www.taxadmin.org/>.
[1103] Virginia Department of Taxation, 'Litter Tax' <http://www.tax.virginia.gov/>.
[1104] Danielle Walker, 'Virginia's Wine Industry is Aging Well' *The Hampton Roads Business Journal* (13 August 2010 <http://pilotonline.com/>.
[1105] 199 F. Supp. 2d 397 (E.D. Va. 2002) *mem., vacated and remanded,* Bolick v. Danielson, 330 F.3d 274 (4th Cir. 2003) at 417 (which struck down Virginia's former regulatory scheme, which allowed Virginia farm wineries to ship wine directly to persons inside and outside the state while prohibiting direct shipments from wine producers located outside the state who did not go through a licensed Virginia wholesaler or retailer).

applied towards the "care, treatment, study, and rehabilitation of alcoholics."[1106] This has been one way of a state-imposed levy serving a broader social function. Following the case of *Costco Wholesale Corp. v. Hoen,*[1107] there was strong support to permit Virginia farm wineries to regain the ability to self-distribute. In that case, the United States District Court for the Western District of Washington struck down many distribution restrictions in Washington's three-tier system as being in violation of the Sherman Act of 1890, and held that the state's practice of permitting in-state wineries to ship directly to retailers, while prohibiting out-of-state wineries from doing so, was unconstitutional in violation of the Commerce Clause.[1108]

5.4.2 Excise Tax

Federal wine excise rates operating in Virginia are $1.07 per gallon for wine with less than 14 percent ABV; $1.57 per gallon for wine with ABV between 14 percent and 21 percent; and $3.40 per gallon for sparkling wine.[1109] Many states apply varying rates based on wine type, and wines with a higher alcohol content are often subject to higher excise tax rates.[1110] Federal rates also differ by type and alcohol content, with wines up to 14 percent alcohol by volume (ABV) being taxed at $1.07 per gallon, wines between 14 and 21 percent ABV at $1.57 percent per gallon, and wines between 21 and 24 percent ABV at $3.15 per gallon. Sparkling wine gets its own category in the federal code and is taxed at $3.40 per gallon regardless of alcohol content.

[1106] Roland Zullo et al, 'The Fiscal and Social Effects of State Alcohol Control Systems', *Institute for Research on Labor, Employment, and the Economy* (May 2013) <http://irlee.umich.edu>. Also following *Bolick*, the General Assembly passed a law signed by Governor Warner that granted farm wineries the ability to apply for a wine shipper's license, which would give them the ability to self-distribute wine in limited quantities for personal consumption and not for resale. Virginia Code Ann § 4.1-112. According to recent estimates, Virginia's ABC stores earned more than $120 million in net income in fiscal years 2010–11. Approximately $67 million of these funds was allocated to the state's general fund and state agencies, including the Department of Behavioural Health and Developmental Services. The latter would utilize the money for "care, treatment, study, and rehabilitation of alcoholics.": Zullo et al, ibid.

[1107] Costco Wholesale Corp. v. Hoen, No. 04-360, 2006 U.S. Dist. LEXIS 27141] (W.D. Wash. 2006), amended by 2006 U.S. Dist. LEXIS 33925 (2006).

[1108] Ibid, at [2-4], [9-10], [26-27], [33], [36] (clarifying the district court's ruling in favor of Costco on the Commerce Clause violation).

[1109] TTB, 'Tax and Fee Rates' <http://www.ttb.gov/tax>. Kentucky has the highest wine excise tax rate at $3.18 per gallon, followed by Alaska ($2.50), Florida ($2.25), Iowa ($1.75), and New Mexico ($1.70). The five states with the lowest wine excise rates are Louisiana ($0.11), California ($0.20), Texas ($0.20), Wisconsin ($0.25), and Kansas and New York (tied at $0.30). Notably, these rankings do not include states that control all sales.

[1110] Ibid. Wine excise rates can include case or bottle fees dependent on the size of the container, as in states such as Arkansas, Minnesota and Tennessee. Additionally, rates may include sales taxes specific to alcoholic beverages and wholesale tax rates, as in Arkansas, Maryland, Minnesota, South Dakota, and the District of Columbia.

Unlike other states, where alcoholic beverages including wine can be bought in privately owned stores, Virginia allows alcohol to be distributed mostly through government-run ABC stores. Wine vendors are responsible for paying a state excise tax of $1.51 per gallon, plus federal excise taxes, for all wine sold. For wine with an alcoholic content less than 4 percent, an additional $0.2565/gallon applies; and over 14 percent, it must be sold through state store. This state liquor monopoly is one of the primary sources of government revenue, as Virginia makes nearly $230m from the ABC stores, $110m from taxes, and $120m in profit annually.[1111]

Virginia ABC also imposes a 5 percent *ad valorem* tax on all wines sold in its stores, which adds to the total amount of tax revenues. However, Virginia cannot make as much from selling licenses and increasing excise taxes as it does from controlling the stores itself. To make up the difference, the state would have to raise sales, income, or property taxes, which would be a rather unpopular decision. For now, it is unknown how the state would address this issue in future and whether it would raise broad-based taxes or continue to raise revenues by selling alcohol itself.

Reporting requirements for excise taxes has been historically a burden to small wine firms. A positive step by Congress to reduce the administrative burden of excise tax filing requirements that, pursuant to §4959 of the IRC, is imposed on the alcohol industry in the US, effective 1 January 2017. Where not more than $1,000 in excise taxes was owing from the previous year, and a wine firm expect to owe not more than $1,000 in the current year, they are eligible to file excise taxes annually, rather than semi-monthly or quarterly. Thus, shifting excise tax revenue to different parts of the calendar year and potentially changing how small producers conduct business through changes in annual budgeting (i.e. cash for taxes due at one time instead of throughout the year).

5.4.3 Income Tax and Exemptions

Virginia wineries are also subject to a number of taxes at both the state and local levels. Vineyards and farm wineries are subject to state income taxes, either individual or corporation, depending upon how they are structured. The tax rate for corporations is 6 percent and the top tax rate for individual income tax is 5.75 percent. The state's income tax rates have not been raised since 1972 and have increased only once since 1948.

[1111] 'America's Weirdest Government Monopoly' *The Economist* (6 September 2010) <http://www.economist.com/>.

Except for structural construction materials to be affixed to real property, vineyards and Virginia farm wineries are entitled to an exemption from the retail sales and use tax pursuant to § 58.1-609.2(1) of the Code of Virginia for all tangible personal property necessary for use in agricultural production for market. Items exempt from the tax include, but are not limited to, machinery and tools, containers for the grapes, the vines themselves, pesticides, and wire and lumber used to trellis the vines. Farm wineries are entitled to the industrial processing/manufacturing exemption from the tax found in § 58.1-609.3(1) of the Code on their purchases of grapes from vineyards, machinery and tools or repair parts therefor or replacements thereof, fuel, power, energy or supplies used directly in the production of wine. Machinery and tools used by wineries are excluded from the machinery and tools tax provided for in § 58.1-3507 of the Code but are included in the classification of farm machinery for purposes of personal property taxes. A majority of the purchases of tangible personal property by wineries or vineyards are exempt from the retail sales and use tax provided the property is used in the production of grapes or in the manufacture of wine.

They are also entitled to an exemption on containers, labels, and boxes, for packaging the wine for shipment or sale. Of the states which impose a retail sale and use tax, only 15, including Virginia, provide exemptions from the tax for farm wineries and vineyards. Of the 13 states with wine industries of comparable size to Virginia's, 11 provide similar exemptions from the tax. It is interesting to note that the country's largest wine producer, California, does not provide a similar exemption. Retail sales of wine, as well as distilled spirits and beer, are subject to the retail sales and use tax in Virginia and in the vast majority of other states which impose a retail sale and use or similar type excise tax. Only two states, Kansas and Vermont, to my knowledge do not subject sales of alcoholic beverages to the sales tax.

5.4.4 Tax Incentives

For the past decades, the state's authorities have worked to establish tax credits for small wineries and vineyard start-ups to support local industry and consequently increase its contribution to economy. Aside from raising revenues from excise taxes, litter taxes, and *ad valorem* taxes, Virginia benefits from wine tourism. In 2016, tourism generated nearly $19 billion in revenue and provided $1.3 billion in state and local taxes. A great part of these revenues was due to attractive wineries tourism that has been enjoying a particular growth from 2005 to present.[1112]

[1112] Gustavo F C Ferreira and Joao P C Ferreira, 'The Virginia Wineries' Websites: An Evaluation' <https://www.atu.edu/>.

The wine industry plays an essential role in redistribution of resources and support of broader social needs.[1113] The regulatory framework through rebates and effective tax planning, recognises wine business as an important part of Virginia economy. More recently, when former U.S. president Barack Obama signed the Protecting Americans from Tax Hikes (PATH) Act of 2015 on 18 December, he extended multiple temporary tax provisions for up to five years and made some tax provisions permanent. The legislation also included new provisions that could benefit vineyard owners—particularly those planting new vines. It might encourage them to plant sooner rather than later as bonus depreciation of vines is winding down.

For example, bonus depreciation for vineyard owners has been extended, but it will be phased out in five years and expire on Dec. 31, 2019. The purpose of bonus depreciation was allowed to encourage investment and economic recovery after the 2008 recession. Each year, Congress would renew it at the last minute, making it difficult for growers to make good decisions. It is very unlikely, however, that Congress will reinstate the PATH Act at the end of five years since the focus is to slow down depreciation, not speed it up. The PATH Act, which is also commonly called a tax extender package, has provided new legislation around bonus depreciation and election of provision §179 of the IRC. It extended additional first-year bonus depreciation for five years and is applicable for qualified property placed in service before 2020. In addition, the tax extender package contains new language pertaining to bonus depreciation and permanent crops such as trees and vines. The legislation also made the IRC §179 expense limitation of $500,000 permanent.

According to IRC §168(k), an additional depreciation deduction is allowed for certain qualified property in the year placed in service. Historically, bonus depreciation on trees and vines was not allowed until the year the crop first became commercially harvestable. With the amendment to IRC §168(k), growers can elect bonus depreciation in the year the trees and vines are planted.

Since grapevines typically take three years to become productive, the grower was unable to take the bonus depreciation immediately. Now the grower can. IRC §168(k) allows bonus depreciation to be taken on qualified property, which includes trees and vines. Under Treasury Regulations §1.263A-4, trees and vines are not considered placed in service until the end of their pre-

[1113] Tax Incentives offered by each US State".

productive period. At that time, taxpayers can depreciate 50 percent of the adjusted basis of the vines placed in service. In accordance with the revised IRC §168(k)(5), after 31 December 2015, taxpayers can now take bonus depreciation of 50 percent of the adjusted basis of trees or vines in the taxable year the trees or vines are planted or grafted, rather than at the end of the pre-productive period. IRC §168(k)(2) defines qualified property as property depreciated via the modified accelerated cost-recovery system (MACRS) with a cost-recovery period equal to 20 years or less, computer software, qualified leasehold improvement property and water utility property. Until the new legislation was passed and signed into law, qualified property had to be placed in service before 31 December 2014.

The new provision extends the date qualified property can be placed in service through 31 December 2019 and will allow bonus depreciation of 50 percent for tax years 2015-17, 40 percent in 2018, and 30 percent in 2019. Note that taxpayers on the alternative depreciation system (ADS) are not eligible to elect bonus depreciation. Family wineries, which often use cost-method accounting, cannot take advantage of this accelerated bonus depreciation too, but they can deduct pre-production costs. It is important to note that the legislation includes an exception to IRC §263A. IRC §263A(c)(7) has been added to the Internal Revenue code and essentially states that any taxpayer who elects bonus depreciation on vines or trees in the year of planting will not have to capitalise this depreciation expense into inventory. For assets placed in service before 31 December 2014, taxpayers could expense up to $500,000 of costs related to the qualified property.

For taxpayers with greater than $2 million in assets placed in service in the year, the $500,000 deduction was phased out dollar for dollar by the amount by which the value of the assets placed in service exceeds $2 million. Prior to the passage of this legislation, assets placed in service after 2014 were subject to much lower limitations - $25,000 and $200,000, respectively. The legislation permanently extends the IRC §179 election with the higher $500,000 deduction and $2 million assets placed in service limitation, with the deduction and limits also indexed for inflation. The new provision does not amend the clause stating that the allowable IRC §179 expense is limited to the taxpayer's taxable income for the year. Therefore, if a taxpayer is in a taxable loss position, no IRC §179 expense may be deducted in that year. While this legislation might encourage growers to accelerate replanting or planting on vines, it does not appear to be broadly overarching.

5.4.5 Real Estate

Real estate owned by farm wineries is subject to real property taxes imposed by localities. The tax rates and the basis for the tax assessment, vary from locality to locality. Assessments for real property taxation generally are based on the fair market value of all taxable real estate. Fair market value is determined by an appraisal process which may occur as frequently as annually or as infrequently as once every six years. However, Virginia law, specifically Article 4 (§§ 58.1-3229 et, seq) of Chapter 32 of Title 58. 1 of the Code of Virginia provides for the valuation of certain property based upon its usage rather than upon its fair market value.

In 1971, the General Assembly passed legislation, effective 1 July 1973, to allow for land-use assessments in order to preserve land dedicated to agricultural, forestal, and open space uses by reducing or deferring the increased taxes due to a potential higher use by reducing the pressure the increasing taxes may play in a landowner's decision to sell or convert such property to a more intensive use. In order to provide for land-use assessments, a locality must adopt a jurisdiction-wide ordinance that permits the appraisal or valuation of the real estate accordingly. However, property located within an agricultural, horticultural, or forestal district established pursuant to Chapter 36 (§ 15. 1-1506 et. seq) of Title 15. 1 of the of Virginia, may be valued according to use values instead of fair market value regardless of whether the locality within which it is located has adopted land-use ordinance. To be eligible for land use assessments, acreage allocated for the specific use must be at least 5 acres and must have been used for this purpose for 5 or more consecutive years. The effect of this is that real property owned by a farm winery may be subject to a use value assessment rather than at its fair market value (FMV), if the locality within which it is located has adopted an ordinance for land use assessment.

Furthermore, under § 58. 1-3236 of the Code, localities may value the property owned by a winery differently for example, the property upon which the grapes are grown may be valued at its land use value, but property upon which the retail or manufacturing portion of the business is located is valued at its fair market value. Personal Property Taxes Personal property owned by a farm winery may be taxed only at the local level.

While required to value property at fair market value, localities have been given the statutory authority to value each class of tangible personal property according to a different method as long as they are uniform in their approach. However, all property within a particular classification must be taxed at the same rate. The different classifications of property give localities a certain amount of choice in selecting, for economic development or other policy reasons, the types of businesses that can be taxed at a rate lower than the normal tangible personal property tax rate or exempted from the tax altogether. Farm machinery and farm implements, including equipment and machinery used by farm wineries in the production of wine, and wine produced by farm wineries in the hands of a producer, may be exempted in whole or in part from taxation, or taxed at a different rate pursuant to § 58.1-3505 of the Code.

Due to tax planning strategies, it is likely that many localities within which farm wineries or vineyards are located exempt personal property of farm wineries from the tax.

5.5 Taxation Regimes Impacting the Victorian Wine Industry

Taxation regimes impacting the Victorian wine industry exist at a federal level, and include the Goods and Services Tax, Wine Equalisation Tax, and Income Tax. These regimes are centrally administered by the Australian Taxation Office (ATO). Property taxes (in the form of annual rates) are imposed at a State level but are not discussed in this dissertation.

5.5.1 GST and WET

From 1 July 2000, the *Goods and Services Tax (GST) Act* (Cth) operated to impose a flat rate of 10 percent on the value of taxable supply of most goods and services, including wine.[1114] That same year, the wine equalisation tax (WET) was also introduced, levying all wine products including non-grape wines, cider, mead, and sake at a rate of 29 percent.[1115]

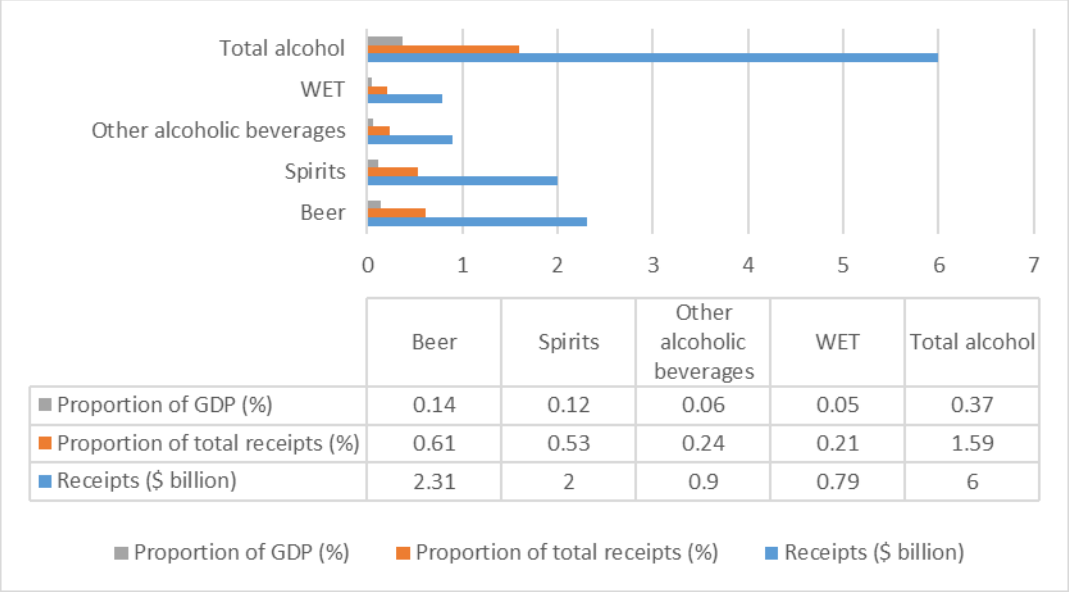
The 29 percent WET rate imposed on premium wines is one of the most highly taxed. Both domestically produced and imported wine is taxed based on its wholesale price (i.e., *ad valorem* tax),

[1114] *International Master Tax Guide 2009/10* (CCH Australia Limited, 2009) 190.
[1115] See Richard Tong, *How To Import From China* (Xlibris Corporation, 2013) 5.

which means that wines with the same alcohol content are taxed differently. This could foster the production of poor quality and cheap wine and subsequent flow-on effect in the domestic markets.[1116]

A producer rebate scheme was introduced in 2004 to support small wineries and local production, with a secondary effect of offsetting to a small degree the onerous impact of the federal tax system. The scheme entitled wine producers to a rebate of 29 percent of the tax on domestic sales. Although a maximum was set that can be rebated ($290,000 in 2005, and an increase to $500,000 in 2006), this approach was proven to be helpful for start-ups and smaller ventures.[1117]

Figure 18 Taxation receipts from alcohol in 2014–15



	Beer	Spirits	Other alcoholic beverages	WET	Total alcohol
Proportion of GDP (%)	0.14	0.12	0.06	0.05	0.37
Proportion of total receipts (%)	0.61	0.53	0.24	0.21	1.59
Receipts ($ billion)	2.31	2	0.9	0.79	6

Source: Australian Government (2015) data[1118]

Figure 18 shows taxation receipts on alcohol in the 2014-2015 financial year as a proportion of total receipts and GDP. In 2014-15, for example, the Australian government paid out

[1116] Brian Vandenberg, Michael Livingston and Margaret Hamilton, 'Beyond Cheap Shots: Reforming Alcohol Taxation in Australia' (2008) 27 *Drug Alcohol Review* 6, 579–583.
[1117] Taxpayers Australia Inc., *The Taxpayers Guide 2014-2015* (John Wiley & Sons, 2014). See also Australian Government, *Alcohol taxation in Australia*, Commonwealth of Australia (Parliamentary Budget Office, 14 October 2015) 10 http://www.pbo.gov.au.
[1118] Estimates of alcohol tax receipts used in this report are from the 2014–15 financial year, unless otherwise noted: see Australian Bureau of Statistics, Australian Government Data (2015) <http://www.abs.gov.au>.

more than $330 million to Australian and New Zealand wine producers under the present system.[1119] This accounted for approximately 1/3 of total revenue from WET over the same period. The WET rebate as a proportion of revenue (expressed as a percentage) sourced from WET in 2014-2015 financial year is outlined in Figure 19.

The WET, however, encouraged bulk production of lower quality wine and placed downward vertical pressure on the price of Australian wine. Certain supermarkets in Australia were able to take advantage of the WET rebate, enabling them to sell Australian wine below cost, and signalling to consumers an incorrect perception about the quality of an Australian wine.[1120]

To address integrity concerns with the WET rebate (in particular associated entities residing outside Australia),[1121] the cap will – from 1 July 2018 – be reduced from $500,000 to $350,000, and require that an eligible wine produce have an interest in a winey.[1122] The scope of the definition of "an interest in a winery" is yet to be determined, but will exclude 'virtual' wineries.[1123] Virtual wineries do not have a physical winery, but are rather a 'brand' created around a style or concept of wine (where grapes may be sourced from different states or wine regions) that will sell in the marketplace.

On the one hand, although, the tax actually had the impact of taxing wines less than other alcoholic beverages in Australia. It could be perceived that the wine industry was perceived to be receiving preferential tax treatment. Coupled with allegations of rorting the system which led to the review of the WET from 2015 and subsequent tightening of the WET in 2017 could, on the one hand, indicate that the wine industry in Australia does not actually need any help.

The better view is that changes to the WET appear to be proceeding in the wrong direction. The WET Rebate was introduced to support small and medium wine producers in regional and rural Australia with domestic sales, and to effectively exempt those wine producers from WET. The WET Rebate needs to be refocused on this objective. Both the WET Rebate and the Victorian Liquor

[1119] See ibid. See also, Nassim Khadem, 'Wine Equalisation Tax Rebate: A Rort?' *The Sydney Morning Herald* (30 October 2015) <http://www.smh.com.au/business/>. See Commonwealth of Australia, above fn 1096, 1.
[1120] *A New Tax System (Wine Equalisation Tax) Act 1999* (Cth) s. 19-5.
[1121] See The Parliament of the Commonwealth of Australia, 'Treasury Laws Amendment (2017 Measures No. 4) Act 2017', House of Representatives, Explanatory Memorandum (2016) 2
[1122] See *Treasury Laws Amendment (2017 Measures No. 4) Act 2017*.
[1123] A discussion about virtual wineries is beyond the scope of this dissertation.

Subsidy (VLS)[1124] are embedded in the business models of small to medium sized wineries, and so the reduction of the WET Rebate will be disastrous for smaller and medium producers of wine which, for Victoria, is the majority of wine firms.[1125] It is also abundantly inconsistent with the Victorian Wine Industry Strategy objective to 'strengthen industry structure and coordination'.[1126]

Since, the impact of these amendments may be bittersweet. Three proposals are made with respect to the WET and WET rebate.

Proposal 1

First, that access to the WET rebate should be limited to packaged, branded wine which is for sale to domestic customers, and bulk and unbranded wine should be excluded from the WET rebate. This is consistent with facilitating the development of a profitable and sustainable export market.[1127] But, the phase out should occur on an accelerated timeline, over a 3-year period.

With regards to the definition of "eligible producer", the current definition of producer (i.e. an entity that manufactures the wine or supplies to another entity the grapes, other fruit, vegetable or honey from which the wine is manufactured) should be maintained, with two additional qualifications:

> An eligible producer must:
> (i) operate from a place of business in a wine region; and
> (ii) maintain ownership of the grapes from which such wine is made from the crusher to the finished bottled and branded product.

To reinforce the punitive effect of non-compliance, a WET general anti-evasion rule (similar to s. 165-10 of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth)) could

[1124] See L*iquor Control Reform Ac*t (Vic), s. 177 (guidelines for the payment of subsidies). A comprehensive discussion of state taxes is not considered in this dissertation.
[1125] See Appendix I, Table 1.
[1126] See above fn 13, 19.
[1127] Ibid, 17.

be included in the *A New Tax System (Wine Equalisation Tax) Act 1999* (Cth) prohibiting schemes a sole or dominant purpose of avoiding tax.[1128]

The WET rebate cap maintained at $500,000 on cellar door or direct sales and wholesale sales for 2 years, and reduce proportionally based on taxable income, on a progressive rate structure for year 3 onwards. This facilitates vertical equity of the WET regime, and access by those small and medium wine producers that need it most. In any event, the WET rebate was never intended to support significant scale of operation businesses in the Australian wine industry. To administer compliance, the ATO should utilise a 'matching rule' between income tax records, rebate claims and the payment of WET.

The motivation to raise revenue should not be at the expense of future development of the Victorian wine industry, or the regional communities which rely on the businesses for employment opportunities.[1129] Further, while small Victorian producers will likely claiming less than $350,000 in WET rebate, a number of medium sized producers would likely be claiming or in building their businesses to the scale necessary to access the export markets, would have claimed more than the proposed $350,000 but less than $500,000 in WET rebate. Such stakeholders will be significantly disadvantaged by the reduction in the rebate cap. So, even if these producers are able to access export markets under FTAs, and this is not certain given the competitive disadvantages they have relative to the large producers who are already targeting these markets, it will take many years to build export sales to the point where they compensate for the loss of the WET rebate.

Proposal 2

The cumulative effect of the GST, WET and income tax (since wine is a commodity purchased with post-tax dollars) can be prohibitive for a consumer purchasing wine. For example, assuming an individual who falls within the highest marginal tax bracket (45 percent in the 2017-

[1128] See e.g., *Commissioner of Taxation (Cth) v Hart* (2004) 78 ALJR 875. See also *Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404; *Newton v Federal Commissioner of Taxation* (1958) 98 CLR 1; *Federal Commissioner of Taxation v Peabody* (1994) 181 CLR 359; *Federal Commissioner of Taxation v Consolidated Press Holdings Ltd* (2001) 207 CLR 235. See further Michael D'Ascenzo, 'Part IVA: Post Hart' (2004) 7(2) *Journal of Australian Taxation* 357

[1129] This is consistent with Public Choice Theory: see section 5.7.

2018 financial year, plus 2 percent Medicare levy) with a net income after tax, on a gross amount of $100.00, amounting to $53.00, purchases a wine that had a break-even cost of $15.00 (but which excludes imposition of GST at a 10 percent rate, and impost of 29 percent WET assuming that the wine producer was unable to avail themselves of a WET rebate). Including then the WET as a mark-up of $4.35, and GST in the amount of $1.50 brings the total price of the wine to $20.85. A consumer may seek an alternative alcoholic beverage that excludes the WET, or a cheaper wine. This is highly discouraging for firms in the Victorian wine industry whose focus is on producing quality wine.

It is therefore proposed that the WET be scrapped and replaced with a volumetric tax on alcohol content. Such a tax would also serve a public health-orientated function provided that it: (i) increases the minimum price at which alcohol generally can be purchased, and/or (ii) taxes products on a volumetric basis (i.e. according to alcohol content), with the aim of deterring initiation into drinking and recognising that among current drinkers it is the volume of alcohol consumed on single occasions and over time that increases health risks.

The Australian Government's own review of the tax system determined that current wine laws are incoherent and concluded that the taxation of alcoholic beverages should be comprehensively reformed.[1130] One possible solution to make the taxation policy in Victoria more adequate and stable is to introduce a system focusing not on individual types of beverages, but rather on volumetric-based taxation approach. Because of complex relationships between alcoholic beverages, such a system would be more efficient in raising revenue and reducing alcohol consumption and related harms.[1131] A reform has been recognised as needed so that "all alcoholic beverages should be taxed on a volumetric basis, which, over time, should converge to a single rate, with a low-alcohol threshold introduced for all products."[1132] Although the plan can potentially benefit the industry, it is still unknown how well it could affect the government revenue and overall consumption of wine in Victoria. However, analysis in this dissertation suggests that the volumetric system would be more advantageous to both the government and the industry. One problem that

[1130] Ibid.

[1131] Anurag Sharma, Brian Vandenberg and Bruce Hollingsworth, 'Minimum pricing of alcohol versus volumetric taxation: Which policy will reduce heavy consumption without adversely affecting light and moderate consumers?' (2014) 9(1) *PLoS ONE* 13, 13. See also Australian Parliament, The Treasury, *Australia's future tax system: Report to the Treasurer, Part One, Overview* (2009); L Cobiac, T Vos, CM Doran, and A Wallace, 'Cost-effectiveness of interventions to prevent alcohol related disease and injury in Australia' (2009) 104 *Addiction* 1646, 1649-50; T Babor et al, Alcohol: No Ordinary Commodity in *Research and Public Policy* (Oxfo4rd University Press, 2nd ed., 2010).

[1132] Commonwealth, *Australia's Future Tax System: Report to the Treasurer* (Canberra, 2010).

would need to be addressed is that uniform volumetric tax would establish a floor price, and because of the effect of input tax credits, could result in wine being sold below this cost. This would negate the prohibitive function that such a tax would ideally serve, namely imposing tax according to alcohol content level or their propensity to cause harm.

Proposal 3

An alternative option that provides support for the wine industry, and meeting identified long-term goals,[1133] is for revenue raised through the tax system (e.g. the WET regime, and portion of Sales, GST or Value Added Tax) to be apportioned and applied to fund the wine industry. This could be in the form of a wine industry fund (ideally administered at a State level, but more likely by the Commonwelath government), that can be accessed by Victorian wineries through a grant application process. This is entirely consistent with the goals of promoting the wine industry on a global scale, and functions as one way of offsetting the costs of running a winery.

5.5.2 Depreciation and Tax Incentives

The Victorian Wine Industry Strategy has already identified that the Australian and Victorian wine industry has "experienced declining profitability over the last decade" which is primarily due to "the global wine surplus and persistently low prices."[1134] Although the ideal method of addressing this is through labelling laws and intellectual property laws, tax should not apply prohibitively to discourage the wine industry generally.

Accelerated depreciation provisions applied to grapevines planted prior to October 2004. These provisions were removed for vineyards planted after October 2004 and there have been no further changes relating to later plantings. The provisions relate to the rate at which grapevines are considered to decline or depreciate. There are two main differences between the "privileged" legislation that applied prior to October 2004, and that which has applied since. The first is that, since 2004, the depreciation rate has been set at 13 percent and the maximum time over which a grapevine

[1133] See section 1.2.4.
[1134] Above fn 13, 8.

is fully depreciated is therefore just under 8 years.[1135] This contrasts with the special provisions that applied to grapevines planted before October 2004, where capital expenditure on establishment could be fully written off over a period of 4 years – i.e. 25 percent per annum. (Note that the effective life of a grapevine is estimated by the Australian Tax Office to be between 15 and 20 years, hence depreciation is still 'accelerated' compared with their estimated lifespan, but they are now treated the same as other horticultural plants).

For grapevines planted prior to October 2004, deductions could be claimed from the time the vines were first used in a primary production business to produce assessable income. For vines planted since 2004, deductions for depreciation can only be claimed from the income year in which the grapevine's first commercial season starts,[1136] which appears to facilitate commercially-driven wine firms, as opposed to small non-commercial hobby farms.

Still, the Victorian wine industry continues to face challenging operational conditions (including rising water costs, heightened biosecurity risk and greater potential for smoke taint events) of the domestic, as well as competition within a global wine industry,[1137] which has led to an unpredictable market environment across the industry as a whole.[1138] As the Industry Level Case Study in section 5.2.2 outlined, there are significant investment outlays for a wine firm. A better targeted levy or tax that benefits the domestic wine industry is one way of addressing these operating challenges.

Presently, contributions to research and development investment from the agricultural industry are made through levies on production.[1139] The Australian Government collects levies on behalf of the industries, and also provides a contribution on a dollar-for-dollar basis, up to a capped limit.[1140] Such agricultural levies are an important source of funding for agricultural research and development for wine,[1141] because the levy system ensures that both industries and the

[1135] See Australian Taxation Office, *Income tax: effective life of depreciating assets* (applicable from 1 July 2017), TR 2017/2. See also *Taxation Administration Act 1953 (Cth).*
[1136] "First use" means the time the vines are planted – whereas "first commercial season" means the first harvest.
[1137] Victorian Wine Industry Development Strategy, above fn 13, 10.
[1138] Ibid, 8.
[1139] Council of Rural RDCs, 'The Rural RDC Model – funding arrangements' <www.ruralrdc. com.au/rural-innovation-in-australia/#rural-rdc-model >.
[1140] Ibid.
[1141] Mr Anthony Battaglene, Winemakers' Federation of Australia, *Committee Hansard*, Canberra, 4 February 2016, p. 1.

Commonwealth contribute to research with public and private benefits.[1142] It also ensures adequate investment in industry initiatives, as individual farmers and producers acting in isolation may not obtain a return on individual investments.[1143]

But, the levy system is not matched well to the wine industry since there are discretionary criteria for its availability between different agricultural sectors in Australia. For example, the Rural R&D for Profit Program is a $200 million competitive grants program which encourages RDC collaboration for innovation.[1144] Grants are provided to RDCs and partners for collaborative research which enhances farm-gate profitability and supports the continued innovation of Australia's primary industries. One of the conditions of grants under the program is that applicants must be RDCs collaborating with other RDCs. This federal program began on 1 July 2014 as a four-year program and was due to conclude on 30 June 2018.[1145] The Australian Government has committed to extend the program by a further four years, subject to additional funding.[1146]

A better option to support investment by and in the Victorian wine industry specifically would be to have 'matched industry money' as a result of a state-based levy apply to the Victorian wine industry. Ideally, the establishment of a new levy would generally come about through an industry body identifying the need for a levy to address an issue requiring collective industry funding and administered to meet long-term environmental and economic sustainability initiatives of wine firms in Victoria.

5.6 The Old-World

Overarching the state tax legislation is the Common Agricultural Policy (CAP), which has been governing the legislative and economic environment of European farmers for over 40 years. Taxation is a tool of sovereign power par excellence that remains at the disposal of each state, capable of modifying the business environment and competitive conditions of companies.

[1142] Council of Veterinary Deans of Australia and New Zealand, *Submission 46*, p. 1.
[1143] See Australian Pork Limited, *Submission 70,* p. 4.
[1144] See Australian Government, *Agricultural Competitiveness White Paper: Getting Research and Development Working for Farmers* (September 2016) 1 <http://agwhitepaper.agriculture.gov.au>.
[1145] See, e.g., Australian Dairy Farmers and Dairy Australia, *Submission 65* (2015) 2; DAWR, *Submission 88*, Appendix B: 'Example of barriers to adoption – ownership and use of big data' (16 June 2016) 12.
[1146] Ibid.

5.6.1 France

France has always protected its wine industry and seek also to improve the quality of wines. Article 433A of the General Tax Code[1147] (translated) states that:

> "Infringements of the laws and regulations relating to the organization of the wine market, the obligations laid down for the removal of wines from the property and measures taken to improve the quality of the wines are recorded and continued as in the case of indirect contributions."

The General Tax Code applies to tax entities in France.[1148] This is similarly articulated in Article 423, which states that:

> "…wines not complying with the provisions of the Community regulations on the common organization of the market in wine, seized from the producer of those wines or from the trader, must be processed into alcohol after payment of their value or be destroyed. Pending the outcome of the dispute, the defendant shall keep the goods intact free of charge."

Dedication to facilitating wine quality is also reflected in administration of taxation obligations. Article 407 (translated) states that:

> "Without prejudice to the obligations imposed by Articles L. 115-1 to L. 115-18 , L. 115-21 and L. 115-22 of the Consumer Code, by Title IV of Book VI of the Rural Code and Every year, after the harvesting of grapes, every owner, farmer, sharecropper producing wine subscribed electronically to the Customs and Indirect Duty Administration by 10 December, the declarations provided for in the Regulation (EC) No 1282/2001 of 28 June 2001."

The General Tax Code also restates the absence of trade barriers between Member States of the EU, and levies imposed should wine-making operations fall short of requirements approved by the Regional Director of Customs and Excise. Article 412 states that:

> "Wines intended for export or shipment to another Member State of the European Community may, in all departments, either at the port of shipment or at the point of exit or at the place of dispatch, Of the duties,

[1147] Code général des impôts (version consolidée au 1 juillet 2017) <https://www.legifrance.gouv.fr/>
[1148] II : Lieu d'imposition (Articles 10 à 11).

> an addition of alcohol provided that the mixture is carried out in the presence of the agents of the administration, under the conditions fixed by ministerial order, and that the exportation is carried out immediately.
> If they are not carried out at a location designated or approved by the Regional Director of Customs and Excise, wine-making operations shall give rise to the payment of surveillance costs."

One can compare a 750ml bottle of wine taxed at 2.7 cents and the same quantity of beer that is taxed at 27 cents to understand how taxation policy in this country could be perceived to favour winemakers. Excise tax rate in France is €3.40 per hectolitre of still wine and €8.40 per hectolitre of sparkling wine.[1149] Wine in France is taxed on the basis of value, rather than price

Notably, the value added tax (VAT) on wine in France is 20 percent, which is one of the lowest in Europe.[1150] France has tax measures encouraging projects deemed viable for young farmers.[1151] For example, income of the fiscal year from grants to young farmers (DJA) – which is part of the second pillar of the CAP – has a 100 percent deduction. The profits during the first 60 months of operations benefit from a 50 percent reduction.

A tax credit system was introduced in 2005 in France and ended in December 31, 2010. This tax credit benefited farmers who yielded their farm as part of a progressive sales contract to a farmer under the age of 40 years whose business is new or is less than 5 years old. The tax reduction is equal to 50 percent of the interest amounts earned annually within the limit of €5,000 for a single person. It is understood that this measure has not been as successful as expected because the conditions for implementation (notary deed and 50 percent payment at the time of signing of the deed) were binding and the borrowing rate (TEC 10) was not necessarily more interesting financially than loans.[1152]

5.6.2 Italy

[1149] Confederation Fiscale Europeenee, 'Excise Duties in France' <http://www.cfe-eutax.org/>.
[1150] Kate Palmer, 'Countries with the Most and Least Tax on Beer and Wine' *The Telegraph* (15 May 2015) <http://www.telegraph.co.uk>.
[1151] Individual farm business are the most common feature with 73 percent in France. Corporate forms specifically dedicated to agriculture are found in France and this explains the higher proportion of farm businesses in the form of companies (27 percent in France).
[1152] See ibid.

The majority of the EU Member States have already incorporated this approach to their taxation policies, applying excises to wine and other spirits. There is no specific Tax Code in Italy. Instead, the General Civil Code contains a special tax scheme for the agricultural sector.[1153]

Even though Italy has refused to introduce excise taxes on wine, a VAT of 22 percent has, since 1999, been applied to each bottle of wine sold in Italy.[1154] Although wineries and producers are not offered specific tax incentives under the Italian Civil Code, they are able to take advantage of general tax planning strategies. Italy's Finance Law (2017), makes a number of positive changes to the country's tax rules as they could apply to wineries, including changes to the notional interest deduction (NID),[1155] the extension of the extra 40 percent depreciation for certain tangible assets,[1156] the introduction of extra 150 percent depreciation for high-tech assets, [1157] several opportunities for Italian companies to obtain beneficial treatment and an extension of the research and development (R&D) tax credit.[1158] Additionally, the corporate income tax reduced to 24 percent (from 27.5 percent) from 1 January 2017, playing a complimentary role to the creation of subzones and *menzioni geografiche aggiuntive*.[1159]

Although, in 2014, Italy introduced measures to enhance the protection of cultural patrimony, with a particular focus on fostering the tourism industry. Decree-Law No. 83 of 2014, established urgent tax, financial, and administrative measures aimed at the protection and promotion of Italy's cultural patrimony and the national tourism industry.[1160] Tax-related initiatives included the creation of the "art-bonus" tax credit to encourage cash donations to support culture during the fiscal years 2014 through 2016.[1161] The tax credit is capped for individuals and non-commercial entities at 15

[1153] See e.g., Art. 2156 (Sale of products); Art. 2137 (Responsibility of the Agricultural Entrepreneur).
[1154] Allaman Allamani and Franca Beccaria & Fabio Voller, 'The Puzzle of Italian Drinking' (2010) 27 *Nordic Studies on Alcohol and Drugs* 5.
[1155] See Decree-Law No. 83 of 2016.
[1156] Ibid.
[1157] Ibid.
[1158] Ibid.
[1159] See section 3.4. See also Italian Wine Central, *Trends in Italian Wine Law* (2016) <https://italianwinecentral.com>.
[1160] Disposizioni urgenti per la tutela del patrimonio culturale, lo sviluppo della cultura e il rilancio del turismo (Decree-Law No. 83 of May 31, 2014, Urgent Provisions for the Protection of the Cultural Patrimony, the Development of Culture, and the Revival of Tourism, Gazetta Ufficiale (trans. Offical Gazette) No. 125 (May 31, 2014).)
[1161] Ibid. art. 1(1), outlining that to be eligible for the tax credit, the donations must be aimed at maintenance, protection, and restoration of public cultural property and must be made to non-profit cultural institutions.

percent of their annual taxable income and for businesses at 0.5 percent of their annual revenues,[1162] which caught only a few smaller wineries.[1163]

Other tax-related measures relevant to the wine industry seek to:

- improve the quality and competitiveness of tourism facilities[1164]
- foster the establishment of start-up tourism and cultural companies;[1165]
- simplify compliance with bureaucratic procedures in the tourism industry,[1166] comprising a streamlined approach to licensing for wineries;
- transform ENIT-Agenzia nazionale del turismo (ENIT-National Tourism Agency) into a public institution charged with the promotion of tourism and tourism services around the country.[1167]

According to Global Legal Monitor, the Decree-Law appropriated €5 million (about US$6.7 million) for fiscal year 2014, €30 million for 2015, and €50 million for 2016.[1168] At the time of submitting this dissertation, however, data was unavailable to see how much of these amounts may be attributed to the Italian wine industry.[1169]

[1162] Ibid. art. 1(2).
[1163] The major cultural projects that are considered to be part of the Italian national cultural heritage and that benefit from the Decree-Law include: the Major Pompeii Project (Grande Progetto Pompei), the entire complex of the Palace of Caserta (Reggia di Caserta), the Parco reale, the Giardino "all'inglese," the Oasi di San Silvestro, and the Acquedotto Carolino: Ibid. art. 3(1).
[1164] Ibid. art. 10.
[1165] Ibid. art. 11-bis
[1166] Ibid. art. 13.
[1167] Ibid. art. 16(1). See also Dante Figuero, 'Italy: Measure to Enhance Protection of Cultural Patrimony', *Global Legal Monitor* (12 August 2014) <http://www.loc.gov>.
[1168] See Figuero, ibid. In addition, it provided funding for the "Thousand Young People for Culture" Fund" (ibid art. 7(3)), which seeks to promote employment for young people by authorizing national and regional public cultural institutions to hire young professionals 40 years of age or younger. Ibid art. 8(1).
[1169] See, e.g., WRDS database, University of Pennslyvania; Statica database.

5.6.3 Comments

Unlike Italy, the French wine industry appears to directly benefits from advantageous taxation system adopted in the country. On top of that, French winemakers have greater discretion regarding choice of how and where they want to sell their wines – directly at the cellar door; through a wine information bureau called '*maison des vins*', or through supermarkets.[1170] Such a distribution system coupled with a transparent tax policy benefits producer and diversifies the market. As mentioned, taxes on wine in France are so low compared to the neighbouring countries that people from Britain, for example, prefer to buy wines there.[1171] Needless to say that through such advantageous policies, French wine producers are encouraged to innovate their businesses and increase production, which strengthens the country's position as a leading winemaker. Italy, by comparison, lacks a defined and accessible tax code, and imposes VAT at a rate of 22 percent on wine. While there has been movement in 2014 to provide a measure of tax-related measures, they have been directed to preserve cultural aspects of the jurisdiction, as opposed to the wine (or any particular) industry.

There is a strong need to balance tax incentives with the revenue-raising function of taxation.[1172] Current taxation policy in France brings immense revenues to the state's budget. In 2012, for example, the wine and spirits industry earned nearly $10.6 billion in exports, contributing almost $1.3 billion in tax revenue[1173]. In 2014, gross sales of wine and spirits reached €10.8 billion. The trade balance was assessed as €9.5 billion, making wine production in France the most profitable agricultural sector thus far. However, critics argue that despite huge revenues that the French winemaking sector brings, allocation of this money could be more effective. Particularly, an inadequate amount of funds is allotted for the prevention and treatment of alcohol addiction.[1174]

Despite clear benefits for the winemaking industry, an argument to modify the tax regulatory framework to make it stricter and align more with other alcoholic beverages. The reason behind the

[1170] Rachel Bridge, 'Buying Wine in France', *Decanter* (1 September 2002) <http://www.decanter.com/>.
[1171] Kate Palmer, 'Return of the Booze Cruise? £4-a-Bottle Saving on French Wine Prompts Cross-border Stampede', *The Telegraph* (26 April 2015) <http://www.telegraph.co.uk/>.
[1172] See Hinchliffe, above fn 219, 16-18.
[1173] Suzanne Mustacich, 'Is French Wine Under Attack?' *Wine Spectator* (7 October 2013) <http://www.winespectator.com/>.
[1174] Ibid.

current arguments include that taxation on wine in France is ten times lower than that on beer.[1175] As a result, taxes from wine amount to approximately 120 million euros, while brewers pay more than 800 million euros.[1176] Taking into account the fact that beer accounts for only 16 percent of consumed alcohol in France, compared to 59 percent for wine, the current taxation system indeed seems protectionist and unfair in relation to other businesses. In addition, policymakers suggest raising taxes on all alcoholic beverages, regulating health warnings on labels, and introducing restrictions on marketing and advertising.[1177] The proposal was also made to link the per-bottle tax on wine to its alcohol content, which is believed to curb heavy drinking.[1178] For now, it is unknown whether this new taxation plan would be implemented as there is a strong opposition to this initiative among the powerful winemakers and influential French politicians.

5.7 Summary and Concluding Comments

Taxation plays a number of roles in a wine regulatory framework. In addition to serving as a source of revenue,[1179] it can protect or discourage domestic industries, services or goods, endorse social interests or operate punitively to discourage behaviour, or (in relation to tariffs) remedy trade distortions.[1180] As a commodity, wine is heavily influenced by supply (by the industry) and demand (by the consumer).[1181] In addition to price mark-ups at each stage of the wine supply chain,[1182] the consumer ultimately bears the full brunt of the imposition of taxation, the impact of which varies depending mostly on consumer preference.[1183] For example, a higher tax imposed on a good or transaction, because wine is a consumable product part of a supply chain, would promote temperance, but also result in decreased demand.[1184]

[1175] Richelle Harrison Plesse, '*French Wine Tax Plans Will 'Cork the Industry''* (2013) <http://www.france24.com/en/>.
[1176] Francois de Beaupuy and Caroline Connan, 'Beer Makers Cry Foul on French Levies as Wine Gets a Pass: Taxes', *Bloomberg Business* (6 December 2012) <http://www.bloomberg.com/>.
[1177] See Mustacich, above fn 1152. See also section 2.4.4.
[1178] Philip J-LWestfall, *Perspectives on France: a handbook on French culture* (U.S. Air Force Academy, 1984) 240.
[1179] Michael Maher, 'On vino veritas? Clarifying the use of geographic references on American wine labels' (2001) 89(6) *California Law Review* 1881, 1905. See also section 5.7.
[1180] Gian Carlo Moschini, Luisa Menapace, and Daniel Pick, 'Geographical Indications and the Competitive Provision of Quality in Agricultural Markets' (2008) 90 *American Journal of Agricultural Economics* 794, 801-3. See also, Federico Ortino, Basic Legal Instrumnts for the Liberlisation of Trade (Bloomsbury, 2004) 250 (referring to "material" as opposed to "implicit", "disguised" or "covert" discrimination in a tax system).
[1181] Harold Isnard, 'La Viticulture Nord-Africaine' in *Annuaire de l'Afrique du Nord-1865* (CNRS, 1996) Vol. 4.
[1182] See Newsletter on the Common Agricultural Policy, *A Common Wine Policy: New Moves by the Commission*. No. 7/69. European Communities – Directorate General Press and Information (1969) 1 <http://aei.pitt.edu/6530>.
[1183] See section 5.1.4, and section 6.6.
[1184] See section 2.4.4.

This chapter articulated the above functional factors of taxation as it applies to the wine industry generally and impacts the Virginia also Victorian wine industry. What was not examined comprehensively was a firm-level specific analysis of the economic impact of the imposition of taxes of wine firms in the jurisdictions discussed in this dissertation. The purpose of this would be to provide motivating support for objectives identified in the Wine Industry Strategies. It is envisaged that data collected for the purposes of the Case Study in section 5.2.3 could be used in a more intricate model to examine this effect in separate research.

Outlined first was the nexus between taxation and the wine supply chain. Second, the global demographics of imports and exports of wine to and from US, Australia, France and Italy, is outlined. Analysis revealed that tariffs impose a negative effect on the wine industry of the exporting country or jurisdiction, which may be counterbalanced by trade agreements. But, trade liberalization measures only create a better avenue to access markets. The method that a wine industry or firm adopts to stand out from others in a globally competitive environment, differs. Accordingly, there needs to be some supplementary measure to create greater awareness of a jurisdiction's wine industry, which can be achieved through attributing revenue from taxes of levies to fund such a purpose. Third, the domestic tax regimes of the analysed jurisdictions, starting with Virginia and then Victoria, were outlined. This section identified what taxes and regimes should be modified to accommodate a greater balance between the goals of regulators, governments and the wine industry. Therein, in addition to the general recommendations made in section 5.1.5, the following recommendations were made to support the economic sustainability of the Virginia and Victoria wine industry:

- **International**: Support trade liberalization efforts such as PTA and FTA negotiations to open markets and provide an entry of Virginia and Victorian wine. To supplement this, a wine industry fund be established to promote local tourism and provide information about key attributes of wines in a wine region. This could be administered by a state government body, such as Tourism Victoria, and the Virginia Wine Board, or through a Consortia arrangement.[1185]

[1185] See section 6.6.2.

- **Victoria and Australia**: Modify impending changes to the WET, [1186] which are consistent with the application of s. 165 of the GST Act. Alternatively, scrap the WET regime, and replace it with a volumetric tax. This is consistent with utilising taxation in a way that distinguishes between regulating consumer behaviour, and the wine product. If the WET regime is retained, then part of the revenue should be redirected to international promotion of wine regions. Ideally, this would be run through a Consortia who would be more informed about unique attributes of a wine region.[1187]
- **Virginia and Victoria**: Given the outlay and investment costs to establish a winery, continue to allow firms to take advantage of tax planning opportunities, such as accelerated depreciation. In the case of Virginia, this is consistent with one of the identified objectives in the Virginia Wine Industry Strategy being, to facilitate the transition from a vineyard to a winery. In the case of Victoria, a levy better targeted to support Victorian Wine Industry initiatives,[1188] and supplement investment output in light of environmental and economically sustainable practices.

Lessons can be learnt from France and Italy. French taxation regimes are more advantageous to producers and consumers. Research revealed that French wine law prioritises public interest and wine industry by offering advantageous taxation. Low taxes encourage small wineries to develop and innovate, which leads to the diversification of the market. More importantly, further changes are being introduced into the current taxation system in France to lower tax and bureaucratic regulation and shorten time to start a business. However, the government's protectionist position concerning wine producers goes contrary to the expectations of public health experts and brewers, who argue for the need to reconsider existing system of taxation. Therefore, a comprehensive policy is required that would benefit producers, while still achieving objectives of tax authorities and other regulators. Similarly, Italian tax regulators have played an important role in setting customer-friendly and industry-friendly taxes – but, surprisingly there are no tax laws that apply directly to the wine industry. The Italian government has, however, been reluctant to impose excise taxes on wine in line with the common European policy, demonstrating unprecedented loyalty to local winemakers and employees.

[1186] *A New Tax System (Wine Equalisation Tax) Act 1999* (Cth); *A New Tax System (Wine Equalisation Tax) Regulations 2000* (Cth).
[1187] See section 6.6.2.
[1188] See Victorian Wine Industry Strategy, above fn 13.

An articulate approach for policymakers to adopt in framing a wine regulatory framework is public choice theory.[1189] This approach to the analysis of public expenditure and taxation holds that the market can provide services better and more efficiently than does the government.[1190] This theory postulates that the free market can provide those services at a lower cost to taxpayers, stressing that governments may not attempt to maximise economic welfare at all. The problem is that politicians may follow their own self-interest and seek to achieve their political goals rather than promote the best interests of citizens, which undermines a stable pattern of redistribution.[1191] At the same time, the theory holds that although each politician's decision may be rational, the overall result may be inadequate, resulting in the asymmetry between those paying for expenditures and those receiving the benefits.[1192] In this way, public choice theory is concerned with how well the government can handle this issue and how effectively it can allocate revenues from taxation.

Acknowledging that public choice theory provides a plausible argument that the government favours increases in taxation without considering the rules of the free market and interests of businesses.[1193] Adopting a public choice theory approach warrants creating a tax system that would assign tax shares to correspond to each citizen's benefit from the public expenditure.[1194] One component of this is to address whether different alcohol products be taxed according to their alcohol content level or their propensity to cause harm?[1195] One possible solution to make the taxation policy in Victoria, for example, more adequate and stable is to introduce a system focusing not on individual types of beverages, but rather on volumetric-based taxation approach. Because of complex

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[1189] See Randall Holcombe, 'Tax Policy from a Public Choice Perspective' (1998)51(2) *National Tax Journal* 359, 362-3.

[1190] See Anthony Downs, *An Economic Theory of Democracy* (1957); James Gwartney and Richard L. Stroup, *Economics: Private and Public Choice* (6th ed, 1992), especially chaps. 4, 30. James Gwartney and Richard E. Wagner (eds). *Public Choice and Constitutional Economics* (1988).

[1191] Irvin Tucker, *Economics for Today* (Cengage Learning, 2016) 611.

[1192] Bent Greve, *The A to Z of the Welfare State* (Scarecrow Press, 2009).

[1193] Robert Leach, *The Politics Companion* (Palgrave Macmillan, 2008) 155, outlining that the legal theory of public choice considers the most rational options for policy makers and investigates how taxation may be manipulated to attract voters.

[1194] Holcombe, above n 197, discussing tax design, and the potential merits of a simple and flat-rate structure, focuses on efficiency issues. Advocates of progressive taxation would view distributional concerns, rather than efficiency factors, as the primary motivation for departing from a proportional system. Arguments for particular tax rules based on redistribution lack the "value-free" appeal of arguments based on efficiency. Compare, e.g., Hettich, Walter, and Stanley L. Winer. "The Political Economy of Taxation." In Perspectives on Public Choice: A Handbook, edited by Dennis Mueller, 481–505. Cambridge: Cambridge University Press, 1996.

[1195] Christopher Doran et al., 'Estimated Impacts of Alternative Australian Alcohol Taxation Structures on Consumption, Public Health and Government Revenues', (2013) 199 *The Medical Journal of Australia* 9, 619-622.

relationships between alcoholic beverages, such a system would be more efficient in raising revenue and reducing alcohol consumption and related harms.[1196]

[1196] Anurag Sharma, Brian Vandenberg and Bruce Hollingsworth, 'Minimum pricing of alcohol versus volumetric taxation: Which policy will reduce heavy consumption without adversely affecting light and moderate consumers?' (2014), 9 *PLOS ONE* 1, 13.

CHAPTER VI

INTELLECTUAL PROPERTY – MORE THAN JUST A LEGAL CONSIDERATION

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CHAPTER VI
INTELLECTUAL PROPERTY – MORE THAN JUST A LEGAL CONSIDERATION

Within a globalised wine industry is the need to understand crucial dimensions of the operating environment.[1197] This chapter reverts to the components of the proposed model framework in Chapter I to identify how a regulatory framework can be structured to address trends in wine markets,[1198] objectives of the industry,[1199] and the needs of stakeholders.[1200] It does this by analysing how stakeholder interests shape the internal dimensions of the three-tier system model framework.[1201]

The focus of this chapter is to clarify, from an economic analysis, what aspects of intellectual property (IP) regimes influence decision making of consumers and how they interact with also drive the wine industry in a globally competitive environment. Whereas chapter I identified that there is a nexus between the wine market and consumer behaviour,[1202] it did not discuss how activities of the wine market influences a consumer and results in the buying decision. The present chapter utilises, as part of analysis, the Nicosia Model of consumer behaviour to signify the importance of information (i.e. type and how it is portrayed) to influence consumer decision-making process. The greater reliance on information, it is proposed. the greater the need to effectively regulate it.

Discussed first is the nature of property being protected, from a legal theory perspective, in IP regimes forming part of the regulatory framework. Second, the role of the consumer (as an external stakeholder), and the importance of minimizing search costs. Third, how jurisdictions deal with conflicts between trade marks and geographical indications (GIs). Fourth, what is perceived by a consumer to be value enhancing. The primary question is whether 'community-specific' branding[1203] is still relevant to a consumer and therefore the industry,[1204] and whether the methods of

[1197] See section 1.2.1.
[1198] See section 1.3.
[1199] See sections 1.2.2, 1.3.2 and 1.5.
[1200] See section 1.2.1.
[1201] Ibid.
[1202] See section 1.3.1.
[1203] Kolleen Guy, *When Champagne Became French: Wine and The Making of a National Identity* (The Johns Hopkins University Press, 2003) 5-6.
[1204] This includes to preservation of the rural environment since people are able to recognize the importance of the land for their continued livelihood. See, section 2.1.4.

protection through the IP regulatory framework continues to be relevant for the wine industry. Providing insight into the effect of the type and method of communicating information to consumers about a wine is a discussion identifying what information most influences a consumer's purchase decision making process. It was hypothesised that the greater the reliance on certain information, including the way it is portrayed, by consumers the need for clear guidelines in regulatory frameworks to balance stakeholder rights and interests.

Last, given theses facets, what aspect of regulatory regimes (with a focus primarily at a national level) would work best for that particular jurisdiction. For example, whether there is room for a modified GI system in Victoria,[1205] what improvements can be made to the regulatory framework in Virginia, or whether a completely new regulatory framework at the local, national or even international level is plausible. This chapter concludes by identifying what changes to the IP regulatory framework are imminent.

6.1 IP encompasses Rights

Property rights, unlike economic rights, are monolithic and do not take into account subjective elements or broader rationales.[1206] If viewed as a pure property right,[1207] a GI (or trade mark, as a matter of fact) would be incapable of taking into account broader interests such as culture or consumer interests. Since rights in both regimes have been influenced by interests, or factors, a narrow property rights' justification is erroneous.[1208] Economic rights are dynamic,[1209] and reflect a more pluralistic perspective of IP regimes.[1210] An appreciation of what interests and rights are

[1205] Reference to GI system and GI regime may be used interchangeably.
[1206] See section 1.3.
[1207] See section 6.3, below.
[1208] See Lynne Beresford, 'Geographical Indications: The Current Landscape' (2007) 17 *Fordham Intellectual Property Media and Entertainment Law Journal* 979, 980 (outlining that even though a trade mark may be viewed more correctly as a property right on a normative analysis – since they are more monolithic in nature, as they seek to protect the right to use by the owner of that trade mark – the same may not be said about GIs). Although, trade marks are – because of the recognition of legitimate interests – now inherently dynamic, and therefore may be discussed from a property rights' perspective, but also – and in this dissertation – an economic right's perspective: see section 6.2.3, below. A property right, from a pure normative perspective, fails to take into account broader rationales, such as culture: see ibid.
[1209] See section 6.2.1, below.
[1210] See Felix Addor, Nikolaus Thumm and Alexandra Grazioli, 'Geographical Indications: Important Issues for Industrialized and Developing Countries' (2003) 74 *Intellectual Property Reporter* 24 (discussing the nature of the IPR inherent in the GI versus trade mark regime is vital here. Intellectual Property in general may be seen to represent a formal recognition of immutable, pre-existing natural rights. It requires policy and economic rationale to underscore it or define its scope and characteristics. The authors also mention that the putative economic role of IP in a domestic context, namely its encouragement of generation and deployment of

protected under each regime provides a clearer indication of whether it (i.e. the regime) does protect the thing that it seeks to protect.[1211]

6.1.1 Scope of an IPR

Accepting that inherent in a GI regime (expressed broadly) are IPRs,[1212] what then is meant by the 'scope of a right'?[1213] A right can be said to exist when there is a corresponding duty on another pertaining to that right.[1214] Such an inquiry is relevant to determine how conflicts between a trade mark regime and a GI regime be resolved.[1215] The difference between the regimes can be explained on the basis of the scope of the right that the GI regime protects. Unlike a private right under the trade mark regime, depending on what the GI itself is protecting will give rise to 'the right *to use*' that GI. This means that the existence of a duty on certain parties not to interfere with (or use) something demonstrates the existence of another's right *to* exclude them from (use of) that thing.[1216] For example, a duty of third parties not to use a trade mark correlates to the right of the trade mark owner (singular) to exclude third parties from use of that trade mark.[1217] A duty of third parties in a GI sense not to use that GI correlates to the right of entities (i.e. plural) associated with a particular wine region (and subject to other requirements under a GI registration system) to exclude third parties from use of that GI if they are not physically located in a region, or grapes are not derived

valuable creative works for the transformation of society, is also illustrative of IPs dynamic flavour: ibid, 25). The flexibility afforded by the TRIPS Agreement, and notwithstanding limitations of Legal Transplantation Theory, in providing room for New World countries to develop their own wine regions and therein facilitate transformation of a society, is illustrative of this: see section 2.4.1. See also, section 2.1.5 (outlining that industrial and commercial growth in states may have been attributed to neo-liberal institutions – the rule of law, independent courts, and free market – as opposed to authoritarian states relying merely on transplantation of black-letter law and bureaucratic power implemented formally through licensing gateways, or informally through politically insulated state and quasi-state institutions).

[1211] This is separate from the general goal of a particular IP regime.

[1212] See Beresford, above fn 1186, 980. The term GI comprises two types of IGOs, namely appeallations of origin (which corresponds to legal definition of the Lisbon Agreement) and indications of origin, which corresponds to the legal definition of GIs definition under Art. 22(1) of TRIPS.

[1213] There has been much written about what an IPR is, and so a discussion is not needed here. Although, there has been limited literature on what is meant by the "nature of a right" in the context of GIs.

[1214] Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (David Campbell & Philip Thomas eds., 2001) 13.

[1215] See section 6.5.2.

[1216] See Hinchliffe, above fn 219, 34 (outlining that although, it is widely accepted that not all rights are negative in this fashion, as noted above, trademark owners' rights to exclude others from using a trademark are negative rights. Hence there is no need to consider the general form of the duties that might correspond to positive rights).

[1217] See section 6.1.1.

from that region.[1218] A 'holder' – for the purposes of entitlement to use a GI – may be classified as the region, and other requirements attached to it under the particular registration system.[1219]

The scope of protection is also consistent with cultural and traditional rights.[1220] GIs are a collective right – one that is open to all producers in the region that observe the specified codes and produce in the demarcated geographical region.[1221] The 'holders' of a GI do not, however, have the right to assign the indication, which is provided to holders of trade marks[1222] and patents.[1223] This is because the good-place link underlying GI-protection automatically prohibits the transfer of the indication to producers outside the demarcated region.[1224] Nor can the indication be used on 'similar' goods originating from outside the designated geographical area. In effect, the result of protection is to limit the class and/or location of people who may use the indication.

It would appear, on a normative analysis of rights, that the conflict between a trade mark and a GI exists because of the lack of clarity in how such an IPR is used. Clarifying this point requires looking at the objective of both regimes and, in light of particular cultural dimensions within a jurisdiction's legal system. The above also sheds light on why, under the US regime, indications of origin (but not necessarily GIs) are protected as trade marks. Under section 2(e) of the Lanham Act,[1225] geographic terms or signs are not registrable as marks if they are geographically descriptive or geographically mis descriptive of the origin of the goods (or services). If a sign is mis descriptive for the goods, consumers would be misled and/or deceived by the use of the sign on goods/services that do not come from the place identified. But, if a geographic sign is used in such a way as to identify the source of the goods/services and over time, consumers start to recognise it as identifying a particular company or manufacturer or

[1218] See section 2.3.1 (regarding GI system).
[1219] See section 2.1.3.
[1220] See section 2.4.1.
[1221] Laurence Bérard and Peter Marchenay, 'Tradition, regulation and intellectual property: Local agricultural products and foodstuffs in France' in Samantha Brush and David Stabinsky (eds) *Valuing local knowledge: Indigenous peoples and intellectual property rights* (Island Press, 1996) 240, 243.
[1222] TRIPS, Art. 20.
[1223] Ibid Art. 28[2].
[1224] David Downes, and Sarah Laird, 'Innovative mechanisms for sharing benefits of biodiversity and related knowledge: 'Case Studies on Geographical Indications and Trademarks' (Center for International Environmental Law, 1999) (noting an exception to this principle by referring to Moran's observation of the licensing of the indication Bleu de Bresse to cheese producers in other countries). See Warren Moran, 'Rural Space as intellectual property (1993) 12(3) *Political Geography* 263, 267-9.
[1225] 15 U.S.C. §1052.

group of producers, the geographic sign no longer describes only where the goods/services come from, it also describes the source of the goods. It is at this point that the sign has secondary meaning or acquired distinctiveness. Accordingly, the primary meaning to consumers is the geographic place and the secondary meaning to consumers is the producing or manufacturing source. If a descriptive sign has secondary meaning to consumers, the sign has a source-identifying capacity and is protectable as a trade mark. Because of this feature of US trade mark law, GIs as indications of origin can also be protected as trade marks or collective marks. Like the US, Australia also has its own interpretation of the concept of GI draws on an attempt to implement a modified concept of the French concept of AOC.[1226] A measure of the lack of clarity in the recognition of rights, it is postulated, is the presence of conflict in regimes.

Accepting that a GI comprises IPRs preempts a discussion of the extent to which a registration system should formerly regulate that right, and how (whether narrowly or broadly) it should do so.[1227] To answer the latter, it is necessary to see what factors and interests influence the rights (i.e. IPRs) that then, through the requisite IP regime,[1228] disclose whether that IP regime is adequately protecting the reason for its existence.[1229]

6.1.2 Nature of Rights

Rights in and of themselves do not influence the shape of the GI regime in a particular jurisdiction.[1230] Rather, GIs and trade marks (by their nature), protect rights since the regimes recognise (formally through registration) IPRs. In Australia, for example, the GI[1231] registration

[1226] See section 3.3.
[1227] See section 6.3.1.
[1228] See, e.g., section 3.2.2 (explaining that the concept of *terroir* encapsulates the subject matter basis in France. It refers to the "thing" worthy of being protected, and the reason that it should be protected. For example, cultural factors are important subject matter basis in France and which is encapsulated in the concept of terroir. In Australia, the subject matter basis is evolving, and may be described as quality and reputation of a region). The challenge with a subject matter basis, is justifying the method of protection afforded to it through an appropriate IP regime, without compromising the purpose of that IP regime.
[1229] This provides a basis for the discussion about the trade mark and GI conflict in section 4.3.1.
[1230] See Daniel J. Gervais, 'The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New' (2002) 12 *Fordham Intellectual Property Media & Entertainment Law Journal* 929, 967-70. See also section 4.1.2 (outlining that rather, the rights that IP regimes protect have been formed as a result of the interests that they represent).
[1231] See section 6.3.1 (observing that Victoria does not have a true GI system, but rather a system of indication of source or origin).

system protects the rights of a winery or producer producing a wine product from grapes derived from that region. The ability to use that GI in informing consumers, looks to labelling laws. Like France, the DOC regime in Italy is not only well-established, but much stricter in affording protection of rights of those wine producers satisfying much narrower requirements regarding source pertaining to and process of wine production.[1232]

The nature of a right (i.e. IPRs) – and the classification of rights they protect (e.g. private rights in the context of the trade mark regime) – exist as a result of factors which shape the particular interest[s] that influence them. In newer New World jurisdictions[1233] – where the latter may not be clear – highlighting the former (i.e. what interests influence the regime) may assist in clarifying what the regime seeks to protect.[1234] Culture and even history, for example, is often unique to a jurisdiction or area. So, the role of such factors in shaping a regime,[1235] and therefore what it is a GI or trade mark should protect, plays a central role in clarifying the nature of rights afforded to Old-World as it does New World jurisdictions. These factors were introduced in chapter I, and comprised culture, politics and broader social interests that influence the wine regulatory framework. It is these factors that are reflected to varying degrees in the interests that are reflected in particular IP regimes.

In the context of IP, cultural consideration and consumer protection (due to wine being not only a product, but a commodity) are key interests that shape the nature of an IPR in a regime that regulates the industry. While factors (some of which are 'interests') differ from 'rights', such factors (or otherwise, interests), provide clarity with regards to the rights of entities *to use* a trade mark, or a GI. For example, health is an interest that may prevail over or influence the [private] rights of an entity to use an IPR. Arguments for plain packaging of cigarettes is an example on point.[1236]

[1232] See section 3.1.2 (The protection system of geographical indications of origin for food and agricultural products dates back to the early 20th century). At the French level, the label "Controlled Designation of Origin" (AOC) protects wine products (since 1935), and all agricultural and food products, raw or processed (since 1990). In 1992, the protection of the geographical origin of agri-food products was extended to the European level by the creation of "Protected Geographical Indication" (PGI) and "Protected Designation of Origin" (PDO). These two indications identify agri-food products according to their characteristics and their geographical origin with, PGI offering a more flexible protection, in terms of the link between the product and the territory, than PDO: see ibid.

[1233] These are other than Australia and the United States, but includes wineries that have been established less than 200 years. For example, Israel.

[1234] See section 6.3.1 (discussing the purpose of an IP regime).

[1235] See section 2.4.3.

[1236] See Hinchliffe, above fn 219, 36.

6.1.3 Balancing rights of the wine industry with broader interests

A right (for example, an IP 'right' or IPR) is not the same as an interest. Reference to "legitimate interests" (in the context of trade marks), and "interested parties" (in the context of the GI regime in TRIPS) illustrates this distinction.[1237] The motivation of a particular IP regime and goals that it seeks to achieve justifies the extent to which [these] regimes can operate (harmoniously or otherwise) in an optimum regulatory framework.[1238]

The importance of legitimate interests in the trade mark regime has previously been outlined in academic scholarship – particularly when defining the scope of "use" of that trade mark by the owner of the trade mark.[1239] "Legitimate interests" (a sub-classification of "interests", generally) is a concept that is to be distinguished from a right.[1240] In the context of tobacco plain packaging, for example, the government and other social groups may be the holders of legitimate interests.[1241] This means that, unlike IPRs – which give a single registered holder a legal interest – entities other than the holder of the right may have legitimate interests. Recognition of these legitimate interests (which could appear as an implied exception to registration of a right at one extreme, or use of a right on the other) for the purposes of the wine industry may be framed in light of certain "factors", such as culture, politics, and other social aspects.[1242] Recognizing legitimate interests is a way for a State,[1243] as its ability to do for tobacco products, to limit the use of trade marks by a holder.

[1237] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) (hereinafter TRIPS Agreement).

[1238] See section 6.3.1 (discussing that this is particularly in the event of conflict between the GI and trade mark regimes in the New World). For a critical analysis of the TRIPs provisions on GI: see Kevin M. Murphy, 'Conflict, Confusion, and Bias Under TRIPs Articles 22–24' (2004) 19 *American University International Law Review* 1181, 1183-4. The article that causes the most debate is Article 23 which deals with the protection of [GI] for wines and spirits."). See also Harry N. Niska, 'The European Union TRIPS over the U.S. Constitution: Can the First Amendment Save the Bologna That Has a First Name?' (2004) 13 *Minnesota Journal of Global Trade* 413, 417-8.

[1239] See Hinchliffe, above fn 552, 1014 (explaining that inherent in this right are 'legitimate interests').

[1240] See, e.g., TRIPS Art. 13 ("Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.") TRIPS refers to concepts such as legitimate interests provides further support to justifying IP regimes on an economic rights analysis, as opposed to a pure property rights perspective.

[1241] Hinchliffe, above fn 552, 1019. See also Molly Torsen, 'Apples and Oranges (and Wine): Why the International Conversation Regarding Geographic Indications is at a Standstill' (2005) 87 *Journal of Patent and Trademark Office Society* 31, 34-6.

[1242] See section 1.4.

[1243] This may be or be encompassed within a State.

What, then, is a legitimate interest? In *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs*, the Panel stated that it agreed with the panel's view in *Canada –Patent Protection of Pharmaceutical Products* that, in the context of trade marks, the term:

> "legitimate interest . . . must be defined as it is often used in legal discourse—as a normative claim calling for p**rotection of interests** that are "*justifiable*" in the sense that they are supported by relevant public policies or other social norms."[1244]

The term 'legitimate interests' encapsulates factors (i.e. culture, politics and social factors) which have the ability to influence the formulation of the trade mark regime – i.e. that "…protection of interests […] are "*justifiable*" in the sense that they are supported by relevant public policies or other social norms."[1245] This is consistent with previous observations that public interest theory of regulation should not be the primary underlying theory representing stakeholder interests, because it is bias in favour of a consumer.[1246] If concern for public interest and the negative externalities caused by alcohol consumption is the motivation behind alcohol regulation, for example, then when testing for motivation, support for the public interest theory,[1247] as well as theories on consumer protection, would be apparent. But, these facets alone do not wholly purport to be effective communicators of information. There is broader consideration.

This indicates that the trade mark regime is capable of adapting to a regime's particular culture through legitimate interests that, amongst other factors, are reflected in implied exceptions to the use of that right. WTO panels' view of legitimate interests is very similar, if not identical, to the normative claim calling for protection of interests that are identifiable by reference to public policies or social norms.

Article 17, which relates to exceptions to trade marks states:

[1244] *European Communities – Trademarks and Geographical Indications*, *supra* note 57, ¶ 7.663 citing Panel Report, *Canada – Patent Protection of Pharmaceutical Products*, WT/DS114/R (Mar. 17, 2000) ¶ 7.69 (emphasis added) (The emphasis is added here because TRIPS Agreement Article 20 refers to encumbrances by special requirements that are unjustifiable. While intellectual property law itself provides no significant contribution to the concept of "unjustifiability" in the context of Art. 20, the discussion of rights, privileges, and legitimate interests most assuredly does).
[1245] Ibid.
[1246] See section 2.4.6.
[1247] Id.

> "Members may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the **legitimate interests** of the owner of the trademark and of third parties."[1248]

It is apparent that Article 17 takes into account both the interests of third parties and the interests of a trade mark owner in a manner that is far more deferential to the interests of third parties than the other exception clauses. This approach in TRIPS to the legitimate interests of third parties makes perfect sense. The legitimate interests of the third parties are a basis for considering whether there exists a right to exclude others from using trade marks. Going back to an earlier discussion, a right, therefore, exists when the balance of reasons requires others to respect the putative right holder's interest in excluding others' use.

But, since trade mark regimes, as GI regimes, usurp similar private rights, the right to use such IP where broader interests are relevant (e.g. health), are best reflected in exceptions. For a jurisdiction, such as the U.S., that has not adopted a GI regime, but has a well-developed trade mark regime, legitimate interests provides a central avenue for IP regulation to balance central "interests" of the owner of a trade mark with other broader factors (such as health), in addition to narrower factors (e.g. consumer protection, that may be encapsulated within interests of third parties. As discussed in Chapter II, the interests of third parties are reflected in labelling laws which require health warnings (an indirect law), and the operation of the trade mark regime itself in preventing geographical mis descriptive marks.

GI regimes, on the other hand, do not mention legitimate interests. And this makes sense, given that the regime protects the rights of a collective of entities to use a GI. This is reflected in Article 22, which makes no mention of legitimate interests. Subsection 2 provides that:

> "In respect of geographical indications, Members shall provide the legal means for **interested parties** to prevent…"

The broad scope of the term "interested parties" (otherwise referred to as stakeholders in this dissertation) seems to indicate a close nexus between broader interests and rights, in providing

[1248] TRIPS Art. 17

flexibility in how a Member defines what GIs protect. Yet, it appears that this flexibility that has created difficulty for New World jurisdictions to define what it is they are protecting under that regime.[1249]

There is therefore a difference between a right and an interest in IP regimes, and degrees of rights encapsulated in IPRs differ in the GI regime, and the trade mark regime. Identifying the strengths and weaknesses of each regime is viewed in this section from a rights/interests analysis assists – the ultimate objective being to determine what elements of an IP regime or laws fit within an optimum framework to regulate the wine industry.

6.2 The Consumer and Information

As a regulated consumption good,[1250] wine is heavily reliant on catering to the needs of consumers.[1251] Consumers, as part of the decision-making process, rely on information – comprising information type, and the way that it is portrayed.[1252]

6.2.1 Why Representing Information Matters

When faced with choices in a market, information about a product enable consumers to make informed and educated decisions.[1253] Information can be portrayed to, and thereby sourced by, consumers in a number of ways: previous experience, friends and family, public advisory bureaus and advertisement. A consumer may draw on any one of these sources to assess the comparative trustworthiness of potential sellers or suppliers of goods.[1254] The information type, and the way in which information is portrayed are maximised if it results in lower search costs to a consumer.[1255] A regulatory framework can facilitate effective communication of information about a good by virtue of the legal regimes that it embodies. Section 40F of the AGWA Act, for example, expressly prohibits misleading descriptions and presentations on wines, and pursuant to s. 40E wine that is

[1249] See section 2.4.3 (discussing this in the context of limitations of Legal Transplantation Theory).
[1250] See section 5.3.1., below.
[1251] See Ramaswamy and Namakumari, above fn 106, 52.
[1252] See section 5.3.1., below.
[1253] Ibid.
[1254] See Stigler, above fn 50, 219, reprinted in D. Lamberton (ed) *The Economics of Information* (Penguin, 1970). See Ramaswamy and Namakumari, above fn 106, 52.
[1255] See section 6.3.5.

sold, imported to, or exported from Australia cannot contain misleading a description or presentation. In this sense, legislatures, through existing regulatory regimes, endorse the need to provide consumers with accurate information about a good or service. Title 15, Chapter 22, Subchapter III of the United States Code lists several prohibitions against the use of marks with misleading information. § 1125, for example, expressly prohibits false designations of origin, false descriptions, and dilution.[1256]

Other Consumer protection laws, such as the *Consumer Protection Act 2010* (Cth), also illustrate a jurisdiction's regard for facilitating accurate description of products to consumers[1257] and, in so doing, reinforce trustworthiness in the description of a product. Labelling laws similarly endorse a jurisdiction's dedication to portraying objective information about a product to consumers through mandating a uniform approach to represent such information.[1258] Because wine is a global commodity, having a centralised regulatory framework at a national level that accommodates a consistent approach to what information should be made available to the public is ideal, in this respect.

The reason that information matters is because consumers are ultimately the drivers of demand for wine.[1259] Making an informed decision about product choice requires having access to information about products in the market. For a regulatory framework to facilitate reduction of search costs, it is necessary to identify what drives the decision-making process. Since wine is a regulated commodity that is largely dependent on consumer demand, such inquiries are important considerations for legislatures with a view, in so doing, to support the long-term sustainability of the wine industry.[1260]

Furthermore, long-term economic sustainability includes supporting the wine industry in protecting their investments through building reputation of the industry and linking that reputation to a 'brand' (a communal brand, or a private brand) in a commercially competitive environment. Regulators, it is posited, can facilitate this through protecting the information channel role of an IP regime.

[1256] This dissertation does not address the issue of dilution of GIs.
[1257] See section 2.4.5.
[1258] See section 2.4.5.
[1259] See section 1.3.2 (supply chain).
[1260] See section 1.5.2.

6.2.2 The Information Chanel of IP

Sources of information include previous experience, friends and family, public advisory bureaus and advertisement, all of which a consumer may draw on to assess the comparative trustworthiness of potential sellers or suppliers of goods.[1261] Intellectual property (IP), while not an overt source of information, can embody information through which is communicated to a user or consumer through the above sources of information.

For example, a primary objective of the trade mark regime is to inform consumers about the origin of a mark (but with a focus on identification of the manufacturing unit), and with a view to minimise search costs.[1262] A geographical indication (GI) similarly seeks to attribute association between a product (or a method) to the unique or natural qualities of particular region or geographical origin.[1263] In a technical sense, a GI is regarded as comprising two type of indications of geographical origin (IGOs), namely appellations of origin (AOC), and indications of origin. IGOs have been regarded as one of the earliest types of trade mark used by traders as a means to exploit local reputation through the use of distinctive signs to evoke a particular geographical origin.[1264] Both GIs and trade marks are therefore capable of representing information about the origin of a product and, by virtue of their inclusion in TRIPS, are both regarded as IP rights. In a quest to reduce search costs and be capable of effectively embodying information, an understanding of limitations of each regime considering a rights/interest analysis[1265] and from an economic perspective, is necessary.

Regarding the latter, classifying the type of good a wine product is aids this inquiry. There are three identified categories of goods: search goods, experience goods, and credence goods. Wine may be described as "search goods" if consumers can develop a robust notion of the quality prior to purchase through either inspection and/or research.[1266] An "experience good" is classified as such

[1261] Stigler, above fn 50, 219. See also Ramaswamy and Namakumari, above fn106, 53.
[1262] Section 6.3.1.
[1263] The term GI comprises two types of IGOs, namely appeallations of origin (which corresponds to legal definition of the Lisbon Agreement) and indications of origin, which corresponds to the legal definition of GIs definition under Art. 22(1) of TRIPS.
[1264] See section 6.4.
[1265] See section 1 1.2.
[1266] Philip Nelson, 'Information and consumer behaviour' (1970) 78 (March-April) *Journal of Political Economy* 27, 31.

where consumers tend to prefer to purchase them and assess quality through use and experience; the latter then guiding future choice. "Credence goods"[1267] are those goods where neither prior inspection nor subsequent use is sufficient for developing a robust notion of quality. Wine products exhibit all three attributes.[1268] Each category refers to the term 'quality' which, as previously identified, can be a subjective concept for wine.[1269] Reference to 'quality' is better understood in the case of wine to mean 'value' to a consumer – the goal being that there will be positive reputation of a wine if consumers value the product higher than others in that class.[1270]

Channelling information through the use of IP regimes in light of wine's classification of a multi-dimensional good to evoke a positive value and thus higher reputation of a wine product is an ideal objective for both the industry and consumer, alike. At present, regimes have a different preference to which IP regime represents rights and interests of these stakeholders.[1271] Regimes also lack uniformity in how information is portrayed (i.e. through labelling laws, or lack thereof), and administering consumer protection laws.

Providing insight into the effect of the above dimensions based on the type and method of communicating information to consumers about a wine is a survey undertaken in 2015 and 2016 of participants located in Virginia, Victoria, Ohio and Hong Kong.

6.2.3 Consumer Preference

Chapter I identified that there is a nexus between the wine market and consumer behaviour.[1272] The Nicosia Model of consumer behaviour, which builds buyer behaviour models from a marketing perspective, establishes the link between a firm and its customers, how the activities of the firm influences the consumer and results in a buying decision. It regards that information from the firm influences consumer preference of the product, resulting in a consumer developing a certain attitude

[1267] See also Ramaswamy and Namakumari, above fn 106, 53.
[1268] See Dwijen Rangnekar, *Demanding Stronger Protection for Geographical Indications: The Relationship between Local Knowledge, Information and Reputation* (Discussion Paper Series, United Nations University, April 2004) 25.
[1269] See section 6.4.2.
[1270] See section 6.3.2.
[1271] See section 6.1.2.
[1272] See section 1.3.1.

towards the product causing him to search or evaluate about the product.[1273] If these steps have a positive impact, it may result in a decision to buy.[1274] The latter observation formed the basis of a case study on consumer preference, that was undertaken in 2015 and 2016 with ethics approval by the College of William and Mary.[1275] Adopting the Nicosia Model of consumer behaviour, the link between the effect of providing consumers with different information and their decision making was examined.

Methodology

Data was collected from participant responses provided in an online survey using Survey Monkey between 4 October 2015 and 6 January 2016.[1276] Participants were adult students and faculty in the College of Business. An anonymous survey was distributed to a general faculty and student list. Participation was optional, and recipients of the email containing a link were able to opt-in to participate.[1277]

Prior to commencing the survey and to facilitate whether to opt-in to participating, recipients were advised that the Nicosia Model of consumer behaviour would be adopted to examine the link between the effect of providing consumers with different information and their decision making.[1278] A link to information about the Nicosia Model was provided.[1279]

There were 236 participants out of a total of 398 recipients of the email that chose to opt-in to provide responses to questions posed.[1280] Data was collected from a sample size of participants living in Virginia at the time of participating in the survey.

[1273] Ibid.
[1274] Ibid.
[1275] See Diagram 3, Appendix VI.
[1276] See Diagram 2, Appendix VI.
[1277] See Diagram 2 (Screen 1), Appendix VI.
[1278] Ibid.
[1279] Ibid.
[1280] See Chapter V (Taxation).

Hypothesis

Hypothesis 1is that there would be a strong relationship between wine as credence goods, and consumer preference towards price. For example, a section of consumers might largely be concerned about the price of wine rather than other attributes.[1281] In contrast, others might also consider of equal or greater importance attributes of flavour in comparison to price.[1282]

H1: There is a strong relationship between wine as credence goods, and consumer preference towards price.

This inquiry is important for the purposes of the present thesis because the greater the reliance on certain information, including the way it is portrayed, by consumers the greater the incentive for clear guidelines in regulatory frameworks to balance stakeholder rights and interests.

Analysis and Discussion

Consumer preference for a wine over another revealed different dimensions. For example, a section of consumers might largely be concerned about the price of wine rather than other attributes.[1283] This group was primarily in the first and second age bracket. In contrast, others might also consider of equal or greater importance attributes of flavour in comparison to price.[1284]

Influencing their decision was knowledge of a winery from past experience or word-of-mouth. In the absence of prior knowledge, question 26 of the survey revealed that 85 percent of participants looked for where a wine came from. This finding was consistent with previous statistics, which identified a nexus between a consumer's perception of the quality of a wine and the region of that wine product.[1285] Findings in the present data endorsed this observation further.

When provided with a choice between two New World regions – here, in Virginia and Victoria – participants opted for a wine in the jurisdiction in which they were resident, or a region in

[1281] See section 1.3.1.
[1282] Ibid.
[1283] Ibid.
[1284] Ibid.
[1285] See Nelson, above fn 1266.

a country that they found "fascinating".[1286] In the absence of a region, participants looked for a country of origin. For example, those that preferred an "Australian wine" over a wine from the United States provided a common reason, being that they "had visited Australia", and had a positive experience. One participant said that it was because "Australian soil was clean". This similarly endorses the observation that consumers have a sense of cultural pride, associate an experience (a source in itself) with a product. They may also value the working conditions and sustainability of wine firms. While the data supports wine tourism initiatives,[1287] it indicates that consumers in the absence of being informed of distinguishing factors of a newer wine region (compared to more established regions in Old-World jurisdictions such as France), may adopt a conservative purchasing decision opting a wine associated with their 'home' jurisdiction.

In the absence of any association or knowledge of a region – there were five participants who did not know where Victoria was located – looked for aesthetic features such as trade mark, logo or brand name. Secondary to the country of origin, consumers located in the US revealed a stronger correlation between a trade mark, where the private brand dominated the label.

Quality is guaranteed by numerous wine regulations in the European Union states such as Italy and France (DOC and AOC laws respectively), while in the Victoria and Virginia quality of wine is ensured by a bucket of laws adopted on a national, federal, and local levels. The majority of consumers surveyed in these New World jurisdictions seek other endorsements, such as a unique name (or trade mark) – the 'pizzazz' factor – and competitive price for a wine product.

Some of the broader patterns identified, however, included that:

- When faced with a choice between a New World and Old-World wine of comparable price, most participants preferred Old-World wines. This supports the positive effect of reputation on consumer choice.
- Most consumers of those surveyed would prefer a more affordable wine, notwithstanding its regional origin. This identifies the need for wineries to remain competitive in a global market;

[1286] See Table 1, Appendix
[1287] See section 6.4.3.

- Participants were influenced by the positioning of a brand or mark, which is directly relevant to the need to regulate information on labels.

This highlights challenges that 'newer' regions in New World countries may encounter. It is necessary to cater towards consumer preference, but also be aware that laws and the regulatory framework within which they operate, can capitalise on such understanding and redirect consumer preference. In addition to considerations within a legal system,[1288] taking charge of barriers (insofar as the above patterns pose to the industry) requires acknowledging economic, marketing, and agricultural factors as a supplement to an analysis purely of black-letter law.

Capitalising on a consumer's perception of "value" and "reputation" in how they source information and what information they may seek out, requires acknowledging such factors. As emphasised by Atkin et al., "…consumer preferences can serve as markers in developing and targeting persuasive messages to attract specific consumer groups. This will help marketers to develop strategies to increase sales."[1289] The above results validate why wine producers and marketing specialists pay much attention to the structure of customer market and its peculiarities.[1290] Some preferences include characteristics of wine like wine type, brand name, vintage, alcohol content, price, and flavour. Consumer demographics, in their turn, consist of gender, culture, age, economic status, income, education, marital status, living location, and having children.[1291] For example, there was an increased preference for more affordable wine by younger participants in the above survey. Increasing visibility and ensuring long-term economic sustainability draws on the need for wine firms to understand consumers' preferences and demographics.

Middle-aged participants, for example, tend to pay less attention to label uniqueness than other age groups did, and they do not perceive it as an indicator of quality.[1292] This fact could justify wine branding and labelling in France, as many French wines are currently targeted towards older generations that do not care much about attractive and unique labels.

[1288] Section 2.1.2.
[1289] Thomas Atkin, Linda Nowak and Rosanna Garcia, 'Women Wine Consumers: Information Search and Retailing Implications' (2007) 19(4) *International Journal of Wine Business Research* 327, 332.
[1290] Lulie Halstead, 'Consumer Trends in the Wine Industry for 2013' (2013) January/February *Wine and Viticulture Journal* 1, 2.
[1291] Jacob Clinite, 'The Preferences in Wine of Various Aged Consumers' (March 2013) <http://digitalcommons.calpoly.edu/ >.
[1292] See also M. Wolf and S. Thomas, 'How Millennial, Generation X, and Baby Boomer Wine Consumers Evaluate Wine Labels' (2007) 38 *Journal of Food Distribution Research* 1, 17.

The Millennial category of consumers, in its turn, has been gaining ground for the past decade. Research shows that these consumers rely less on geographical indications such as region of origin to determine wine quality and pay more attention to the label's attractiveness and alcohol content.[1293] The above data is consistent with this observation. Australia successfully used this information to attract consumers, as its top-selling brands like Alice White, Jacob's Creek, and Yellow Tail, with their colourful labels, imaginative names, made 'Australia' one of the largest wine exporters. These results are crucial for wineries to prioritise their marketing appeals to the Millennial segment.

Trends also appear to influence consumers' choice of wine. Environmental sustainability, for example, has been making slow but steady gains in societal recognition for the past several years. As a result, an increasing number of wine producers, retailers, and consumers include sustainability in their considerations when it comes to the evaluation wine products.[1294] A growing number of companies use environmental strategies to advance technologically, innovate, and build competitive advantage.[1295] For example, 72 percent of participants answering question 27 preferred a label of the same wine that said, "organic wine", even if they were required to pay a premium on that organic wine. Sustainable actions are therefore considered to be increasingly profitable and valuable in reinforcing the brand and market positioning, as more and more consumers choose to buy ecologically-friendly products.[1296] Australia, for instance, is one of the countries that place a particular emphasis on business and environmental sustainability at both national and individual winery levels.[1297]

Health and wellness trend is another factor that determines the customers' demand for wine. Due to the increasing public attention towards the healthy lifestyles, health concerns are growing

[1293] Thomas Atkin and Liz Thach, 'Millennial Wine Consumers: Risk Perception and Information Research' (2012) 1(1) *Wine Economics and Policy* 54, 57.
[1294] James A F Stoner, *Global Sustainability as a Business Imperative* (Palgrave Macmillan, 2010) 14.
[1295] Daniel Esty and Andrew Winston, *Green to Gold: How Smart Companies Use Environmental Strategy to Innovate, Create Value, and Build Competitive Advantage* (John Wiley & Sons, 2009) 45-6.
[1296] Sharon L Forbes and Tracy-Anne De Silva, 'Analysis of environmental management systems in New Zealand wineries' (2012) 24(2) *International Journal of Wine Business Research* 98, 110.
[1297] Enterprising Partnerships Pty Ltd., 'Emerging Themes. Wine Industry Australia' Prepared for the Future Leaders – Succession for the Australian Wine Sector, 2007.

among consumers, which results in changing preferences toward healthier foods and beverages.[1298] Contemporary consumers expect wines to be healthful and produced with the help of environmentally sustainable techniques. Although health conscious consumers may be difficult to reach, as they are selective concerning their alcohol decisions, knowing their health considerations may increase opportunities for presenting wine as a healthy beverage.[1299] Thus, ongoing health-consciousness induced some wine producers to focus on "organic" wine that presumably causes less harm to customers' health, as well as promote civilised drinking as a healthy alternative to binge drinking. Traditional winemaking countries like France still maintain that consuming red wine in a moderate quantity not only strengthens the cardiovascular system, but also increases lifespan due to the natural phenol called resveratrol found in red wine.[1300]

Finally, the way wine is sold is also a crucial factor for determining customers' tendencies. Survey participants appeared to value convenience, price, communication, and overall attitude of retailers to their clients, and these factors determine the choice of local markets, grocery stores, or wineries.[1301] An increasing number of customers nowadays prefer to buy wine in supermarkets chains, because it is convenient. Although not part of the survey, it is purported that due to consumers' preference for convenience, they may be increasingly driven to on-line stores to purchase wine. These cost-reducing technologies are lowering the spread between wine producer and final prices, potentially to the benefit of all parties.[1302] However, the presence of virtual wineries (i.e. those that do not have a physical winery, but develop novel wine styles and blends, are a cause for concern among small wine producers and boutique wineries. The impact of 'cloud wines', in this sense, are that they water down quality benchmarks of wines from a jurisdiction, generally.

Summary

The data supports H1 and indicates that there is a strong relationship between wine as credence goods, and consumer preference towards price. Although participants were from a narrow class of

[1298] Lindsey M Higgins and Erica Llanos, 'A Healthy Indulgence? Wine Consumers and the Health Benefits of Wine' (2015) 4 *Wine Economics and Policy* 1, 3-11.
[1299] Ibid.
[1300] Betul Catalgol et al., 'Resveratrol: French paradox revisited' (2012) 3 *Frontiers in Pharmacology* 141, 142.
[1301] Mei-Lien Li and Robert D Green, 'A Mediating Influence on Customer Loyalty: The Role of Perceived Value' (2011) 7 *Journal of Management & Marketing Research* 1, 2.
[1302] Glyn Wittwer and Kym Anderson, 'How Increased EU Import Barriers and Reduced Retail Margins can Affect the World Wine Market', School of Economics and Centre for International Economic Studies, Adelaide University, 2001.

participants (i.e. those either attending or working at a college), the varying ages of participants would suggest that the results would have a broader application. At the same time, consumers appear to pay greater attention to information on a label in the absence of knowledge of an area. Therefore, the greater the reliance on certain information, including the way it is portrayed, by consumers the need for clear guidelines in regulatory frameworks to balance stakeholder rights and interests. But, while laws should protect the interests of customers, it should not be at the expense of wine producers endeavour for greater recognition of a quality wine product.

6.3 The Importance of Information Channels in a Regulatory Framework: Reputation, Quality and Value

The notion of 'value' to a consumer is linked to 'reputation' of a product. Indicative in the above results is that there will be positive reputation of a wine if consumers value the product higher than others in that class.[1303] Results from data collected also indicated that reputation can be influenced by how information is sourced, and the avenue through which it is conveyed. Trade marks, in this sense, embody a brand since they protect private rights of the holder of that right;[1304] whereas GIs represent a collective of rights and interests which are embodied in regulatory practices governing a good.[1305] While the previous section explained that trade marks protected private rights of the holder, and GIs embody public interests of a collective, this section outlines the nexus between rights/interests of stakeholders, and economic justification for these regimes' existence.

6.3.1 Trade Marks

In the case of infrequently purchased experience goods such as wine, a buyer uses multiple sources of information (e.g. friends, family, advertisements, labels) to generate a perception of that wine product. Where consumers seek out a brand such as a trade mark, they do so because a mark acts as a signalling device that identifies a particular winery's product and building an expectation of quality – in the sense that a winery's product has a good reputation for a wine product. Economides's[1306] implies that "unobservable qualities" may be subjective in nature and therefore

[1303] Section 6.4.2.
[1304] Section 6.5.2.
[1305] Ibid.
[1306] Nicholas S. Economides, 'The Economics of Trademarks' (1988) 78 *Trademark Reporter* 523, 526.

difficult to regulate. But, he does identify a nexus between the "value" to consumers of "unobservable features", and therefore that a consumer's positive perception of value is linked to reputation. Such reputation may be of the product, the region, or a private firm. It does this through protection of the investments undertaken to develop brand names, and second the associated reputation and safeguard the role of trade marks as information channels between buyer and seller.[1307]

To achieve the economies in 'search' – by being an efficient information channel – a trade mark must meet certain conditions. First, the mark must be distinct and differentiated from previously existing trade marks and certain words cannot be protected through or used in marks. A formal centrally regulated and administered trade mark registration system embodies this.[1308] The trade mark allows the consumer (and obviously the winery) to build a linkage across the aggregate category of wine products. Usefully for consumers the distinctness of a trade mark provides them with an opportunity to 'retaliate' by changing their loyalty when the expected quality is not delivered.[1309]

Trade marks, following this, act as mechanisms signalling a firm's reputation, thus helping consumers overcome, to some extent, the information asymmetries in the market. In this manner, trade marks are intrinsically associated with the buying and selling of products.[1310] It is this role of 'channel of information' through signalling a firm's reputation that allows trade marks to lower search costs, protect consumers from fraud and assist in consumer decision making.[1311] By way of

[1307] See, e.g. William Landes and Richard A. Posner, 'Trademark law: an economic perspective' (1987) 30(2) *Journal of Law and Economics* 265, 292-3; Gene Grossman and Carl Shapiro, 'Counterfeit-product trade' (1988) 78(1) *American Economic Review* 59, 63.
[1308] Ibid.
[1309] There are limits to this potential for retaliation in today's corporate world because of the diffused ownership pattern within the corporate sector: see George Akerlof, 'The Market for Lemons: Quality Uncertainty and the Market Mechanism' (1970) 84(3) *The Quarterly Journal of Economics* 488, 499-500.
[1310] William Cornish, I*ntellectual Property: Omnipresent, Distracting, Irrelevant?* (Oxford University Press, 2004) 102-3 (Cornish expands this idea to link the protection of trademarks with the need to protect information, in this case information about source and quality of products, much like the rationale for protecting other intellectual property rights (e.g. patents). However, most other commentators disassociate this link between the protection of trademarks and information.). See also Keith Maskus, 'Intellectual Property Rights and Economic Development' (2000) 32 *Case Western Journal of International Law* 471, 489 (acknowledging that trademarks are not associated with the creation of additional knowledge and hence may not produce the dynamic efficiencies of incentives for new product development).
[1311] Maskus, ibid. In this regard, a single mark can and is invariably used across a number of products that might fall within a category (e.g. microwaves) or a broader aggregation of products (e.g. home appliances). A variety of

example, consider the case of experience goods that may be either frequently or infrequently purchased.[1312] Regarding the former (i.e. frequently purchased experience goods), trade marks work because consumers have sufficient memory of the previous act of consumption, and the distinctive mark allows them to identify a product and link it to expected quality.[1313] Their preference is because even while the consumer may not have experience with the specific product, they may have experience with other products within a broader category.

Similarly, trade marks, which protect a private right of the holder,[1314] on a narrow interpretation therefore would seek to prioritise the reputation of a firm. Through its function of signalling certain quality standards that induce consumers to return and purchase new products, a "mark becomes an asset of the firm, embodying its accumulated goodwill".[1315] It is thus suggested that trade mark protection acts as an incentive for firms making investments in maintaining a certain minimum level of quality. This also implies the need for a regime to support long-term sustainability of the industry. Economides's echoes this, and observes that:

> "In many markets, sellers have much better information as to the unobservable features of a commodity for sale than the buyers. … Unobservable features, valued by consumers, may be crucial determinants of the total value of the good. …However, if there is a way to identify the unobservable qualities, the consumer's choice becomes clear, and **firms with a long horizon have an incentive to cater to a spectrum of tastes for variety and quality, even though these product features may be unobservable at the time of purchase**." [1316]

For example, if there is a poor-quality wine in a market where consumers cannot readily observe the characteristics of the wine because they only learn about the quality/authenticity of the good one-period later.[1317] When the product does not match the quality claims made by the firm does the consumer feel that the (legitimate) firm has compromised its quality. Assuming consumer rationality where they believe that a firm will continue to compromise quality, consumers may transfer their loyalty to another firm. Similarly, the misappropriation of trade marks through the production of

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information channels exist to provide product-related information: advertising, product labels, consumer magazines, friends, etc. Trademarks, as a distinctive sign, help in linking these different information sources.

[1312] See Economides, above fn 1277.

[1313] See 4.1.1 above.

[1314] Ibid.

[1315] Grossman and Shapiro, above fn 1307, 60.

[1316] Above fn 1277, 526

[1317] Ibid.

counterfeit goods is said to harm firms by diluting their reputation and market power and confusing consumers.[1318]

A long-term commitment to the industry calls for the need for centralised legal regimes governing and administering trade marks. Regimes, as they presently do, should continue to draw on a model framework, such as TRIPS. This consistency is one way of protecting the assets and investment of the wine industry, and at the same time endorsing the need to convey reliable information about a product. The trade mark regime should continue to operate to fill in the gaps of information imperfections in the market through such centrally regulated and administered regime, and therefore commit to the economic role of reputation. But, this does not mean that the trade mark regime should be the only IP regime to regulate the wine industry.

6.3.2 Geographical Indications

While trade marks identify the manufacturing unit (i.e. the private firm or winery), GIs identify the geographical area of origin of the product.[1319] Furthermore, while the trade mark is a distinctive sign signalling the expectation of a certain level of quality – the brand's reputation – GIs are similarly endowed with a reputational element on account of the product's specific characteristics and quality that are essentially attributable to the physical and human elements in its area of origin. Since AVAs are regarded as being based on an AOC system, they are (as AVAs) embodied as GIs for the purpose of this section.

Scholars such as Thiedig and Sylvander have suggested that GIs, and the reputation[1320] embedded in them, are a club good[1321] or a collective good.[1322] They purport that, to qualify as a club good, GIs "must exhibit specific properties including the benefits of displaying the indication requires meeting certain conditions" (i.e. that they are, therefore, excludability) and that "allowing an additional agent to enjoy the benefits of the indication involves zero marginal costs" (i.e. they are non-rivalrous). This means that the specifications defining the GI are the conditions that must be met

[1318] Ibid, 63.
[1319] See section 6.2.2.
[1320] See paragraph, below.
[1321] See section 6.4.3.
[1322] See Moran, above fn 1224, 270.

to allow a producer or winery to use an indication (excludability) and allowing for the use of the indication by an additional producer does not involve significant additional costs (non-rivalry).

Further, the reputation embedded in the indication is collectively on account of and simultaneously accrues to the geographical region identified in the indication. If viewed as a club good, wine from a region would be a local public good for those who have paid the toll and/or who enjoy membership of the club.[1323] There is a symbiotic relationship between region and indication, since the region endows the indication with reputation, while the reputation of the indication popularises the region of origin.[1324] It is quite unlikely that a single firm would have mobilised its resources to develop and promote the indication. Although, a single firm may adopt the role of leader in the supply chain.[1325]

Consequently, as GIs are club goods, they confront the problem of provision of public goods on account of free-riding.[1326] A firm might be tempted to play down its interest in marketing expenditures envisaging that they could free-ride on the promotion expenditures undertaken by others in that GI, which has the potential of resulting in an advertising distortion. A similar issue may arise in the context of a Consortia. This could be disastrous in a jurisdiction that has few wineries within a region, such as Virginia. It could also lead to unhealthy competition and the incentive to revert to a trade mark-oriented framework in a jurisdiction comprising a number of regions, and wineries within those regions, such as in Victoria.

It is necessary to recognise that GI products differ on account of the fundamental requirement for the product. The concept of terroir to exhibit the distinguishing characteristic, quality or reputation that is considered to be essentially attributable to its area of geographical origin.[1327] This is because

[1323] Ibid.
[1324] See Moran above fn 1224, 277. See also section 3.2
[1325] See section 7.2.
[1326] See Rangnekar, above fn 1268 (explaining that individuals are often tempted, for a variety of reasons, to not reveal their genuine preferences – particularly since benefits are non-rivalrous. The author goes onto explain that this sends incorrect signals to suppliers; thus, the market is undersupplied and resource allocation suboptimal).
[1327] See Robinson above fn 5 (defining 'terroir' as: 'much discussed term for the total natural environment of any viticultural site. … Major components of terroir are soil (as the word suggests) and local topography, together with their interactions with each other and with macroclimate to determine mesoclimate and vine microclimate. The holistic combination of all these is held to give each site its own unique terroir, which is reflected in its wines more or less consistently from year to year, to some degree regardless of variations in methods of viticulture and wine-making. … The extent to which terroir effects are unique is, however, debatable, and of course commercially important, which makes the subject controversial'). For a situated example of the 'debate' and the extent of

there are a range of firms or wineries that are legally and economically distinct units produce the very same product.[1328] It is possible for a manufacturing unit or a group of firms to attempt to differentiate their products – which are otherwise rather similar – from those of other firms in the supply chain. However, the uniqueness of GI product supply chains goes deeper than this. This is because the entire supply chain right down to raw materials and, if relevant, the land used for cultivation is implicated in the product specifications (e.g. blending rules) and indication (e.g. encompassing *terroir*).

In addition to maintaining the distinguishing characteristics of a wine, is ensuring compliance with governing regulations which, in turn, requires that all firms throughout the supply chain behave properly. This raises a dilemma wherein opportunistic behaviour on the part of a single firm can jeopardise the reputation of the indication. At issue here is more than a link between a product and its place of origin, but that the distinguishing characteristics of the product derive from the human and physical area of origin.[1329] The former, that is using an indication to link a product to its area of geographical origin, *per se* is not problematic. It is the triple connection between product, place of origin and quality that is more difficult to unambiguously define since there are significant socio-cultural dimensions to it.[1330]

A GI regime may, nevertheless, result in negative monopolistic competition since it allows parties who can use the GI to gain supracompetitive profits because the GI suggests differences between its products and those of others, when in fact the products are the same. Facilitating efficiency within the wine supply chain while, at the same time, recognising the notion of wine as a collective good, engagement of public or quasi-public institutions (such as national or state

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'typicity' or 'distinctive character': see Elizabeth Barham, 'Translating Terroir: The Global Challenge of French AOC Labelling' (2003) 19 *Journal of Rural Studies* 127, 128–32; and Warren Moran, 'The Wine Appellation as Territory in France and California' (1993) 83 *Annals of the Association of American Geographers* 694, 715–16. More generally, see James Wilson, *Terroir: The Role of Geology, Climate and Culture in the Making of French Wine* (1998). See also, Elizabeth Barham, 'Translating Terroir: The Global Challenge of French AOC Labelling' (2003) 19 *Journal of Rural Studies* 127.

[1328] James Chappuis and Peter Sans, 'Actors coordination: governance structures and institutions in supply chains of protected designation of origin' in Bertil Sylvander, Dominiqe Barjolle and Filippo Arfini (eds) *The Socio-economics of Origin Labelled Products in Agri-food Supply Chains: Spatial, Institutional and Co-ordination Aspects* (2000, Actes et Communications) 51-66.

[1329] See discussion in 5.1.3.

[1330] Moran above fn 1224, 266-67; Bérard and Marchenay, above fn 1221, 238-9.

administering government body) is desirable.[1331] It follows from this that supply chains of different manufacturing unit's producing the same GI-product must exhibit similar features based on the collectively established codes of practice. This occurs within and across the product's supply chain: (a) firms vertically integrated in the supply chain observe the relevant codes to produce the GI-product and (b) firms producing the intermediate product.[1332]

6.3.3 Certification Marks and Geographical Names

Geographical indications are protected through the trademark regime as "certification marks" under US federal law.[1333]

The term "certification mark" is defined in 15 U.S.C. § 1127 as "any word, name, symbol, or device, or any combination thereof ... [that is used to] certify regional or other origin, material, mode of manufacture, quality, accuracy, or other characteristics of ... goods or services...." A certification mark is used by third parties to indicate that a goods or service being offered conform to the standards or characteristics established by the mark's owner.[1334] In a certification mark regime, the mark owner generally has greater freedom to define the standard. But, in the case of a geographic certification mark, that freedom is constrained, as only firms in the particular geographic area may use the term.

In this respect, and unlike Australia, the US may be described as having a quasi-GI protection regime that forms part of the trademark regime. A certification mark system does, however, closely approximate many of the important aspects of a GI system. First, geographic terms can be protected as certification marks, even without demonstrating "acquired distinctiveness" or secondary

[1331] See, e.g. Dominique Barjolle and Bertil Sylvander, *PDO and PGI Products: Market, Supply Chains and Institutions*, Final Report, FAIR 1-CT95-0306 (June 2000, Brussels, European Commission); L.M. Albisu, Work Programme 2: Link between origin labelled products and local production systems, supply chain analysis (Final Report, July 2002). DOLPHINS – Concerted Action, Contract QLK5-2000-0593, European Commission.; B. Sylvander, Work Programme 1 (Origin labelled products: definitions, characteristics, legal protection, Final Report (July 2002).

[1332] cf. Albisu ibid.

[1333] See 15 U.S.C. § 1127.

[1334] See 15 U.S.C. § 1064. For cases discussing challenges to certification marks, see, e.g., Levy v. Kosher Overseers Association of America Inc., 104 F.3d 38 (2d Cir. 1997); and Community of Roquefort v. William Faehndrich, Inc., 303 F.2d 494 (2d. Cir. 1962).

meaning.[1335] Many geographic terms, for example, Idaho potatoes, Vidalia onions, are registered as certification marks. Like a GI, this means that anyone who produces products in the region may use the mark. Therefore, unlike the exclusivity of a typical trademark, a certification mark, like a GI, is essentially a communal right.

In the US, enterprises use geographic names or "toponyms"[1336] to brand their goods, either using "the name of the place where they were made" or some other place name that they think will catch consumers' attention. From the Toyota Tacoma to Kentucky Fried Chicken, brand names derived from toponyms are a dime a dozen. Unlike wine regions, the Toyota Tacoma brand is not a trade mark linked to a geographic region. While a small number of geographic terms are incorporated into generic names for types of goods or services (e.g. Swedish massage) and under traditional trade mark doctrine, these can never be protected as trade marks *for* those goods or services.[1337] Another small number of brand names containing geographic terms are found to provide deceptive information to consumers, and are denied protection for that reason regardless of whether they have obtained secondary meaning.[1338] Such facets of regimes that function within the US legal system should not be dismissed. For constitutional reasons, they cannot. Rather, such limitations should be embraced in proposal made to facilitate identified objectives for the Virginian wine industry.[1339] As part of this, distinguishing between what information a consumer requires as part of the decision-making process and how that information is portrayed, is relevant in such circumstances.

[1335] See 15 U.S.C. § 1054.

[1336] A toponym is simply "a name of a place." Webster's New International Dictionary of the English Language 2670 (2nd ed., 1947). Terms such as "geographic term," "place name," "geographic designation," and "toponym" are used interchangeably to refer to all designations of particular places, whether those designations are words, as most are, or are nonverbal symbols or designs. Reference to "particular place" excludes terms referring to types of geographical features, such as "bay" or "archipelago"; but meant to include places of all sizes, from a single street, to an entire continent or ocean, such as the Indian Ocean.

[1337] This is why "Australian Wine" could never be a trade mark capable of protection and registration.

[1338] For the vast majority of geographic brand names, however, the crucial issues for trade mark protection are whether a demonstration of secondary meaning will be required, and if so how and when that demonstration can be made. The most common issue regarding trade mark protection for such brand names, particularly in New World jurisdictions such as the U.S., has traditionally been whether protection is available immediately upon use, or must await proof that the brand names have gained "secondary meaning" among consumers. See, e.g., Two Pesos. Inc. v. Taco Cabana, Inc., 505 U.S. 763, 769 (1992) ("Marks which are merely descriptive of a product . . . do not inherently identify a particular source, and hence cannot be protected. However, descriptive marks may acquire the distinctiveness which will allow them to be protected under the [Lanham] Act.. . . . This acquired distinctiveness is generally called 'secondary meaning.'").

[1339] Ibid.

As a sub-category of trade marks, distinctive signs indicating geographical origin are the earliest type of trade marks, with evidence in pre-industrial periods for a variety of products like minerals, simple manufactured goods and agricultural products.[1340] Blakeney reports of the use of animals (panda beer), landmarks (Mt. Fuji sake), buildings (Pisa silk), heraldic signs (fleur de lys butter), and well known personalities (Napoleon brandy, Mozart chocolates) as distinctive signs indicating geographical origin whilst also conveying a certain quality or reputation.[1341]

Historically, in a range of professions (e.g. carpenters, stone masons, tile manufacturers, potters, printers), the distinctive sign helped distinguish products and protect goodwill with consumers. The role of goodwill protection was enhanced with the formation of guilds and their territorial control of trade in the Middle Ages.[1342] Inherent here is the basis for the shared economic rationale and legal principles between IGOs and trade marks. It thus follows that the economic rationale for protecting GIs, much like in trade marks, emerges from economic theories to do with information and reputation.

Such considerations are relevant for a legal system that places greater emphasis on a trade mark regime. The question being, in such context, is whether such regime is sufficient? Virginia, for instance, lacks a formal GI regime. Rather, it adopts what may be regarded as a quasi-system of indication of source through the US trade mark regime, in addition to an AVA system. Although GIs are seen as protected through common law trademark law without being registered by the USPTO. For example, the TTAB has held that "COGNAC" is protected as a common-law (unregistered) certification mark in the United States. Institut National Des Appellations v. Brown-Forman Corp.[1343]

In this dissertation, I do not purport that Virginia formerly adopt a statutory GI regime, as this would be limited constitutionally. But, rather their system of protection be refined and any such

[1340] Frank Schechter, *The Historical Foundation of the Law Relating to Trade Marks* (1925).
[1341] Michael Blakeney, *Geographical Indications and TRIPS*, Occasional Paper 8, Friends World Committee for Consultation (Quaker United Nations Office, 2001).
[1342] See also section 7.2.1.
[1343] 47 USPQ2d 1875, 1884(TTAB 1998) ("Cognac" is a valid common law regional certification mark, rather than a generic term, since purchasers in the United States primarily understand the "Cognac" designation to refer to brandy originating in the Cognac region of France, and not to brandy produced elsewhere, and since opposers control and limit use of the designation which meets certain standards of regional origin.)

changes be brought in line with the goal of the trade mark regime.[1344] Either more could be done to bring the operative section more in line with the trade mark regime, or that protection afforded be more tailored to an affected entity. One case study on point is laws concerning Geographical Mis descriptive Marks. In the absence of a GI registration system, the prohibition against registering primarily geographically deceptively mis descriptive of the goods is outlined in Title 15 U.S.C. § 1052(e)(3). Australia, because it has a GI regime, does not have an identical section in the *Trade Marks Act*.

In determining what is capable of protection, the traditional common law approach has been to require the demonstration of secondary meaning for virtually all trade marks consisting of geographic terms.[1345] The refusal to grant trade mark protection to geographic terms immediately upon first use has largely been grounded upon uncertainty about whether competitors might also need to use such terms to describe their own goods or services. Competitors, in this regard, are envisioned to be making these descriptions as part of commercial communications to consumers,[1346] and the ultimate goal is to benefit consumers (through reduced search costs) and, in so doing, producers (because of the positive association with investment assets) through support of those commercial communications.[1347]

The doctrine barring registration in the US requires that the "mark's primary significance [be] a generally known geographic location"; that the relevant public would be likely to believe that the goods originate from the stated geographic location (when in fact they do not); and that the deception be "material."[1348] Although there have been no known case law concerning the Virginian wine industry, there appears adequate administration of geographically mis descriptive marks. In fact, courts have embraced a standard of "materiality" as the key to the distinction between deceptive

[1344] See section 7.5.
[1345] Ibid.
[1346] Ibid.
[1347] Blakeney above fn 1341, 4.
[1348] Courts have generally held that actions under Section 43(a) require a demonstration that the misrepresentation in question is material, that is, would have an effect on consumer purchase decisions. See, e.g., William H. Morris Co. v. Group W, 66 F.3d 255 (9th Cir. 1995); See, e.g., Mary LaFrance, 'Innovations Palpitations: The Confusing Status of Geographically Misdescriptive Trademarks' (2004) 12 *Journal of Intellectual Property Law* 125; J. Thomas McCarthy, *Trademarks and Unfair Competition §§ 14:26-14:33* (4th ed. 2005), § 27:35). By comparison, I argue that the NAFTA and TRIPS definitions of "geographic indication" fall somewhat short of requiring materiality. Thus, in theory, the Lanham Act might not quite comply in this respect with NAFTA and TRIPS standards, although this discrepancy could possibly be cured by judicial reinterpretation of Section 43(a)(1)(B), since the materiality requirement is not stated explicitly in the language of that provision.

matter and mis descriptive matter.[1349] This materiality test focusses on whether the inaccurate data communicated by the mark under analysis would be "important to consumers".[1350] Professor McCarthy, for example, has summarised that the "'materiality' test focuses upon the question of whether purchasers care whether the product contains the misdescribed quality or comes from the geographic location named."[1351] The Federal Circuit in *In re California Innovations* alluded to an inquiry into a consumer's decision to purchase the goods to be considered material. So, whether a consumer cares about whether a good comes from the geographic location requires looking beyond pure black letter law to the practical implications of a regime on consumer preference. For service mark, which do not relate to a wine product, the court in *In re Les Halles de Paris J.V.*[1352] applied a higher burden of proof. The California Innovations court concluded that a finding that the place indicated by the mark is noted for the goods on which the mark is proposed to be used is sufficient to raise a presumption of materiality. This decision shifts the focus of inquiry from the goods-place association, which was crucial and therefore under constant examination and development in the first two decades after *In re Nantucket*,[1353] to the requirement of "materiality."

[1349] See, ibid In re California Innovations, Inc., 2002 WL 243562 (2002). The California Innovations decision has resulted in a number of dramatic changes in the legal analysis and treatment of geographic trademarks. Most notably, the decision creates a category of geographically misdescriptive marks that are immediately registrable, while both geographically descriptive marks, and marks that are descriptive or deceptively misdescriptive in ways unconnected with geography, still require secondary meaning to be registered upon the Principal Register. See 15 U.S.C. § 1052(e)(1) (authorizing a refusal to register a mark which "when used on or in connection with the goods of the applicant is merely descriptive or deceptively misdescriptive of them"); 15 U.S.C. § 1052(e)(2) (authorizing a refusal to register a mark which "when used on or in connection with the goods of the applicant is primarily geographically descriptive of them"); 15 U.S.C. § 1052(f) (providing that "[e]xcept as expressly excluded in [certain subsections that do not include (e)(1) or (e)(2)], nothing in this chapter shall prevent the registration of a mark used by the applicant which has become distinctive of the applicant's goods in commerce."). In 2003, the U.S. Court of Appeals for the Federal Circuit held that marks were only "primarily geographically deceptively misdescriptive" when the misdescription materially affected consumer purchasing decisions. That holding focused the geographic mark inquiry even more narrowly on consumer protection from fraud rather than competition-promoting commercial communication, and substantially enlarged the category of geographic brand names eligible for immediate trade mark protection.

[1350] See e.g., Gold Seal v. Weeks, 129 F. Supp. 928, (D.D.C. 1955) aff'd per curiam, 230 F.2d 832 (D.C. Cir.), cert. denied, 358 U.S. 829 (1956) (mark GLASS WAX for cleaning product containing no wax held to be deceptively misdescriptive, but not deceptive, on the grounds that consumers would not feel aggrieved if they learned about the absence of wax in the product).

[1351] See McCarthy, above fn 142 § 11:58. See also, Kenneth Germain, 'Trademark Registration Under Section 2(a) and 2(e) of the Lanham Act: The Deception Decision' (1976) 44 *Fordham Law Review* 249, 26. See also, In re House of Windsor, Inc., 221 U.S.P.Q. 53 (T.T.A.B. 1983) (where the Board explicitly repudiated the intent standard, and embraced materiality as the key dividing line between inaccurate geographic marks that could be salvaged by secondary meaning, and those that were beyond redemption, declaring, "it seems to us that intent of the user of the mark should not be an element of a case of geographical deceptiveness. . . . The better approach is to determine whether the deception is material to the purchasing decision. If so, the mark is deceptive within the meaning of Section 2(a).") See also In re California Innovations Inc 329 F.3d 1334 (2003).

[1352] 334 F.3d 1371 (2003).

[1353] See also Felix Addor & Alexandra Grazioli, 'Geographical Indications beyond Wines and Spirits: A Roadmap for a Better Protection for Geographical Indications in the WTO/TRIPS Agreement' (2002) 5 *Journal of World*

Even though laws concerning Geographical Mis descriptive Marks do not depict a disconnect between the goal of the trade mark regime (to provide information to consumer, and reduce search costs), and what it actually protects (a private right), legislatures should assess whether they are the most appropriate regime in light of themes discussed in this chapter. In this regard, courts in the US should therefore be mindful that it has been pointed out that the development of the goods-place association test, with its focus on subjective consumer perception, has led the law of geographic trade marks to stray from its traditional goal of protecting the communicative needs of competitors.[1354] At the same time, adopting the "materiality" approach as outlined would appear inconsistent with the requirement posed under TRIPS [and NAFTA].[1355] Adoption of the US approach in other New World countries, therefore, must proceed with caution.[1356]

The reason for this is that NAFTA and TRIPS do not include a materiality requirement. They do, however, contain an additional, carefully crafted test that is clearly an alternative to a materiality requirement. This test is contained in the treaties' substantially identical definitions of the term "geographical indication." The version in TRIPS provides:

> "Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a **given quality, reputation or other characteristic of that good is essentially attributable to its geographical origin**."[1357]

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*Intellectual Propert*y 865, 869 (defining GI as "any designation which points to a given country, region, or locality").

[1354] Blakeney above fn 1341, 15, See also, World Intellectual Property Organization, *What is a Geographical Indication?,* <http://www.wipo.int/>; Steven A. Bowers, 'Location, Location, Location: The Case Against Extending Geographical Indication Protection Under the TRIPS Agreement' (2003) 31 *American Intellectual Property Law Quarterly Journal* 129, 133–34.

[1355] C.f., LaFrance, above fn 141, 126. See also ,2 Thomas McCarthy, *Trademarks and Unfair Competition* (4th ed. 2005) §§ 14:26-14:33.

[1356] McCarthy, ibid.

[1357] TRIPS, Art. 22(1) (emphasis added). The NAFTA version provides: "geographical indication means any indication that identifies a good as originating in the territory of a Party, or a region or locality in that territory, where a particular quality, reputation or other characteristic of the good is essentially attributable to its geographical origin": see North American Free Trade Agreement, Dec. 17, 1992, art. 1721, 32 I.L.M. 289 (1993). The words "essentially attributable" to the geographical territory are intended to establish the link between the product and the relevant territory. While a literal reading of "territory" would suggest that the link must be physical, that is, that the product must embody certain characteristics because of the soil conditions, weather or other physical elements in a place, the terms "reputation" and "essentially attributable" allow flexibility. Therefore, "essentially attributable" can be understood to also refer to human labour in the place or to goodwill created by advertisement in respect to the place. This also seems to be confirmed by the drafting history of TRIPS. In the 1990 draft (Draft of 23 July 1990

The NAFTA and TRIPS definitions require that "a quality, reputation, or other characteristic" of a good be attributable to the place that the mark designates as the origin of the good. The nexus, or connection, between the goods and their place of origin can, in theory, be either objective or subjective. This may explain why Victoria implements what is regarded as a GI system, but which is more a system of indication of source of grapes in a wine.

6.4 Dealing with Conflicts

An extension of this is that there is an apparent conflict between GIs and trade marks, which rests in the two conflict resolution mechanisms. Trade mark rules firmly built on priority, exclusivity, and territoriality or the sui generis rules built on the assumption that the "common good" GI was somehow superior to the private property right trade mark and could therefore destroy its existence, or at least its exclusivity, irrespective of priority and territoriality.[1358] The issue being which one would prevail. The following sections outline present approaches in jurisdictions.

6.4.1 Trade marks and GIs in Europe

In situations of conflict between GIs and trade marks, priority, exclusivity, and territoriality exist under EC Wine Regulation.

For example, upon entering into force of Regulation No. 479/2008 (repealed by Regulation No. 491/2009 amending Regulation No. 1234/2007),[1359] the absolute prevalence of GIs over trade marks adopted under the former Wine Regulation was abandoned. The former approach was clearly

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(W/76) at [2]), the quality, reputation or other characteristic of the product had to be attributable to its geographical origin, including natural and human factors. The qualification "natural and human factors" did not however reappear in the final text of TRIPS, which uses the broader term of "geographical origin". See further Daniel Gervais, *The TRIPS Agreement, Drafting History and Analysis* (Sweet & Maxwell, 2nd ed., 2003) 188-9.

[1358] See World Trade Organization (WTO) Panel decision in *European Communities—Protection of trademarks and geographical indications for agricultural products and foodstuffs* and the judgment of the Grand Chamber of the European Court of Human Rights in *Anheuser-Busch v. Portugal* conflicts are resolved on a basis of priority, exclusivity, and territoriality; this is mostly a result of two milestone decisions).

[1359] Council Regulation (EC) No. 479/2008 of April 29, 2008, on the common organisation of the market in wine [2008] OJ L148/1, repealed by Council Regulation (EC) No. 491/2009 amending Council Regulation (EC) No. 1234/2007 on a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) [2007] OJ L 299/1.

inconsistent with Articles 16.1 and 24.5 of TRIPS, and likely to be in violation of the fundamental guarantee of private property rights as protected under the EU Treaty and the European Convention on Human Rights.

Pursuant to former Regulations No. 1493/1999[1360] and No. 2392/89,[1361] a later-filed GI for wine prevailed, in principle, over a prior trade mark. Only well-known trade marks that were registered at least twenty-five years before the official recognition of the geographical name in question and that had been used since then without interruption had been allowed to coexist. Other trade marks were subject to cancellation.[1362] This latter limited exemption was not even provided for in the original Regulation No. 2392/89. It was included after an amendment of the Regulation following Torres wine v the Torres Vedras (*Torres* case).[1363] In that case, trade mark registrations for *Torres* had been in use for wine for many years. The prior trade mark registrations were put at risk upon the registration of the name "Torres Vedras" as a GI for a valley north of Lisbon that the government claimed was a traditional wine-growing region under Regulation No. 2392/89. The protection of the GI would have had as a consequence the invalidation of the *Torres* marks, as they conflicted with the later-filed GI.[1364]

Regulation No. 479/2008 (and now Regulation No. 1234/2007) opted for a more balanced approach, allowing refusal of protection of later-filed GIs where in light of a prior trade mark's reputation and renown it is liable to mislead the public and providing for coexistence for all other prior trade marks.[1365] This approach was consistent with the approach taken under Regulation No.

[1360] Council Regulation (EC) No. 1493/1999 of May 17, 1999, on the common organisation of the market in wine [1999] OJ L179/1.
[1361] Council Regulation (EEC) No. 2392/89 laying down general rules for the description and presentation of wines and grape must [1989] OJ L232/13.
[1362] Annex VII, Part F, No. 2, subparagraph (2) of Regulation No. 1493/1999. Council Regulation (EC) No. 1493/1999 of May 17, 1999, on the common organisation of the market in wine [1999] OJ L179/1, Annex VII, Part F, No 2.
[1363] Ibid.
[1364] Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, Oct. 31, 1958, 923 U.N.T.S. 205 (Lisbon Agreement). See also Alexander Skol, *Geographical Indications and International Trade*, WIPO/GEO/SFO/03/15 (June 20, 2003) 2. For a discussion on the approach taken under Regulation No. 2392/89, see: Nina Resinek, 'Geographical Indications and Trade Marks: Coexistence or "First in Time, First in Right" principle?' (2007) 29 *European Intellectual Property Law Review* 446, 449.
[1365] See Art. 43(2) of Regulation No. 479/2008 (now Article 118k(2) of Regulation No. 1234/2007); Art. 44 of Regulation No. 479/2008 (now Article 118l of Regulation No. 1234/2007).

2081/92 for agricultural products and foodstuffs, which was found compatible with the TRIPS Agreement by the Panel Report.[1366]

6.4.2 AVA and Trade Marks in the US

The US similarly adopts a "first in time" approach. While the USPTO is responsible for registering trade marks, the Alcohol and Tobacco Tax and Trade Bureau (TTB) is currently the federal agency that determines the requirements for wine production and labelling, including the designation of American Viticultural Areas (AVAs).[1367]

AVAs are "delimited grape growing region[s] distinguishable by geographical features, the boundaries of which have been recognised and defined ...."[1368] It has been noted that the hierarchy of appellations in the 20th century was "legitimated by appeal to 'scientific environmental evidence'" divorced from establishing how particular localised environmental conditions influenced the resulting wines.[1369]

Technically speaking, any person or organization may propose an area be designated an AVA by petitioning the TTB in writing, and must demonstrate that the proposed area possesses a distinguishing feature from other wine-growing areas.[1370] This includes evidence that the name of the viticultural area is locally or nationally known by that name, historical or current evidence as to the boundaries of the area, evidence that the geographical features of the land distinguish it from

[1366] See, e.g., Article 6*quinquies*(B)(i) of the Paris Convention ("Trademarks covered by this Article may be neither denied registration nor invalidated except in the following cases: (i) when they are of such a nature as *to infringe rights acquired by third parties* in the country where protection is claimed."); and Article 9 of the Community Trademark Regulation (Council Regulation (EC) No. 207/2009 of February 26, 2009 [2009] OJ L 78/42) ("A Community trade mark shall confer on the proprietor *exclusive rights* therein."). See also World Trademark Organization (WTO) Panel Report *European Communities—Protection of trademarks and geographical indications for agricultural products and foodstuffs* (Panel Report), complaint by the United States, WT/DS174/R (Mar. 15, 2005) at [7.602], it is held on exclusivity of trademark rights). For a discussion of exclusivity with a focus on GIs, see Dev Gangjee, 'Quibbling Siblings: Conflicts between trademarks and geographical indications' (2007) 82 *Chicago.-Kent Law Review* 1253, 1255-7.

[1367] See Alcohol and Tobacco Tax and Trade Bureau, History of TB, http://www.ttb.gov/abo ut/history.shtml (last visited Oct. 7, 2009) (highlighting the role and mission of the 1TB).

[1368] 9 27 C.F.R. § 4.25(e)(1)() (2006).

[1369] See Glenn Banks and Scott Sharpe, 'Wine, regions and the geographic imperative: The Coonawarra example' (2006) 62 *New Zealand Geographer* 173, 174. See also Moran, above fn 1224, 694.

[1370] 27 C.F.RI § 9.3(b) (detailing five requirements for every petition to establish an AVA).

surrounding area, and other pertinent pieces of information relating to the location of the area.[1371] The TTB then records the petition in the Federal Register to provide notice and allow comments so that anyone may oppose or support the suggested AVA.[1372] When the comment period expires, the TB then decides if the proposed area is worthy of the AVA designation.

The TTB is also concerned with whether the proposed name of the AVA poses a likelihood of consumer confusion.[1373] If the TTB determines that there is a likelihood of confusion with existing trade marks or other appellations of origin,[1374] it considers alternative names suggested by the petitioners or others who commented during the notice and comment period. Issues can arise when the TTB determines there is no likelihood of consumer confusion, even if there is a similar mark in existence. For example, when a similar mark exists, the TTB generally holds that the simple addition of a word like 'District' or 'Hills' is enough to allow the approval of an AVA, even if that small difference is all that distinguishes the AVA name from a trade marked brand name.[1375]

Whether such additions resolve a likelihood of confusion is debatable, since the likelihood that consumers will be confused between AVAs and trade marks is the essence of the issue.[1376] Although consumers are rarely parties to trade mark disputes, since such disputes are most often between business enterprises, the consumer's state of mind is often what is adjudicated and largely determines the outcome. On the one hand, because the wine industry is different from other product-oriented industries since consumers "expect quality and certain other characteristics to come from distinct regions",[1377] as Leslie Rudd practically identifies:

> "No consumer will take the time to read the front and back label of every different wine on the shelf, and most consumers will make a purchasing decision based only on a fairly cursory review of basic label information. Accordingly, if a consumer sees a brand name that includes the name of a recognizable wine

[1371] Ibid.
[1372] 5 U.S.C. § 553 (2006) (detailing the informal rulemaking process, in which proposed regulations must be published in the Federal Register for a period of time for the public to assess the regulations and offer comments).
[1373] See Sociedad Anonima Vifia Santa Rita v. United States Dep't of Treasury, 193 F. Supp. 2d 6, 22 (D.D.C. 2001).
[1374] Ibid.
[1375] Vija Santa Rita, 193 F. Supp. 2d at 22.
[1376] Julia Lynn Titolo, 'A Trademark Holder's Hangover: Reconciling the Lanham Act with the Alcohol and Tobacco Tax and Trade Bureau's System of Designation American Viticultural Areas' (2009) 17(1) *Journal of Intellectual Property Law* 175, 187.
[1377] Titolo ibid, 188.

region, the consumer will assume the wine is from that place and make a purchasing decision on such basis without any detailed review of any additional information on the label."[1378]

On this view, AVAs would be an adequate way to indicate wine regions and, in so doing, simplify the consumer experience without creating confusion.[1379] They do not see any issue or conflict with a trade mark.

But, on a contrary view, AVAs, unlike trade marks which are intended to protect the consumer, seek to protect the interests of producers within the AVAs. So, if the TTB approves an AVA that is confusingly similar to an existing trade mark, then the government may be endorsing action that is likely to cause increased consumer confusion.[1380] Such protection, similarly, comes at the expense of producers who already hold a mark to which the AVA is very similar, and possibly at the expense of consumers who fail to distinguish between the trade marked product they know and other products that will use a similar name under the AVA.[1381]

Recent changes to the use of AVA names as Appellations of Origin on wine labels appears to have broadened their system of protecting indications of origin. In 2016, former § 4.25(e)(3)(iv) was removed, and drew upon Notice No. 142 in the Federal Register, proposing the establishment of "The Rocks District of Milton-Freewater" AVA in Umatilla County, Oregon.[1382] The Rocks District of Milton-Freewater is an AVA that is located near the Oregon-Washington State line, approximately 10 miles south of the city of Walla Walla, Washington. The AVA is also located within the larger Walla Walla Valley and Columbia Valley AVAs, both of which cover portions of Washington and Oregon. The removal of the requirement in § 4.25(e)(3)(iv) was that that wines labelled with an AVA appellation of origin be fully finished within the same State as the AVA.

For those that use grapes grown within The Rocks District of Milton-Freewater but fully finish their wines using custom crush facilities across the State line in Walla Walla, Washington, did

[1378] Comment from Leslie Rudd, Owner, Dean & Deluca and Rudd Winery to Frank Foote, Director, *Regulations and Ruling Division, Alcohol and Tobacco Tax and Trade Bureau* (14 February 2008, TB-2007-0068-0047) (discussing opposition to Notices of Proposed Rulemaking Nos. 77 and 78).
[1379] Titolo above fn 1376, 188.
[1380] See ibid, 187.
[1381] Ibid.
[1382] Federal Register 6931 Vol. 80, No. 26 (9 February 2015) <https://www.gpo.gov/>. See also 79 FR 10742; T.D. TTB-127 (which formally establishes The Rocks District of Milton-Freewater as an AVA).

so because there are no such facilities nearby in Oregon. The TTB, being empathetic towards commercial needs, took the view that since The Rocks District of Milton-Freewater AVA is a single-State AVA located in Oregon, under current TTB wine labelling regulations, none of these individuals would be able to use that AVA name as an appellation of origin, even if 85 percent of the grapes in their wines came from The Rocks District of Milton-Freewater AVA – because their wines are fully finished in Washington.

Although, their wines could be labelled with the Columbia Valley or Walla Walla Valley AVA names as appellations or origin because The Rocks District of Milton-Freewater AVA is located within both of those AVAs, and both the Columbia Valley and Walla Walla Valley AVAs are multi-State AVAs that cover portions of Oregon and Washington. Additionally, their wines could be labelled simply with the political appellation "Oregon," since wines labelled with a State appellation of origin may be fully finished in an adjacent State. The TTB noted that the "purpose of the AVA program is to provide consumers with additional information" on the wines they may purchase by allowing vintners to describe more accurately the origin of the grapes used in the wine.

Amendments to regulations at § 4.25(e)(3)(iv) comprised allowing wines that meet the requirements of § 4.25(e)(3)(i) and (ii) to be labelled with a single-State AVA name as an appellation of origin if the wine was fully finished either within the State in which the AVA is located or within an adjacent State. While the TTB noted that the purpose of the AVA program is to provide consumers with additional information on the wines they may purchase, preference to commercial aspects appears principal, particularly in their observation that:

> "Vintners would have a greater choice in both where they fully finish their wines and what appellation of origin they use."

Providing justification that:

> "…Grape growers within a single-State AVA may have more buyers for their grapes if vintners in adjacent States are allowed to label their wines with the AVA name."[1383]

[1383] Ibid.

This backwards broadening occurs because the TTB, while reinforcing a description of the source of the chattel (or grapes), does not consider the method of production necessary to regulate. Wine production, as discussed in Chapter I, is an art and assists with building the reputation of a region. Since international wines must also comply with the foreign country's laws and regulations governing composition, production, and designation,[1384] should it therefore not be the case that there be greater consistency in what goes into making wine, or at the very least, how sources are labelled?

6.4.3 Trade marks and GIs in Australia

For wineries in Victoria, it is not any special rules based on an assumption of inherent superiority of one type of right over the other. Rather, priority, exclusivity, and territoriality are the guiding principles for the conflict between trade marks and GIs.[1385]

In Australia, the trade marks system and the wine GI system operate parallel to each other.[1386] As outlined in Chapter IV, the GI system is administered by Wine Australia pursuant to the *Australian Grape and Wine Authority Act* (AGWA Act), whereas the trade mark regime is administered by IP Australia pursuant to the *Trade Marks Act*. Despite these two separate administering bodies, the GI system contains important parameters for use of GIs in trade marks. For example, new GIs are capable of being determined and entered on the GI Register even if a trade mark is registered in respect of all or part of the GI. Owners of registered and unregistered trade marks in Australia can however object on numerous grounds to the determination of a proposed GI.

[1384] 27 C.F.R. § 4.25(b)(2).

[1385] Daniel J. Gervais, 'Reinventing Lisbon: The Case for a Protocol to the Lisbon Agreement (Geographical Indications)' (2010) 11 *China Journal of International Law* 67, 96. See also Daniel J. Gervais, 'The Lisbon Agreement's misunderstood potential' (2009) 1 *World Intellectual Property Organisation Journal* 87, 98. See also Mihály Ficsor, Challenges to the Lisbon System, WIPO/GEO/LIS/08/4 (Oct. 31, 2008), at [19]. Arts. 5(3) and Rule 9(2)(ii) require an indication of the grounds for a declaration of refusal if the competent authority of the contracting country declares that it cannot ensure the protection of an appellation of origin whose international registration has been notified to it, but neither the Agreement, nor the Regulations specify the grounds on which a declaration of refusal can be based. It happens in practice, and thus it seems broadly accepted, that an internationally registered appellation of origin is, and can be, denied protection in a contracting country to the Lisbon Agreement because existing prior rights would conflict with that appellation.

[1386] See, e.g., *Beringer Blass Wine Estates Limited v Geographical Indications Committee* (2002) 125 FCR 155. See also *Beringer Blass Wine Estates Limited v Geographical Indications Committee* [2002] FCAFC 295. For an explanation of the trade mark and GI conflict in this case, see Stephen Stern, 'The Overlap between Geographical Indications and Trade Marks in Australia' (2001) 2 *Melbourne Journal of International Law* 1; Miranda Ayu, How does Australia Regulate the Use of Geographical Indication for Products other than Wines and Spirits?' (2006) 3 *Macquarie Journal of Business Law* 1. See further *Penola High School v. Geographical Indications Committee* [2001] AATA 844.

Notices of proposed GI determinations need to be published by the Geographical Indications Committee (GIC) to allow objections to be made by persons who will be aggrieved by such determination. Objections can be made on similar grounds to objections to trade mark applications (e.g., that the proposed GI is likely to cause confusion). An appeal process is set out in the AGWA Act and are brought in the Federal Court of Australia.

However, the AGWA Act and Regulations allow for the co-existence of Australian GIs and trade marks registered or applied for prior to the registration of the GI. It is unclear to what extent existing trade mark owners would lose exclusivity of their trade mark protection if a GI is successively registered in respect of all or part of their trade mark. *Winemakers Federation of Australia v European Commission*[1387] shows the way in which the Registrar of Trade Marks is likely to deal any other attempt to register grape varieties as GIs.[1388]

In that case, the Deputy Registrar upheld the objection made by the Winemakers Federation of Australia (WFA) to the registration of the Prosecco GI on the basis that it had "established use [by Australian producers of Prosecco] where on its face the clear meaning of the term is as a variety of grapes").[1389] The Deputy Registrar made this finding based on the widespread use of the term Prosecco as the name of a grape variety at the time the name was first used in Australia, also because the term Prosecco was the only name that Australian producers were legally permitted to use in respect of the relevant grape variety. The Deputy Registrar also refused to exercise his (broad) discretion to direct the GIC to consider the Prosecco GI application, on the basis that, amongst other matters:

- the confusion worldwide as to whether Prosecco is a GI, a grape variety or a style of wine;
- that Prosecco has been available as a variety name for use by Australian producers since 1994 (and is the only official name for that grape variety); and
- that the effect of registering the Prosecco GI would be to prevent producers from continuing to use Prosecco as the name of a grape variety (which is exactly the mischief that the Act is designed to avoid).

[1387] [2013] ATMOGI 1 (the Prosecco Case)
[1388] See also section 3.3.
[1389] Ibid.

Additionally, the decision shows that the discretion of the Registrar in these matters is broad and that they will in making an assessment consider a number of factors, and not just factors going to the inconvenience of the parties or to the "first in time" principle.[1390] It is proposed that there be greater statutory clarity of this test. For example, worldwide regard for the term (including equivalent foreign language terms), its known context of use (including a jurisdiction's migrant history), and quantifiable economic impact on a firm should it be prevented from continuing use of the term. This is consistent with regard for consumer confusion in s. 120 of the *Trade Marks Act 1995* (Cth), and s. 33(b)(5) of the United States Trademark Act. Such an approach is also consistent with Article 16 (Rights Conferred) of the TRIPS Agreement, which does not exclude the possibility of a trade mark owner excluding the protection of a later coming GI (identical or similar) on condition that the GI is used or has been registered in bad faith or that its use constitutes an act of unfair competition. This logic should equally transpose to GIs, since the use of GIs is the use of an indication (encapsulated as a "sign")[1391] in the course of trade.

Assessing the 'quantifiable economic impact' also requires an assessment of the economic dimensions of IP, and the role of effective information channels on decision making within a supply chain framework.[1392] This is discussed in the next section.

6.5 Value Enhancement

There is a symbiotic relationship between value and quality of a wine.[1393] Despite its importance to both a consumer and the wine industry, legal scholarship does not explore the impact of these concepts on regulatory development.

Both the Virginia and Victoria Wine Industry Strategies have identified that long-term sustainability of the industry (leaving aside environmental issues), and that one way of achieving this

[1390] See *Rothbury Wines Pty Ltd v Tyrell* [2008] ATMOGI 1
[1391] TRIPS Art. 16
[1392] See section 1.2.1.
[1393] See Filippo Arfini and Christina Zanetti, 'Typical products and local development: the case of Parma area', 52nd EAAE Seminar: Typical and traditional productions: Rural effect and agro-industrial problems, Parma, 19-21 June 1997, 8.

is through greater market recognition – domestically and internationally.[1394] If recognition is to be of a region, then how broadly should this be cast? For example, should a region refer to a country, a state or a wine GI region? The challenge for regulatory frameworks, in the case of the latter, is how to shift a consumer's mind towards association between a region or a collective brand, and purchase decision? It is necessary to identify: (i) what explains this reputation and association? and (ii) what IP regime is best suited to administer a collective brand?

6.5.1 How Information is Portrayed and Perceptions of Quality

The type of information a consumer relies on to make an informed decision has a bearing on the way in which such information is portrayed. Labelling requirements, in this respect, have the ability to detract from a product, or emphasise attributes. For example, reputation of a product or a brand may be enhanced by how information is portrayed, and the emphasis of what and how it appears on a label. Tobacco Plain Packaging is illustrative of this,[1395] where the emphasis of a brand has been subdued by an overarching bland generic style of packaging of tobacco products.[1396] Consumers' focus, as a result of this, are drawn to the health implications and thus negative reputational association between the tobacco product and its use.[1397]

This indicates that legislatures, in addition to marketing theories, are capable of influencing consumer perception and decision making through the prevalence of a particular legal regime. For example, reputation of a region or a brand may be enhanced by how information is portrayed, and the emphasis of what and how it appears on a label. The positive or negative reputation of a collective brand is therefore inhibited or facilitated by labelling requirements.

This draws on Ilbery and Kneafsey's[1398] attempt to in articulating what quality means in the context of adding value. They identify four points worthy of consideration in terms of agro-food quality, which can apply to wine products.

[1394] See ibid, 19.
[1395] See Hinchliffe, above fn 552, 1031-5.
[1396] Ibid.
[1397] Ibid.
[1398] Brian Ilbery and Moya Kneafsey, 'Product and Place: Promoting Quality Products and Services in the Lagging Rural Regions of the European Union' (1998) 5 (4) *European Urban and Regional Studies* 329, 334.

- First, all actors, despite their varying perceptions concerning quality, within the supply chain are implicated in the production and maintenance of quality.
- Second, quality is socially constructed, it is contingent on socio-cultural, political and economic interests that influence the production/consumption of the product.[1399]
- Third, as quality is negotiated it could temporally change under the influence of powerful actors within the supply chain.[1400]
- Finally, quality is constructed by labelling practices (e.g. such as Regulation EEC 2981/92).

It is positive that labels are capable of serving as instruments to guarantee wine products' quality in the consumers' interest if there is a better understanding of what a consumer looks for to be indicative of a wine's quality. Discussed already is that wine, viewed as a commodity in a supply chain, represents (through the IP regime that characterises these underlying IPRs) a collection of interests and rights.

Some laws, however, presume that consumers are interested in knowing only about the geographical origins of a product. This is one of the presumptions grounding Regulation EEC 2081/92, which states that:

> "Whereas in view of the wide variety of products marketed and of the abundance of information concerning them provided, **consumers must, in order to be able to make the best choice,** be given clear and succinct information regarding the **origin of the product**"

It also reinforces consumer association because of that society's understanding and appreciation of culture, and reputation of a product in a broad sense, or the process of production and region from which it came.[1401] For example, EC Regulations recognise this by endorsing culture as value-enhancing. The EU legislation protecting IGOs – EEC 2081/92 for example – has, as one of its justifications, the demand by consumers for quality and identifiable geographical origin in agro-food products. But, the same approach may not necessarily be suitable for all jurisdictions.

[1399] Ibid, 335.
[1400] See Hinchliffe, above fn 552.
[1401] See section 1.3.4.

While not a case involving wine, aspects of this complicated notion of quality were apparent in the battle concerning Parma ham and Consorzio del Prosciutto di Parma.[1402] In recognising the importance of preserving quality through reputation, the court stated that:

> "Such a condition may, however, be regarded as justified on grounds of the protection of industrial and commercial property, and hence compatible with Article 29 EC, since its aim is to preserve the reputation of Parma ham by **strengthening control over its particular characteristics and its quality,** thus constituting a measure protecting the designation which may be used by all the operators concerned…"[1403]

The Regulation in that case adopted a production management approach, where "quality [wa]s intended as a standard set of characteristics which can be measured, observed and certified."[1404] On the other hand, whether this resolves the link to quality is questionable in the New World, since the term "quality" remains a highly contested, socially constructed and ambivalent notion.[1405]

It follows from this that 'origin' is one element within a wider set of factors that influence perceptions of quality. However, the notion of 'origin' itself has mixed connotations that could include 'produced in one's own region' or 'regional speciality'.[1406] It is therefore important to recognise limitations of existing regulatory regimes, but at the same time utilise key features to achieve long-term sustainability objectives of the wine industry in these New World jurisdictions.

6.5.2 Geographical Origins and Value to a Consumer

Consumers see value in the authenticity of a wine region, in as much as they seek to be informed of where a wine comes from. As noted by Fisk:

[1402] Case C-108/01
[1403] Case C-108/01
[1404] See Antonio Segale et al, 'The determinants of 'typical' production: An empirical investigation on Italian PDO and PGI products' in Filippo Arfini and C. Mora (eds.) *Typical and Traditional Products: Rural Effects and Agro-industrial Problems* (1997) 367, 369. An intricate analysis of 'production management approach' is beyond the scope of this dissertation.
[1405] See section 4.1
[1406] Andre Tregear, *Work Programme 4 Link between origin labelled products and consumers and citizens*, Final Report to the European Commission (July 2002) 4.

> "Attribution has a commodity value distinct from the value of the intellectual property or human capital to which it is attached. The commodity value of credit is entirely informational: it tells consumers, current and prospective employers, creators, and the world at large about products and their creators. The commodity value of credit and blame is dissipated if the right to it is transferred because the information is lost. Attribution is a type of signal..."[1407]

In a commodity-driven world where ignorance of a wine region counts negatively for firm using a GI, but attribution or association holds a distinguishing quality that, in conjunction with a mark, conveys meaning to consumers, the weight of whether: "… the mark identify the geographic origin of the goods or services?",[1408] may not be so significant. In this sense, trade marks, once exported from a particular social, economic, and political context, signify a much more elastic kind of origin. For instance, the mark "Coca-Cola" in Johannesburg, Tokyo, or Beijing surely does not signify origin in a trade mark sense in those countries. Instead, what it might signify is American, which in turn could be short form for status, class, or membership in a group.[1409] Consumers wanting to capture a taste of American culture or an association with the imagery of life in the US may choose McDonald's, Coke, or Pizza Hut for all these reasons.[1410] "Origin" in this sense of the foreign consumer is all about general geography, and how geographic location invokes particular associations in a particular market.[1411] In the context of wine, if a wine from the New World lacks qualities that may only be recognised as particular to that region or *terroir*, then a GI system (viewed in a narrow sense) seems superfluous.

On the other hand, the positive association between geographical specialisation and a protected IGO is apparent in studies undertaken by the EU Commission, which have demonstrated that consumers are willing to pay extra (or a premium) for GI products.[1412] The definition of "value premium rate" of this study may be described as:

[1407] Catherine Fisk, 'Credit Where It's Due: The Law and Norms of Attribution' (2006) 95 *Geology Law Journal* 49, 54.
[1408] Robert Tinlot and Y Juban, 'Différents systèmes d'indications géographiques et appellations d'origine. Leurs relations avec l'harmonisation internationale' (1998) *Bulletin de l'OIV*, 811-812: 773-799.
[1409] Thomas Drescher 'The Transformation and Evolution of Trademarks – From Signals to Symbols to Myth' (2001) 82 *Trademark Reporter* 301, 301.
[1410] Ibid.
[1411] Roland Barthes' *Mythologies*: *Structuralism and Semiotics* (Hawkes, 1977) 130-134.
[1412] See Tanguy Chever, Christian Renault, Séverine Renault, Violaine Romieu, *Value of production of agricultural products and foodstuff*s, *wines, aromatised wines and spirits protected by a geographical indication (GI)* (Final Report, October 2012).

> *Premium = Σ(GI volume×GI price)/ Σ(GI volume × non-GI price), where the premium for wines across the EU was estimated at 2.75.*[1413]

Testing or applying the above is, however, beyond the scope of this dissertation. The results of that study indicate that there is also an economic incentive for the value of a GI, as findings have shown that EU GI products were sold at a price 2.75 times higher than that of a similar quantity non-GI product.[1414] One reservation is that, consumers may not be aware – in the case of Victoria a GI, or in the case of Europe a PDO label – these can improve consumers' protection, because wine firms are obliged to have the control for the compliance of the wine consistent with statutory requirements, in order to distinguish between the controller and the controlled. Consortium,[1415] as already mentioned, is one way of overcoming this knowledge gap. Effective administration of labelling laws should similarly ensure that consumer faith for the system is not compromised.[1416]

Rangnekar's discussion on regional specialisation within product categories similarly reflects this positive correlation on IGOs.[1417] He identifies that this geographical specialisation is also apparent at lower levels of product aggregation.[1418] For example, he identifies that, despite widespread distributions (internationally and within nations) of the species *Vitis Vinifera*, the major protection areas are highly localised and, in some instances, the grape variety has its own distinctive geographic pattern.[1419] In explaining this pattern, Rangenekar noted that relevance of local knowledge, the cultural and economic processes through which these come to be in the known and reputable.[1420] For geographers, he noted that the organising analytical category is *terroir*, and that:

> "…the attempt to affect, influence, or control actions and interactions (of people, things and relationships) by asserting and attempting to enforce control over a geographic area."[1421]

Not too dissimilar is the notion of culture economy, suggested in sociology literature as a:

[1413] Ibid, 3 (where "premium" is defined as the ratio between the price of a GI product and the price of the corresponding non-GI product).
[1414] See ibid.
[1415] See section 6.6.2.
[1416] See section 6.5.3.
[1417] See Robert Benson, 'Toward a New Treaty for the Protection of Geographical Indications' (1978) *Industrial Property* 127, 129.
[1418] See Table 1
[1419] Moran, above fn 1224, 694.
[1420] See section 2.3.1.
[1421] Rangnekar, above fn 1268, 31.

> "…relationship between resources, production and consumption. [W]hile 'culture' tries to capture the reorganisation of economies, at least partially, onto the geographical scale of local cultures-territories".[1422]

Rangnekar's findings are indicative of the need for effective administration of a centralised system. He recognised the nexus between protected IGO (i.e. through a centralised IGO registration at a country level) and geographical specialisation,[1423] and went on to mention that illustrative of this point, France holds in excess of 80% of the wine and spirit appellations protected under the Lisbon Agreement for the Protection of AOCs.[1424] This indicates the transparency and predictably brought about by a centralised regulation and administration aids consumer awareness of a region's reputation, and associated value they assign.

But, origin of a product alone does not necessarily increase the value of a product. This is because the wine industry is an imperfect market because of the high level of information asymmetry on the quality of marketed wine products.[1425] To prevent misleading or confusing consumers, it is important that labelling laws be centrally regulated, and consistent with how they embody underlying stakeholder interests.

6.5.3 A GI System or System of the Indication of Source?

Even though, in form, Australia has GI regime, it is debatable whether, in substance, this it is a true "GI system" (i.e. one like France).[1426] The mix of "raw material" (i.e. grapes) to permit calling a wine as sourced from a particular region, is rather lax. The AGWA permits that:

- If a grape variety is stated on the label, 85% of the wine must consist of that grape.
- If a vintage is stated on the label, 85% of the wine must come from that vintage.
- When blending grapes, if two or three grapes make up at least 85% of the wine, each of the grapes that make up 20% or more of the wine must be. If four or five grape varieties are used,

[1422] Christopher Ray, 'Culture, intellectual property and territorial rural development' (1998) 38(1) *Sociologia Ruralis* 3, 3-4.
[1423] Rangnekar, above fn 1268, 31.
[1424] See ibid referring to the Lisbon Agreement for the Protection of Appellations of Origin.
[1425] See e.g. Akerlof's, above fn 1309 (who works up to the research conducted by Grossman and Shapiro above, fn 1307, regarding analyses of information-asymmetrical markets, generally)).
[1426] See section 3.3.

and each makes up at least 5% of the wine, each of these grapes must be stated. In addition, the grapes must be stated in the order of importance, such as Cabernet-Merlot when the wine contains more Cabernet Sauvignon than Merlot.

It is therefore entirely possible to source 5% of a grape variety from Queensland, 5% of a grape variety from Western Australia, have a winery located in Yarra Valley, Victoria, crush and mix these grapes with their own, bottle the wine and label it as attached to the Yarra Valley GI. Because of these lax requirements, Victoria seems only to have a system of the indication of the source of grapes in a wine.[1427] Making wine is not like baking a cake. While it is entirely possible to have the correct mix of grape varieties and the 'correct' blend of a wine style, it is misleading to a consumer to say that such a wine 'style' is associated with a particular region in the absence of more stringent requirements limiting the source of those grapes. An analogy may be drawn to passing off a paragraph in a paper as your own without acknowledging its primary origin.

It could easily be the case that consumers knowingly purchase a substitute wine with 'French style'. For instance, brand-name wineries can effectively signal authenticity (e.g. through restricting/monitoring distribution channels, pricing policy), which through experience (some) consumers learn. Thus, some consumers consciously decide to purchase a substitute wine product. These consumers buy-in the 'snob value' associated with the status good without paying the premium price for the original brand. Interestingly, the deception then is not of the consumers who purchase the product, but observers "who sees the good being consumed and [are] duly (but mistakenly) impressed".[1428] In this case, substituting may dilute the communal brand-owner or private-brand owner's market power by expanding the market of status goods while also diminishing the reputational value associated with the wine product.[1429] As a result, legitimate wine producers are unable to offer customers the prestige associated with a small network of exclusive consumers.

Virginia has an opportunity to embrace recognition of hybrid varieties of vine that grow well in particular regions, particular farming practices that are unique to an area (including cultivation

[1427] See above section 6.3.2.
[1428] Ibid, 82.
[1429] Ibid, 83 (also acknowledging that the welfare implications of stronger trademark protection, wherein counterfeiting is eliminated, are ambiguous. While there is little dispute on the benefits of eliminating counterfeiting to trademark owners, the negative impact on consumers who knowingly consume the counterfeit and to counterfeit producers raise complications. Under certain conditions and market assumptions, the negative impact might outweigh the benefits).

methods), and modified blending to develop novel styles of wine. This should be encouraged by regulatory frameworks.

In Virginia, the requirements are even more fluid. The Bureau of Alcohol, Tobacco and Firearms established American Viticultural Areas (AVAs) to define growing regions distinguished by geographical and *terroir* features. AVAs, unlike GIs, can extend beyond state boundaries, like the Columbia Valley which extends from Washington into Oregon. Unlike the French AOC, American AVA laws only establish growing area boundaries and do not govern which varietals can be grown or vineyard and winemaking practices. Accordingly, for a domestic wine:

- If a wine label carries the name of an AVA, 85% of the grapes must come from that AVA.
- If a wine label carries the name of a county, 75% of the grapes must come from that county.
- If a wine label carries the name of a state, 75% of the grapes must come from that state. Some states vary on this law, such as California, where 100% of the grapes must come from California to carry the state's name on the label. Virginia does not have such a requirement.
- When a wine label carries a vintage, 95% of the grapes must be grown during the stated year.
- When a wine label carries the name of a grape variety, the wine must be made from at least 75% of that grape variety.

Fundamental to a GI regime concerning wine region classification is the concept of *terroir*. In its narrowest sense, *terroir* refers only to the physical environmental aspects of the geographical origin of a wine: soil, lay of the land, elevation, climate and related factors.[1430] This assessment that the concept of *terroir* (which can also impact successful blending of a wine style)[1431] includes the 'human environment'[1432] comprising a link between producer and consumer that runs through the product and its unique, *terroir*-based qualities. *Terroir* is capable of indicating a better-quality product because each finished wine product is a faithful expression of its geography, resulting in better quality products emerging from parcels or areas of land with unique qualities, and therefore better endowments. Since each product will inimitably reflect its growing conditions, different crops, vines and grapes are distinguishable from each other and may be associated with their geographical

[1430] See sections 3.3 and 3.4.
[1431] See section 4.3.2. This dissertation does not discuss blending rules.
[1432] See Jacques Fanet, *Great Wine Terroirs* (University of California Press, 2012) 28, 148.

origin. Where there are a bundle of GIs, as in the case of Victoria, distinguishing unique factors is challenging.

The above is different to the 'scientific environment' regarded under the AVA system.[1433] While reference to 'human environment' implies a non-interventionist, *terroir*-driven culture of production meaning less human manipulation, more respect for the earth's independent capacity to express itself through its fruits and adequately satisfy human tastes, desires and indeed wants, environmental sustainability has taken a recent spotlight. Recognizing the need to implement environmental sustainability practices into farming activities may see the notion of *terroir* change in time.[1434] Unlike the Old-World which may encounter challenges in aligning wine-making practices with any future amendment to the CAP, the New World is able to embrace this as an opportunity and implement environmental sustainability into their wine regulatory framework.

The concept of *terroir* (whether viewed in a strict sense as in the case of France or modified to accommodate environmental sustainability objectives) appears ripe for the taking in Victoria. While Victoria has, which is referred to as, a GI system in place it is difficult to attribute specific qualities unique to a region, as embodied in a French interpretation of *terroir*, to each 22 regions within a total land area of 87,807 square miles,[1435] compared to Virginia, which has a total land area of 39,594 square miles and 9 wine regions.[1436]

Having fewer wine GIs that embody the concept of *terroir* and that mandate sustainability practices unique to a region, is a step in the right direction. This could, for example, be regarded as a super-GI system. Motivating this is that, in addition to consumers' regard for value of a GI, wine firms also see value in a wine GI where there is a positive reputation associated with that region. For example, in *Beringer Blass Wine Estates Limited v Geographical Indications Committee*,[1437] both Beringer Blass and Southcorp were making a calculated assessment about the value of their land, and

[1433] See section 4.3.2.
[1434] See, e.g., European Environment Agency, *Climate change adaptation and disaster risk reduction in Europe*, EEA Report No.15/2017 (17 October 2017).
[1435] See Australian Bureau of Statistics (2017) <www.abs.gov.au/>.
[1436] See Census, *Virginia* (2017) <censusviewer.com/state/VA>.
[1437] (2002) 125 FCR 155.

viticultural prospects by being included or excluded from the Coonawarra GI.[1438] This is a key driver for a super GI system that is centrally administered.

On the other hand, a more sophisticated level of thinking about *terroir*, just as nature and humankind have through progressive efforts established and confirmed which crops do best in which *terroir*, should recognise and support that farmers and winegrowers discover the 'best' winemaking and oenological practices most suitable for each area of production. Accordingly, since *terroir* is thus the epitomic opposite of globalization: an exemplary reflection of place and people, it arguably deserves protection, through clarification of the term, and possible enhancement or modification. The essence of a GI should, in its function to identify the source and unique attributes of a particular region goes beyond a broad reference to indications of source. The present Victoria GI regime appears to indicate a system that aligns with the latter.

6.5.4 Culture

The repute of a region is substantially located in the historical evolution (and in France and Italy, of local knowledge) and its relationship with the proximate socio-cultural geography.[1439] As such, the development of scholarship recognises law as a cultural accomplishment.[1440] The concept of culture in light of this is tied in with quality, reputation and value of a wine.

[1438] See Lynn LoPucki, 'Legal cultural, legal strategy and the law in lawyers' heads' (1996) 90 *Northwestern University Law Review* 1498, 1499.

[1439] Stigler, above fn 50, 220. See also section 2.4.6. There have been several famous suits over the use of French wine terms. For one literary account, from the UK, see 'Champagne on Trial', Wines and Vines (June 1961) reprinted (December 2003) 42 discussing *J Bollinger v Costa Brava Wine Co Ltd (No 2)* [1961] 1 All ER 561. In Australia, there have been several prominent wine industry trials and appeals. Henschke, for example, unsuccessfully alleged that Rosemount's 'Hill of Gold' infringed its registered 'Hill of Grace' trade mark, see *CA Henschke & Co v Rosemount Estates Pty Ltd* [2000] FCA 1539 (Unreported, Ryan, Branson and Lehane JJ, 31 October 2000). See also *Thomson and Ors v B Seppelt & Sons Ltd* (1925) 37 CLR 305; *Comite Interprofessionel du Vin de Champagne v NL Burton Pty Ltd* (1981) 38 ALR 664*; Comite Interprofessionnel des Vins Cotes de Provence v Stuart Alexander Bryce and Anor* [1996] 742 FCA 1 (Unreported, Heerey J, 23 August 1996); *Koppamurra Wines Pty Ltd v Mildara Blass Ltd* [1998] 226 FCA (Unreported, Von Doussa J, 3 March 1998); *Gartner v Carter; In the matter of Gartner Wines Pty Ltd* [2004] FCA 258 (Unreported, Lander J, 17 March 2004); *Gartner v Ernst & Young (No 3)* [2003] FCA 1437 (Unreported, Mansfield J, 8 December 2003). Another boundary dispute associated with the King Valley in Victoria has been appealed to the AAT: *Whitlands High Plateaux and Anor v Geographical Indications Committee* [2005] AATA 292 (Unreported, Downes J, 30 March 2005).

[1440] See section 2.4.2.

The recognition of culture in IP regimes is implicitly provided for in TRIPS.[1441] At the same time, TRIPS provides Member States a measure of flexibility in how they frame their IP regimes to recognise rights and interests. As identified in Chapter I, culturally dependent legal norms are thought to be transferable only between legal systems with similar legal cultures.[1442] The United States, for example, has a distinct constitutional basis which would deflect any attempt to introduce a GI system similar to France's AOC system. They have also not seen the need to implement a GI system. By contrast, although not a Civil Law jurisdiction, the implementation of a GI system in Australia[1443] appears to be an attempt of Watson's theory of legal transplants,[1444] which allows modification in applying transplanted law – which is considered to be a process of adaptation of the transplanted rule to the new environment. At the same time, this does not suggest that a particular regime is always capable of transplanting into another.[1445] For example, it is not suggested that the US adopt a GI regime, which is consistent with Friedman's observation that national culture need not be perceived as an obstacle to transplants but as a source of effectiveness of law.[1446] In other words because of the history and constitutional basis of GI regimes presently in place in the US, a GI regime would be nonsensical.

The culture of a legal system is shaped by the culture within and history of that jurisdiction. In this regard, it is back-ward looking.[1447] There is increasing recognition of local knowledge (also indigenous knowledge)[1448] as falling within the dimension of patrimony, namely: the historical, collective and ongoing contributions on the previous and current generations of people in the region

[1441] See Hinchliffe, above fn 552, 1012.
[1442] See section 2.4.3.
[1443] See section 6.1.3, above.
[1444] Alan Watson, *Legal Transplants* (1974). See also, Eric Stein, 'Uses, Misuses - and Nonuses of Comparative Law' (1977-1978) 72(2) *Northwestern University Law Review* 198, 198. See also Paul Edward Geller, 'Legal Transplants in International Copyright: Some Problems of Method' (1994-1995) 13 *Pacific Basin Law Journal* 199; Pierre Legrand, 'The Impossibility of 'Legal Transplants'' (1997) 4 *Maastricht Journal of European and Comparative Law* 111; Daniel Berkowitz, Katharina Pistor and Jean- Francois Richard, 'Economic Development, Legality, and the Transplant Effect' (2003) 47 *European Economic Review* 165; Helen Xanthaki, 'Legal Transplants in Legislation: Defusing the Trap' (2008) 57 *International and Comparative Law Quarterly* 659; Steven J Heim, 'Predicting Legal Transplant: The Case of Servitudes in the Russian Federation' (1996) 6 *Transnational Law and Contemporary Problems* 187, 192–3; Lorraine M McDonough, 'The Transferability of Labor Law: Can An American Transplant Take Root in British Soil?' (1992) 13 *Comparative Labor Law Journal* 504, 504 and 508; Bradley J Nicholson, 'Legal Borrowing and the Origins of Slave Law in the British Colonies' (1994) 38 *American Journal of Legal History* 38, 41; Esin Örücü, 'Law as Transposition' (2002) 51 International Comparative Law Quarterly 205, 206; Hideki Kanda and Curtis J Milhaupt, 'Re-examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law' (2003) 51 *The American Journal of Comparative Law* 887, 889.
[1445] See section 2.4.3.
[1446] See Friedman, above fn 305, 39-44.
[1447] Ibid.
[1448] This is beyond the scope of this dissertation.

in creating the range of products with specific characteristics and attributes. This is, to a degree, supported by the Preamble to the International Treaty on Plant Genetic Resources for Food and Agriculture, and considering that the wine industry as discussed in this dissertation is an agri-business, which states that:

> "Affirming that the past, present and future contributions of farmers in all regions of the world, particularly **those in centres of origin and diversity**, in conserving, improving and making available these resources, is the basis of Farmers' rights."

While European wine regions might be able to claim that their wine making methods are a form of traditional or indigenous knowledge, however, the same argument cannot be made in the 'New World'. The wine regions in Australia and America are not indigenous – they represent European colonisation over First Nations peoples and the introduction of exotic plants that have overtaken the indigenous plants of the region.

Van der Ploeg's work on the development of farming styles, or what he termed *art de la localite*, is suggestive of the relationship with the proximate socio-cultural geography and reputation of a region. He states that:

> "…every location acquired, maintained and enlarged …. its **own cultural repertoire**: its norms and criteria that together established the local notion of 'good farming'."[1449]

Reference to "cultural repertoire" in this context, brings broader issues to account. It seeks inquiry about current and future trends. In this regard, Fairhead and Leach[1450] point to a relationship between individuals and their ecology,[1451] in observing that established local agro-economical practices have enriched landscapes. For example, the 'mode of production' may define the *typicity* of the product – thus, differentiating it from others within the same product category. This mode of production is itself constituted by the natural environs, local know-how, raw materials used, the stages and method of production/processing, etc. On the one hand, these are codified in the cultural

[1449] Jan Douwe Van der Ploeg, 'The reconstitution of locality: technology and labour in modern agriculture' in Thomas Marsden, Peter Lowe and Samuel Whatmore (eds) *Labour and locality: unecen development and the rural labour process* (David Fulton, 1998) 20.
[1450] See James Fairhead and Melissa Leach, 'Enriching the landscape: Social History and the Management of Transaction Ecology in the Forest- savannah mosaic of the Republic of Guinea' (1996) 66(1) *Africa* 14, 20-2.
[1451] See section 5.1.4.

repertoire of the peoples of the region. On the other, it is entirely possible that the above stages of the manufacturing stage in the supply chain may, in light of broader environmental considerations such as global warming, require to be altered. Since definitive processes of wine production are not prescribed in the New World jurisdictions discussed in this dissertation, they may afford greater flexibility in affording the wine industry strategies to cater for broader environmental changes. It also supports why wine oenology practices should not be overtly restricted by a regulatory framework.

The relationship between these codified cultural repertoires and reputation came under scrutiny at the ECJ in the case brought by *Consorzio del Prosciutto di Parma*.[1452] At issue was whether the slicing of Parma ham in front of the consumer – a step in the specifications defining 'Prosciutto di Parma' – was a disproportionate measure. The Court decided in favour of the Consorzio and states that the 'mode of production' is:

> "…intended to guarantee that the product bearing them [the protected indication] comes from a specified geographical area and displays certain particular characteristics… For consumers, the link between the reputation of the producers and the quality of the products also d**epends on his being assured that products sold under the designation of origin are authentic**."[1453]

The above indicates preference towards stabilisation of particular culture repertoires in a geography as being best described as the historical, but also collective and on-going product of the persons of that region. This is particularly because the natural environment has actively co-evolved with the peoples who inhabited the surrounding environs. It would be erroneous to conceptualise natural resources as merely free gifts of nature.

This rationale for the protection of indications was expressed by Judge Gault in *Comite Interprofessionel du Vin de Champagne* to protect the GI of Champagne in New Zealand:

> "Champagne is a geographical name. When used in relation to wine the primary significance it would convey to persons who know that would be as the geographical origin of the product. If the name conveys

[1452] *Consorzio del Prosciutto di Parma & Salumificio S. Rita SpA, v Asda Stores Ltd & Hygrade Foods Ltd* C-469/00 and C-108/01.
[1453] Ibid.

> something of the characteristic of wine it is because those familiar with wine sold by reference to the name associated those characteristics with it"[1454]

Moran also notes a symbiotic relationship between an indication and its region, and says that:

> "Burgundy gives its name to one of the best-known wines in the world, but at the same time the region of Burgundy because known because of its wine."[1455]

The reputation on account of a product's distinctive characteristics is therefore not on account of a single enterprise. And while attitudes to food and quality are cultural, they may also be further shaped by environmental and sustainability concerns. To build reputation, and therefore appear to be of value to a consumer, a clearly defined and unbiased regulatory framework is necessary. Trade marks as indicators of particular origin, on the other hand, may not be as valuable. Trade marks would function well in an individualistic or atomistic culture, being one that are motivated by personal preferences and view differentiation favourably – for example, the New World. In atomistic cultures with independent values, a brand generates loyalty and will likely evoke the source-identifying function of trade mark law more quickly.[1456] Accordingly, cultural tendencies provide an insight into who favours [strong] geographical protection, and who benefits from weak GI protection.

In this light, law is in fact capable and does perform these different relationships to culture and because cultural norms unfold in time, law can enforce cultural norms only by intervening into an ongoing process of historical development.[1457]

6.5.5 Regional Reputation and Indigenous Knowledge

Forming part of the unique features of a region is indigenous culture. This is an inquiry that speak to whether a region is capable of protecting indigenous rights through IP regimes, or whether the former is a value adding features of culture within an existing region. GIs are being increasingly considered as part of a wider policy measure aimed at protecting and rewarding indigenous peoples'

[1454] [1991] 2 NZLR 432.
[1455] Moran, above fn 1224, 266.
[1456] Ibid.
[1457] See section 2.4.3.

knowledge. Notable in this respect are observations of WIPO's intergovernmental committee on intellectual property and genetic resources, traditional knowledge and folklore that some forms of IPRs cover the content of knowledge, others a specific expression and others a distinctive sign or symbol.[1458] As at the date of this dissertation, the WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) is negotiating international legal instrument(s) including on intellectual property (IP). The impact on the wine industry remains to be seen. Thus, the very real possibility of a product being protected by these complementary, though overlapping, instruments of IP.

Consider handicrafts or the production of champagne. The technical content may be protected as a technical idea, while the cultural value as form of expression and its distinctive characteristics through marks or indications.[1459] One important finding of the Committee's 'Review of existing IP protection of traditional knowledge' was that while many countries considered few intellectual property instruments as suitable for protecting traditional knowledge some looked favourably at GIs.[1460] This is highly supportive of protection of indigenous culture in both the Old-World and New World jurisdictions, should this arise.

Both the US and Australia have recognised culturally-based IP rights;[1461] although the wine regulatory framework does not directly protect this historical and cultural aspect in the same way that the Old-World does.[1462] As mentioned above while European wine regions might be able to claim that their wine making methods are a form of traditional or indigenous knowledge, however, the same argument cannot be made in the 'New World'. The wine regions in Australia and America are not indigenous – they represent European colonisation over First Nations peoples and the introduction of exotic plants that have overtaken the indigenous plants of the region.

The name of a region often pays tribute to that region's traditional history. Coonawarra, Aboriginal word meaning 'Honeysuckle' which is about 380 km southeast of Adelaide and close to the border with Victoria, has become a well-known wine region in Australia. History is a different

[1458] World Intellectual Property 'Organization, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore' WIPO/GRTKF/IC/5/12 (4th session, Geneva, 7-15 July 2003), 74-83.
[1459] WIPO/GRTKF/IC/5/7.
[1460] WIPO/GRTKF/IC/3/7.
[1461] See Hinchliffe, above fn 552.
[1462] Downes and Laird above fn 1224, 14.

type of 'source identifier' than is recognised in the Old-World. History does not, in and of itself, necessarily represent nor reflect the *terroir* of a region. Such a region can be said to have an association with a historical figure, or indigenous attribution in much the same way that a brand does, in the mind of a consumer. In so doing, naming a region in recognition of a particular historical element of that region (e.g. Monticello), can be said to have class that region as a "brand". The Monticello wine region, for example, was named in honour of Thomas Jefferson's vision for wineries around Charlottesville.[1463] As mentioned already, private brand recognition aligns with trade mark protection.[1464]

In recognising the positive aspects of GIs for the protection of indigenous peoples' knowledge, Downes and Laird[1465] draw attention to the general conflicts between contemporary IP right systems, also customary law and traditional cultural property rights.[1466] Even while indigenous communities may hold concepts similar to 'property rights', the 'informal innovation system' of communities and the cultural exchange systems that are part of the communities raise deeper conflicts between the norms, practices and economics of contemporary IPRs and the cultural rights and customary practices of indigenous communities.[1467] GIs, in this sense, as an instrument of intellectual property protection have specific features which, in contrast to other IPRs, are considered relatively more amenable to the customary practices of indigenous communities. Since no institution (firm or individual) exercises exclusive monopoly control over the knowledge/information embedded in the protected indication (or the good), it remains in the public domain. This would invalidate fears of the commodification of traditional knowledge on account of GIs.

Protection involves the codification of well-established practices into rules that become part of public knowledge.[1468] But, as the knowledge embedded in the good is not protected, apprehensions concerning the misappropriation of traditional knowledge remain.[1469] Further, rights

[1463] Ibid.
[1464] See Gary Dutfield, *Intellectual property rights, trade and biodiversity* (Earthscan, 2000) 73.
[1465] Michael Winter, 'Embeddedness, the new food economy and defensive localism' (2003) 19 *Journal of Rural Studies* 23-32. See also Rangnekar, above fn 1268, 18.
[1466] Of relevance in this regard, according to Downes and Laird, above fn 1224, 103-5 are the following declarations and statements: Kari-Oca Declaration of 1992, Indigenous Peoples' Earth Charter of 1992 and the Matataatua Declaration of 1993.
[1467] See Dutfield above fn 1464, 75; Downes and Laird, above fn 1224, 107.
[1468] Duncan Posey and Gary Dutfield, *Beyond intellectual property, toward traditional resource rights for indigenous peoples and local communities* (IDRC, 1996). See also Bérard and Marchenay, above fn 1221, 36.
[1469] See Dutfield, fn 1464, 70.

are (potentially) held in perpetuity. The particular indication is protected as long as the good-place-quality link is maintained, and the indication not rendered generic. Many indigenous communities consider their knowledge as a heritage to be protected for the lifetime of their culture.[1470] In recognising potential element of compatibility, it is also useful to be aware that the codes of practices associated with a GI can evolve and change with time.[1471] No doubt, this raises fundamental questions concerning core features of a 'traditional' practice/product and the extent of permissible change.[1472] GIs do not, however, protect the knowledge embodied within the good and/or the associated production process.[1473] Consequently, as noted earlier, GI protection is no guarantee against the misappropriation of traditional knowledge and other strategies to protect traditional knowledge must be adopted. GIs do, however, remain meaningful in enabling "people to translate their long-standing, collective, and patrimonial knowledge into livelihood and income".[1474] Traditional proprietary systems relating to land, resources, goods, knowledge and cultural expressions are often highly complex, and varied.

Whether indigenous rights should and the extent to which they ought to be protected is beyond the scope of the present dissertation. Save to say, there is a difference between common law[1475] and indigenous law[1476] that could pose limitations. Indigenous law in Australia does not, for example, recognise the protection of individual rights, let alone intellectual property *per se*.[1477] Nor does indigenous culture or 'laws' recognise the concept of wine regions,[1478] or potential for consumer confusion between an indigenous name that may not be truly representative of the place it purports to represent.

[1470] Downes and Laird, above fn 1224, 101.
[1471] EEC 2081/92 makes specific provisions for revisions to the product specifications and codes of practices (Article 9).
[1472] Bérard and Marchenay, above fn 1221, 240-2.
[1473] Compare. E.g., Dutfield, fn 1464. See also Downes and Laird, above fn 1224.
[1474] Bérard and Marchenay, above fn 1221, 240.
[1475] Ibid, 74.
[1476] Ibid.
[1477] Ibid, 75.
[1478] *Milpurrurru v. Indofurn Party Ltd* 54 F.C.R. 240 (1994) (Characteristics of Aboriginal customary laws, and their importance for Aboriginal people, can be acknowledged and recognised without resorting to a precise definition. Justice Blackburn rejected the confines of an all-purpose legal definition of customary law: (1971) 17 FLR 141, 266, 267.

And, while Courts in Australia are prone to extend intellectual property rights to protect indigenous cultural works,[1479] in the United States, courts are reluctant to rule on matters outside of their enumerated powers, particularly on matters concerning Native Americans.[1480] The process of the delineation of the Coonawarra region illustrates the tensions between treating wine regions as biophysical entities, and the realities of the economic, political, legal and cultural forces that shape regions.[1481] It is because of these cultural considerations that there are limitations in the operation of legal transplantation theory.[1482] Any formal recognition of traditional cultural property rights and indigenous knowledge should be protected under a separate regulatory regime.

6.6 Practical Considerations

The above factors are in theory, important for all sized wineries in Virginia and Victoria.[1483] In practice, smaller farms – because of their limited volumes – may be described as the verticalization of the production process which, in jurisdictions that comprise primarily small wineries and farms, could (on their own) negatively affect the sector of that jurisdiction. As indicated in Chapter I, this is because the wine production system consists of very dissimilar farms typologies in terms of entrepreneurship, size, environmental conditions and relationships with the market.[1484]

The demographic of the wine industry in Virginia and Victoria comprised primarily small and medium vineyards. If such observation exists in an Old-World jurisdiction such as Italy, then the size of a farm and the ability to produce a wine,[1485] can also impact the competitiveness of the sector in that a New World jurisdiction. It is necessary to look at collective options for the wine industry of these jurisdictions to facilitate the industry's economic sustainability.[1486]

[1479] Three famous Australian cases illustrate the increasing willingness of Australian courts to consider indigenous beliefs and values: *Yumbulul v. Reserve Bank of Australia* 21 I.P.R. 481, 492 (1991); *Milpurrurru v. Indofurn Party Ltd* 54 F.C.R. 240 (1994); *Bulun v. R&T Textiles Party Ltd* (1998) 157 ALR 193. These three cases show the most recent progression in the ability of indigenous peoples in Australia to use the court system to protect their intellectual property rights, particularly their copyrights.

[1480] *Chilkat Indian Village v. Johnson* 870 F.2d 1469, 1471 (where the Court refused to rule on the validity of the tribal ordinance or to consider communal property rights, as federal law does not recognize them. However sympathetic the Court may have been to Indian concerns, it was powerless to rule outside of its jurisdiction).

[1481] See *Beringer Blass Wine Estates Limited v Geographical Indications Committee* (2002) 125 FCR 155. See also section 2.2.1.

[1482] See section 2.3.1.

[1483] See section

[1484] See section 2.4.3.

[1485] See section 2.4.6.

[1486] See also Victorian Wine Industry Strategy above fn 13, 9; Virginia Wine Industry Strategy, above fn 27, 2.

6.6.1 Economic Perspective and Preliminary Inquiry

While this dissertation inquires and discusses the impact of legal regulatory frameworks on stakeholders within the wine supply chain, analysing the proposed effects of changes to regulatory frameworks at a wine region level, or a state/jurisdiction level, by undertaking a case study analysis is beyond the scope of this dissertation. It is hypothesised, however, that a 'value' chain analysis of the wine sector at these different levels would highlight that the distribution of the value added among the various players in the different stages of production is not homogeneous, since the costs that each phase must support are very diversified and mainly related to farm size (i.e. economies of scale) and to product typologies.[1487]

Indicative of this is that, over the past three decades, the number of Italian wine farms has, in addition to the land used for viticulture, decreased.[1488] Although, as the results in Diagram 1 of the Appendix outlines, in the same period, the areas intended for certified products (PDO) showed an increase.[1489] This data indicates that, in the national wine sector, the producers show the greatest weakness in terms of bargaining power because of both the size of their farms and the perishable nature of the product.[1490] The exception to this would be large-scale enterprises that are autonomously able to verticalise the production process and reach the final market. Whereas, smaller farms are not (in the absence of regulatory assistance or intervention) able to come together.[1491] This could create a negative for the wine industry particularly in the New World at the production point, even more so in light of a competitive global market, and the role of price takers. The risk being that, in the absence of legislative intervention, wineries and vineyards do not reach a fair remuneration for the production inputs invested in the process.

[1487] See Gori and Sottini, above fn 87, 63. See also M.E. *Porter, The Competitive Advantage: Creating and Sustaining Superior Performance* (Free Press, *1985; G* Malorgio, E. Pomarici, et al, 'La catena del valore nella filiera vitivinicola (2011) No. 7 *Agriregionieuropa* 2. See also, E Pomarici and F Boccia, 'La filiera del vino in Italia: struttura e competitività' in G Cesaretti, R Green, A Mariani, E, Pomarici (eds.) *Il mercato del vino: tendenze strutturali e strategie dei concorrenti* (FrancoAngeli, 2006).
[1488] See Gori and Sottini above fn 87, 63.
[1489] Ibid.
[1490] See ibid, 67.
[1491] See ibid.

6.6.2 Consortia

The concept of Consortia was introduced previously in Chapter III. A Consortium is statutorily recognised in Italy and is one way of supporting a personalised regionalised framework and potentially value-enhancing for a region.

Research undertaken by Rangnekar, for example, demonstrates that consumers from a sample size in the Old-World predominantly look for the consortium's label when purchasing the product and only a small percentage of consumers look at the private/firm label for Old-World agriproducts.[1492] Rangenekar referred to research undertaken by Afrini with regards to the Parmigiano-Reggiano Consortia (established in 1934) and Parma ham (established in 1963). Both consortiums have a long history of regulatory aspects of their relevant supply chains,[1493] and each consortia have become the public face for the producers they represent.[1494] Recognising the need to fill the gaps created by this deficiency, legislative degree No. 61/2010[1495] in Italy officially recognised the role of the Consortia, which now takes on promotion and protection functions, and requires all users of a Designation to pay.

Consortium could equally benefit the Virginia and Victorian wine industry. Virginia technically has the infrastructure (e.g. the Virginia Wine Board Marketing Office, Virginia Wineries Association (VWA), Virginia Vineyards Association (VVA), and the Virginia Distribution Company (VDC)) to implement a more formalised a Consortium arrangement. The VWA and VVA (also VDC) are LLC entities, and operate as ambassadors for the Virginia wine industry. Formerly recognising Consortium could be achieved through statutory measures administered by the Virginia Wine Board.

It seems surprising that Victoria, comprising 22 wine GI regions, does not have Consortium. There are wine cooperatives, the largest being Wine Society (a not for profit entity that provides information about Australian wines), as informers of Australian wine products. Wine Australia is the

[1492] See Rangnekar, above fn 1268.
[1493] See Gori and Sottini, above fn 87, 63. Filippo Arfini, 'The value of typical products: The case of Prosciutto di Parma and Parmigiano Reggiano cheese' in B. Sylvander, D. Barjolle, F. Arfini, (eds) *The Socio-economics of Origin Labelled Products in Agri-food Supply Chains: Spatial, Institutional and Co-ordination Aspects* (2000) 77-97.
[1494] Ibid.
[1495] See ibid, 67.

primary (albeit Government) body that plays a broad administrative and representative function between the Australian government, wine sector bodies including AGWA, and the wine industry to support the long-term success of the industry. Having a more regionalised Consortia that represents the wine industry in Victoria and, in recognising the "diversity of skills and business models in the Victorian wine industry", be a stronger advocate for the Victorian wine industry, regions, and enhance "pathways to profitability for individual wine businesses".[1496]

A Consortia would ideally be an organization that can be an industry advocate for a wine region by taking actions to improve the knowledge and transparency of the productions and the markets, forecast productive potentials, coordinate the release of products in the market including through market and research studies, implement actions to defend and promote a region, GI, protected designations of origin, labels, and organic products.[1497] Since a Consortium would act as a third party endorser or ambassador of the wine industry, it is important that they remain impartial to protecting a wine region, and not favour a particular wine brand. To be true to this objective, it is necessary to distinguish between a "Consortia Label" which would be a Consortia body representing a collection of entities within a particular geographic location. They would assist wine firms within a defined GI region comply with statutory requirements and be ambassadors for that region. A "Consortia Brand" by comparison would be a Consortia body that represents a collective of wineries from any region. Wine Australia and the Wine Society, for example, could be regarded as aligning with the concept of a Consortia Brand, where the brand is a wine that is "Made in Australia".

Similarly, a Consortia Label presents an opportunity for a third-party endorser to oversee and administer consistency in approach to production practices and resulting wine products from a region. This is much more than a cooperative, which may limit itself to the sale of wines from a region. It could therefore facilitate wineries forming part of that Consortia to charge a premium price and the willingness of consumers to pay this premium. There is, however, a risk that wineries not part of that Consortia to be pushed out of the market by virtue of traditional market forces.[1498] In a state such as Virginia where the total grape producing land area is 11,657 kms,[1499] and taking into account that the Virginia Wine Industry Strategy seeks to improve the "quality of Virginia wines" but

[1496] Victorian Wine Strategy, above fn 13, 10.
[1497] See Gori and Sottini, above fn 87, 63.
[1498] See section 2.4.3.
[1499] See generally, Statista, *Virginia Wine Agriculture 2016* <https://www.statista.com>.

at the same time "expand AVAs in Victoria" seems contradictory. Enhancing quality of Virginia wines could stem from better recognition of AVAs in Virginia. The existing entities outlined above could act as Consortia for the Virginian wine industry, but carefully administer product and farm practice requirements prescribed in statute and in county ordinances.

Verticalizing of a wine firm would occur in a broader sense through the use of Consortia. The benefit of a Consortia, in this regard, is that it leads to a significant and encouraging trend towards aggregation with a view to bring significant benefits to the promotion of wine from a jurisdiction.[1500] This is of particular relevance in Virginia and Victoria, where there is a high concentration of small and medium wine firms. In the absence of a Consortia, there is a risk that community brands have the ability instead of facilitating the incline of quality, to detract from it. The latter can manifest as a negative association of a region, in situations where buyers suspect that a certain proportion of wine from a region are of poorer quality, since it would dilute the reputation of that region. If it is consistent pattern of regions in that state, then – based on the above assumptions – lead to an associated reference of poor-quality wine in that state. This is the very opposite of what the Victorian and Virginian Wine Industry Strategies seek to accomplish.[1501]

6.6.3 Price and Quality

Chapter V identified that price increases of wine as a result of imposition of a 'sin tax' does not have the intended effect of preventing harmful use of wine.[1502] Acknowledging that this would be the case, reference to 'price' here excludes tax considerations. Rather, the assumption made in the present context is that price is closely tied with perception of the quality of a wine.[1503] This is spurred from observations of critics of the 'rational choice theory',[1504] also research conducted by Ariely, Loewenstein and Prelec. These authors demonstrated that once people are fixed on a valuation, they respond to price changes in ways that are consistent with the rational choice model, which they referred to as "coherent arbitrariness."[1505] Following this theory, tax regulation in wine industry can indirectly influence consumer behaviour through altering the relative price of wine. Critics of the

[1500] See Gori and Sottini, above fn 87, 64.
[1501] Ibid.
[1502] See section 5.1.4.
[1503] This dissertation does not examine the opportunities, from an accounting perspective, of the effect of mark-ups on cost of goods sold (COGS), net present value (NPV), or firm valuation.
[1504] See section 5.1.4.
[1505] Jonathan Levin and Paul Milgrom, *Introduction to Choice Theory* (September 2004) <http://web.stanford.edu/>.

theory argue that choice is intuitive rather than conscientiously considered, which means that individuals are guided by their intuitive desires. It is this intuitive desire that this section speaks to.

In the absence of a third-party endorser (e.g. a Consortia),[1506] consumers look to other sources such as wine price in making an assessment about reputation. For instance, consumers in the data collected[1507] indicate a bias assumption that a cheaply priced wine has a lower reputation because it is of poorer quality.[1508] A region, state or even a country that has a glut of cheaply priced wine may result in a negative association between reputation and association to a consumer. As in the case of France, Victoria and Italy, there have been efforts to curb this glut – for example, through the grubbing up of vineyards, or placing fiscal limits on tax benefits offered in the case of planting of new vineyards.

This is consistent with Akerlof who has noted the quality-related information asymmetries between buyers and sellers.[1509] As mentioned above,[1510] the buyer cannot observe the quality of a wine product with any significant surety whereas the seller has more reliable information about it. In such a situation of information asymmetry, good and 'bad' wine producers would tend to sell at comparable prices. Dynamically, this leads to a situation where poorer quality wines drive out good quality wines.[1511] In other words, the common price between good and bad wine presents sellers with perverse incentives motivating the withdrawal of good wine products, in much the same way as could arise with poor quality wine produced in a particular region that quality wine products chose not to be associated with.

Another approach from the producer's perspective (which also impacts the seller further along the supply chain), is that the producer or seller does not receive a price mark-up for good wine that reflect its superior quality in comparison to poorer quality wine. Consequently, as these products are withdrawn from the market, equilibrium is achieved at lower levels of quality.[1512] For the result to hold it is necessary that a common price exists for both types of wine and that the seller does not

[1506] See Gori and Sottini, above fn 87, 4.
[1507] See Table 1 of the Appendix.
[1508] Ibid.
[1509] George Akerlof, 'Uncertainty and the Market Mechanism' (1970) 84(3) *The Quarterly Journal of Economics* 488.
[1510] See section 6.3.1.
[1511] Ibid.
[1512] See Akerof, above fn 1477,490.

differentiate between good and bad wine. By persistent maintenance of this minimum level of quality, reputation economises search costs for consumers. Consequently, the attempt by producers of reputable products to charge a premium price and the willingness of consumers to pay this premium.[1513] Of course, this observation should not detract from the ability of the market to supply wine at varying price levels.[1514]

6.7 Summary and Concluding Comments

IP regimes represent information about a good and, coupled with how information is presented (i.e. the source of information, and what appears on a label), can influence a consumer's perception of a wine region (in the case of a GI), or a firm (in the case of a mark). This is consistent with Ilbery and Kneafsey[1515] four-point definition of 'quality' in its function as value-adding through a positive reputation. Following this is that a positive reputation [of a region] is therefore value-adding. There are other factors that are value-adding and that can also contribute toward consumer preference of a wine.

This chapter identified that the greater the reputation, particularly if positive, the greater the desire of entities in that region or jurisdiction, for example, to remain exclusive, and protect that image formerly through a centralised regulatory framework.[1516] A measure of this is a consumer will select a wine that is directly associated to the region of that wine product.[1517] Results of the analysis are consistent with this, and indicate that it may be possible to assign an economic value to a region, provided that a wine region recognition is fostered by the operation of an effective regulatory framework and administration. Having a third-party endorser, such as Consortium, may aid in educating and influencing a consumer's interest in 'origin', where consumers will be inclined to pay a price premium for a GI-product. Targeting the way in which information can be sourced can reshape this emphasis. Societies in which community and interdependence appear to define social

[1513] Stigler, above fn 50, 219. Stefano Boccaletti, 'Il roulo delle produzioni tipiche e delle denominazioni d'origine nella salvaguardia della competitività della produzione agro-alimentare italiana' (Atti de XXIX convegno di studi della SIDEA, Perugia, 17-19 September).
[1514] See Appendix VI, Table 1.
[1515] Brian Ilbery and Moya Kneafsey, 'Product and Place: Promoting Quality Products and Services in the Lagging Rural Regions of the European Union' (1998) 5 (4) *European Urban and Regional Studies* 329, 334.
[1516] See section 1.4.4.
[1517] See Nelson, above fn 1266. See also 5.2, regarding data analysis.

interaction (such as Europe)[1518] respond differently to marketing stimuli, advertising, and, ultimately, brand association that US consumers, and Australian consumer, have be conditioned to look at.[1519] Their response may also be conditioned because of the preferred IP regime prevalent in that legal system. For example, preference in the US, pursuant to the trade mark regime, appears to be given to the concept of a private firm.

To do this effectively, it is necessary for any conflict between the GI and trade mark regime to be clarified.[1520] It was suggested that a suitable test, which is a modified version of the "first in time" principle, be statutorily implemented.[1521] This approach would be consistent with the spirit of existing trade mark legislation that applies nationally in Australia and the US.

Some structural changes to the GI system in Australia is needed. As mentioned, there are 22 wine GIs in Victoria. If the purpose of efficient information communication channels is to eliminate consumer confusion about the source of a wine, and also prevent the dilution of reputation, then a change is required to the classification of wine GI regions. One option would be to introduce a complementary "super-GI" system that has fewer wine GI regions, stringent requirements (including of blending rules of wines associated with that super-GI system) concerning farming practices and wine oenology – somewhat along the lines of the French path.

The objective of this super-GI system would be to set a minimum 'quality' benchmark for the Victorian industry, distinguish between a GI system and an indication of source of wine (as the present 'GI system' appears to function as). The AGWA Act could, as part of distinguishing between the existing 'GI system' and a 'super-GI system' for determining wine super-GI region implement the following:

- **For a 'super-GI system'**: have more traditional GI system that, through clarity in what the system protects, echoes the concept of *terroir* as embodied in French AOC system, but that harmoniously aligns with environmentally sustainable practices.

[1518] See section 3.3.
[1519] Ibid.
[1520] See section 6.4.2.
[1521] Ibid.

Victoria and Virginia have an opportunity to embrace recognition of hybrid varieties of vine that grow well in particular regions, particular farming practices that are unique to an area (including cultivation methods), and modified blending to develop novel styles of wine. For Victoria, this is particularly suitable under the present GI-system.

- **Present 'GI system'**: Provide clarification about the term *terroir* that embraces new vine and grape varieties, and support wine oenological practices. For the traditional GI system, include a schedule of modified blending rules permitting the use of hybrid vines, and that harmoniously aligns with objectives of sustainability that embrace environmental sustainability initiatives, and to cater for global climate change.

One of the downfalls of the existing 'GI system' as it applies to Victoria is, because of the 'glut' of wine GIs, consumers may be confused as to the region source of the wine. Consumers may turn their mind to other source indicators, such as broader source reference (e.g. "Made in Victoria" or "Made in Australia"), label design or even the 'pizazz' of the wine brand name. Government and legislatures should rethink the impact of the present 'GI system' which, is in essence educating consumers to look towards an overtly broad concept of community brand (i.e. state or country source) and/or a private brand.

If the New World seeks to develop a system of protection based on consumer perspectives, and therein protect a brand and generalised information about origin, then trade mark protection (as in the case of "affordable wine") is more logical. A generic indicator of source, "Australia" could suffice in such instances. If, however, there is specific information concerning a culture that is to be protected, then GIs are justifiable. This means that in cultures where brands are more likely to be viewed as communicating information about the underlying product and its fit into the social context, a GI is a critical factor in the purchasing decision because there is a specific meaning to the consumer about the origin. In such cultural contexts, the symbol alone is insufficiently communicative about the product. This approach implies that a jurisdiction has an identifiable culture, and attributes value to regions comprising and representing such culture – as in the case of the Old-World.

A culture of commoditization and mass marketing is, by comparison, reflected in proprietary norms that de-contextualise products and facilitate consumer association with mere symbols.[1522] This would explain why, for example, use of a geographical mark that is unconnected to the goods could be considered an arbitrary mark under U.S. law and thus qualify for the strongest level of trade mark protection. As products of agriculture and technique, the protection of wine GIs would be hard-pressed to be protected purely by trade mark law. As wines from particular regions (e.g. the Yarra Valley) become internationally recognised, consumers demand not just a particular wine brand (e.g. Yellowtail), but wines from a particular region. Such a situation points to the relevance of both the trade mark and GI regimes.

As discussed, there is a distinction between the rights and interests that IPRs in a GI regime and a trade mark regime protect,[1523] and so it is important for legislature to be consistent in reflecting this. It is necessary, on the one hand, for the wine industry to be clear about their entitlement to use or otherwise an IPR.[1524] For example, a duty of third parties in a GI sense not to use that GI correlates to the right of entities (i.e. plural) associated with a particular wine region (and subject to other requirements under a GI registration system) to exclude third parties from use of that GI if they are not physically located in a region, or grapes are not derived from that region.[1525] A 'holder' – for the purposes of entitlement to use a GI – may be classified as the region, and other requirements attached to it under the particular registration system.

IP regimes should remain centrally regulated and, for the US, statutorily prescribed labelling laws for the wine industry exist at a national level. Effective administration of the wine regulatory framework would similarly be required. Consortia could oversee the administration of centrally regulated wine making practices of firms within a region (including blending, land use and labelling). Ideally, their obligations, responsibilities and ability to change levies should be set out in the *AGWA Act* (Cth). For example, membership should be kept discretionary, but with a view to administering a common goal – namely, to grow reputation of that region. Consistency in wine making practices is, however, different to guaranteeing a particular taste or quality of a wine.[1526] But, it is value-

[1522] See Latha R Nair and Rajendra Kumar, *Geographical Indications, A Search for identity* (LexisNexis Butterworths, 2005).
[1523] See section 6.1.1.
[1524] Ibid.
[1525] See section 2.3.1 (regarding GI system).
[1526] See section 1.3.4.

enhancing due to its consistent approach, and commitment to overcome quality-related asymmetries between stakeholders.

A consortia would be value enhancing to the Virginian and Victorian wine industries and do more than a mere cooperative. However, in the United States at least, there is a possible cultural and federal constitutional impediment to greater use of consortia. Of all the common-law nations, the United States, has perhaps the greatest historical fear of monopolization.

In this regard, the reputation of a product or a region is greatly influenced by: market prevalence, and source. Reputation, viewed another way, is enhanced or diminished by a consumer's perception of value. Wine selection based on quality alone, as mentioned, is subjective.[1527] Consumers do usually, but not always, associate a higher price with a higher quality of wine.[1528] For example, in the absence of knowing about a wine, a large portion of consumers from the above data set based their decision making on price and the information of the label. If the label emphasises a mark over a region, then a consumer (given a comparably priced wine from the same New World jurisdiction) would select the label with more of a pizazz appeal. This indicates that the type of information a consumer relies on to make an informed decision may be influenced by the way in which such information is portrayed, both facets play a role in the decision-making process.

[1527] See section 1.3.5.
[1528] See section 6.2.3.

CHAPTER VII

OPUS WINE! AN OVERARCHING APPROACH TO AN OPTIMUM WINE LAW FRAMEWORK

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CHAPTER VII
OVERARCHING APPROACH TO AN OPTIMUM WINE LAW FRAMEWORK

Each of the aforementioned chapters defined pertinent components of a wine regulatory framework. This chapter brings together the analysis of frameworks of laws and regulations of France, Italy, Virginia, and Victoria, and summarises proposals comprising an optimum regulatory framework for the wine industry in Virginia and Victoria. This chapter sets out a checklist for an optimum regulatory framework for these New World jurisdictions, but the methodology adopted may have broader application.

7.1 The Approach to Frame an Optimum Regulatory Framework

As noted in Chapter I, the Oxford English dictionary defines the term 'optimum' as the "most conducive to a favourable outcome, best…" The legal regimes or laws are the glue that holds together a regulatory framework within a legal system. An optimum wine law framework should therefore eliminate uncertainty about the application of legal regimes and laws, with a view to promote the creation of effective institutions that address key interests of stakeholders.[1529]

An "optimum" regulatory framework should recognise interests of external stakeholders and balance these with the rights of internal stakeholders. One method of undertaking this is to identify the needs of stakeholder groups, the underlying objectives of legal regimes and laws, and see whether that legal regime's scope is capable of facilitating a balance of interests. Chapter V, for example, examined these dimensions in the context of the taxation system as it applied to Virginia and Victoria's wine industry. It revealed that a tax system's revenue-raising and distribution functions can accommodate balancing of interests. But, that each regime has a different purpose or objective that is not always capable of achieving an even balance of stakeholder interests. For example, eligibility requirements for the wine equalisation tax (WET) rebate is set to be scaled back effective 1 July 2018, leading to a potential for those needing the rebate, being unable to access it. Further, the WET operates punitively resulting in additional mark-ups on wine products in the market. The WET is an example of a tax regime that is poorly targeted to meet consumer or wine industry stakeholders.

[1529] Dimitri Demekas, *Building Peace in South East Europe: Macroeconomic Policies and Structural Reforms Since the Kosovo Conflict* (World Bank Publications, 2002) 21.

Some legal regimes and laws may operate well within one jurisdiction, but poorly within another. The US's attempt to introduce a French-type AOC system is one such effort. Such limitations exist because of legal transplantation theory, a legal system's norms, history and culture (i.e. that concepts of a legal system's culture is different to another's, and that cultural norms of a society within a legal system are therefore interrelated) are strongly indicative that what is considered an "optimal" wine regulatory framework for Virginia, may not be for the Victorian wine industry. For example, while both the Virginia and Victoria Wine Industry Strategy recognise the desire to promote quality wine from their jurisdiction, and long-term economic sustainability of the industry, the laws and legal regimes that would function within a regulatory framework would differ. A 'uniform approach' to wine regulation, as Waye mentions, is therefore inappropriate.

As previously alluded to in Chapter I, an optimum wine regulatory framework is one that operates both efficiently (to the extent that there conflicts between legal regimes are limited, or extinguished) and effectively (i.e. because they represent stakeholder interests, and are appropriately administered), the components of a wine regulatory framework may differ from one jurisdiction to another. As mentioned, a blanket approach to such a framework, is ill advised.

Articulating the components of an optimum regulatory framework required at first instance to understand the context of a 'wine regulatory framework'. Chapter I outlined the reasons for selecting Virginia and Victoria, and why they were assessed against two Old-World jurisdictions (France and Italy). Chapter I did this by first undertaking a literature review of scholarship discussing 'wine law', which identified that in light of factors such as sustainability, commerce and supply, and preservation of culture, there is a need to evaluate the effectiveness of legal regimes and laws that operate within existing regulatory frameworks and legal systems to address key stakeholder interests. Key stakeholders include the consumer, wineries (referred, in a general sense, also to as wine producers, wine farms, firms or vineyards), and the government (and, the broader societal and health goals that they may seek to achieve in regulating the wine industry). As a regulated commodity that is subject to a production process, wine is inevitably subject to economic considerations in a supply chain framework. Recognising that wine is part of a supply chain and is regulated by at least 3-tiers (i.e. local, state, national and, in the case of Members States in the European Union, EU level), gave rise to an inquiry about: (i) what levels should regulate the industry; and (ii) what legal regimes be included within that framework; to (iii) balance shareholder interests. This forms the basis of the

Model depicted in Figure 2, Chapter I. In order to identify the regulatory framework model, this dissertation draws on Waye's scholarship. In her recent article,[1530] Vicki Waye identifies that there is a "need for regulatory coherence in the global wine sector", and outlines options for regulatory integration through harmonization, mutual recognition, equivalence and regulatory cooperation.[1531] In contrast to Waye's top-down approach in identifying such avenues, this dissertation identifies what motivates the need to regulate the wine industry in the New World, what is worth protecting, and why. For the purpose of this dissertation, therefore, in deciphering an optimum wine regulatory framework for the wine industry in the former, Virginia and Victoria, in particular, necessitated considering various interdisciplinary facets.[1532]

This comprised first setting out the evolution of the wine regulatory framework and legal regimes, also the motivating factors of the Old-World that have influenced two relatively unexplored jurisdictions in literature to-date – Victoria and Virginia. With regards to the former, the French wine regulatory framework[1533] played a central role in the development of regulatory frameworks of some New World legal frameworks.[1534] The regulatory framework in Italy presents a "control", since it has a reputation for producing known wines, but without the same stringent regulatory framework as its French neighbour.[1535] As one of the United States' oldest wine industries,[1536] success of the Virginian wine industry may primarily be attributed to tourism, and a business tax-friendly environment.[1537] In addition to the "Vision 2020: Blueprint for Virginian wine",[1538] it presents as a unique case study given the minimal change to the regulatory structure governing the wine industry, and (leaving aside the Prohibition)[1539] economic challenges that the wine industry has faced over the past half-century.[1540] The Victorian government, in the 2017-2021 Victorian Wine Industry

[1530] Vicki Waye, "Regulatory Coherence and Pathways towards Global Wine Regulation" (2016) 50(3) *Journal of World Trade* 497, 497-500.
[1531] For a comment regarding preliminary steps required before embarking on Waye's analysis, see section 1.1.2.
[1532] C.f. Waye, above fn 1530.
[1533] See section 3.2.2 (defining the scope of the "French wine regulatory framework").
[1534] See section 3.5, and section 4.1.2.
[1535] See section 3.2.3.
[1536] Ibid. While Ohio may also be acknowledged as one of the United States' oldest wine producers, Virginia is recognised as the oldest wine producer in the United States. See, Mendelson, above n 7 at 69-70.
[1537] See 1.2 below, regarding the impact of Virginia wine on the Virginia economy. But, see Chapter V (Taxation) below. Reference to Virginia in this context emphasises economic values. Business climate is influenced by a number of factors, including the cost of labour, transportation, and energy; education levels and the quality of the workforce; and the tax and regulatory environment.
[1538] See Virginia Wine Board, *Overview of the Wine Industry* (19 March 2017) <http://virginiawine.org>.
[1539] See section 3.1, discussing the Prohibition in the US.
[1540] For example, adjusting to recent cuts in federal spending, and slow overall economic growth in the State. See generally, Harold Burton, *Principle of Development Economics* (1965) 359-62; Everett Hagen, *The Economics of*

Development Strategy,[1541] has similarly recognised that the wine industry operates in a "rapidly changing environment." Both Victoria and Virginia identify a need to implement long term strategies for sustainable prosperity.[1542] This dissertation identifies how the regulatory framework that regulates the wine industry in both jurisdictions should and can be modified to accommodate long term goals.

Chapter II, though a normative analysis of legal theories, explained the relationship between legal regimes, their operation and justification within a legal systems. The objective of Chapter II was to carve out the extent to which a legal regime can and should encapsulate a wine legal regulatory framework. Discussed first was the role of legal theories within a legal system, comprising law and order, and the difference between law and norms. Second, factors that shape a legal system were identified – with a focus on monism and dualism. This facilitated an analysis of the structure of a regulatory framework and the individualism of its legal regimes, including the limitations posed by legal transplantation. It cautioned against broad recommendations by scholars, including Vicki Waye, to adopt a blanket uniform regulatory approach in the context of wine. Chapter II concluded that laws may be borrowed or transplanted into legal systems, which implies that a framework for the unity of wine regulations may be built in order to ensure the sustainability of the wine industry going forward. But that uniformity is in the objectives of the industry, which may require a different regulatory framework to be adopted in one jurisdiction to another.

Chapter III presented a mostly descriptive account of the regulatory framework overshadowing the wine industry in France and Italy. Discussed first were key aspects of international regulatory framework of the wine sector – the focus primarily being on treaties governing intellectual property rights. In so doing, it challenged the limitations of regulatory uniformity by noting its limitations. Second, an explanation of the drivers of the regulatory framework in the European Union (EU) was provided. The motivating factors, from a historical perspective, provide a context within which laws in Italy and France operate. Third, the gaps and potential opportunities in existing regulatory frameworks in these Old-World jurisdictions were discussed and highlighted as opportunities for the New World to capitalise on within their wine

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Development (1968) 480-84; Simon Kuznets, *Modern Economic Growth* (1966) 451-53; William Arthur Lewis, *The Theory of Economic Growth* (1955) 408-15 (outlining that even development economists generally concede that development re- quires some legal framework, which usually means a minimal provision of law *and* order).

[1541] Victorian Wine Industry Strategy above fn 13, 2.

[1542] See Ibid, 3. See also above fn 1509, 2.

regulatory framework. This included to afford flexibility within such a framework to recognise the 'culture' of a New World jurisdiction.

Chapter IV highlighted that flexibility in New World regulatory frameworks foster innovation within the wine industry, but once a region develops a reputation amongst consumers, wineries within that region may seek to preserve if not enhance that status. Outlined first is the constitutional framework within which Virginia and Victoria operate, followed by a descriptive analysis of wine laws within these jurisdictions. Second, the overall regulatory framework in Victoria and Virginia, in turn, as part of a broader national or federal setting was outlined. This was followed by a discussion of the wine regulatory framework, and some of the main laws that are encompassed therein. Requirements concerning labelling – in particular requirements that a winery or producer adhere to in order to avail the use of a wine GI on a label – were discussed. Identified was that the use of an AVA in the US is divorced from the notion of an appellation under the French AOC system.[1543] For example, AVAs are permitted to cover two or more States (i.e. a 'multi-State AVA'), provided that the wine is fully finished[1544] within one of the States in which the AVA is located. It was noted that recent changes to the use of AVA names as Appellations of Origin on wine labels appears to have broadened their system of protecting indications of origin, indicating a further departure from a system of GIs, and a greater shift towards protection of rights under the trade mark system.[1545] On a more localised level, out of the three ordinances examined, the Albemarle Ordinance is a model ordinance, as mentioned, which is very accommodating towards the wine industry, should be adopted for the interests of both wineries and local government.

Chapter V focussed on the impact of taxation regimes in a wine regulatory framework. Noted was that, although taxation may be classified as an indirect law in its application to regulating the wine industry, it has profound importance to the sustainability and growth of the wine industry. Chapter V discussed how existing taxes impact the wine industry, and their prohibitive versus

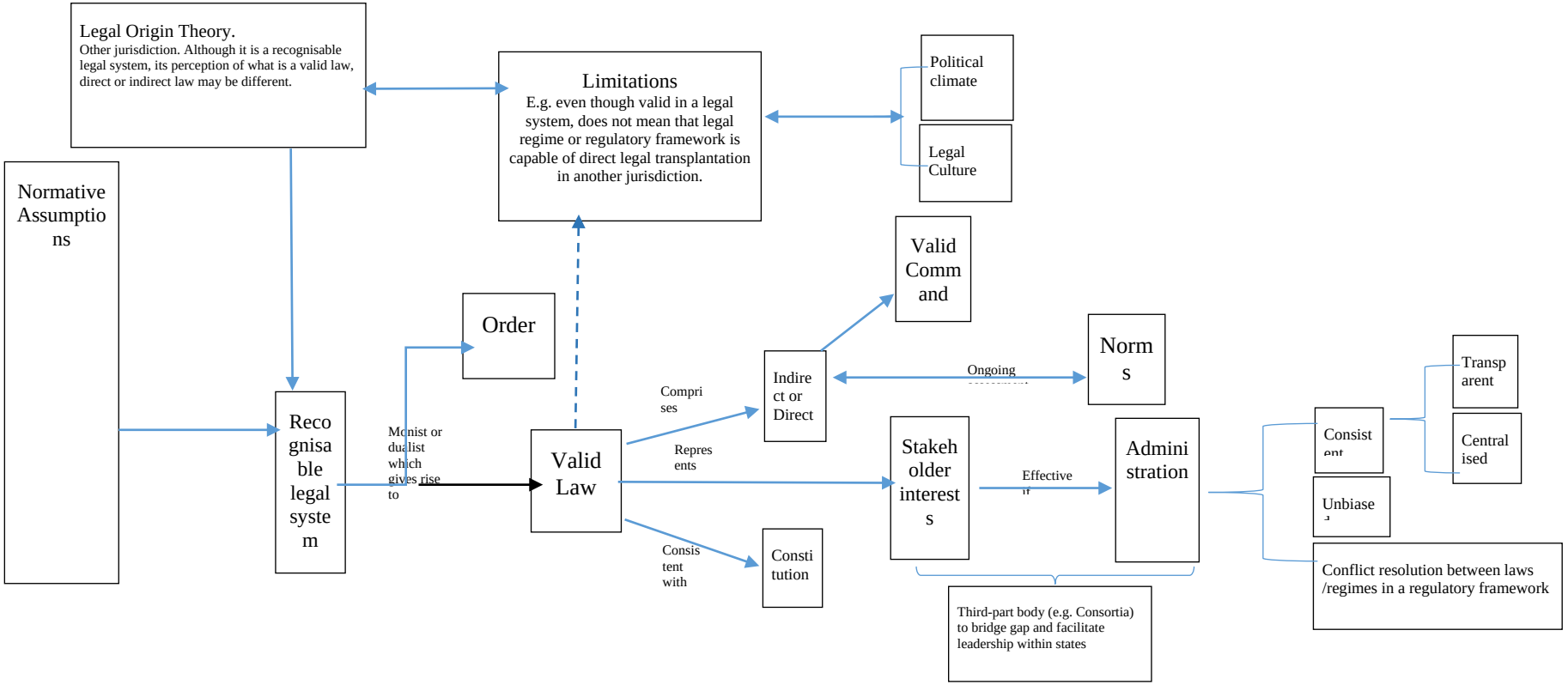
[1543] See section 4.3.1.2.
[1544] T.D. ATF-53, published in the Federal Register by TTB's predecessor agency, the Bureau of Alcohol, Tobacco and Firearms (ATF) at 43 FR 37672 (23 August 1978. Prior to publication of that Treasury Decision, ATF did not have codified definitions for "appellation of origin" or "viticultural area," and there was no systematic approach to designating a region as a "viticultural area": see ibid. The ATF regulatory requirements for the use of an appellation of origin on a wine label prior to T.D. ATF-53 stated that: (1) At least 75 percent of the wine be derived from fruit or other agricultural products grown in the named region; (2) the wine be fully manufactured and finished within the State containing the named region; and (3) the wine be made in compliance with the named region's laws and regulations.
[1545] See section 4.3.2.3.

permissive impact – with a focus on wineries and producers of wine. Since this dissertation proposes an optimum regulatory framework for the Virginian and Victorian wine industry, national tax laws in those respective jurisdictions were discussed. Outlined first was the nexus between taxation and the wine supply chain, with particular focus on demographics of production and consumption of wine, also the net and economic cost of not only setting up but running a winery. The latter provided a canvas for discussing the impact of imposition of taxation along the wine supply chain. Second, the global demographics of imports and exports of wine to and from US, Australia, France and Italy, was outlined. One of the findings from this chapter analysis was that tariffs impose a negative effect on the wine industry of the exporting country or jurisdiction, which may be counterbalanced by trade agreements. Third, the domestic tax regimes of the analysed jurisdictions were outlined. Discussed is how they achieve a balance between norms identified in Chapter II, government revenue-raising objectives, and interests of society and the wine industry *in toto*. The final section proposed what taxes and regimes should be modified to accommodate a greater balance between the goals of regulators, governments and the wine industry. It suggested that taxation can assist the tourism industry, and economic sustainability of the industry – which has been noted in both Virginia and Victoria's Wine Strategy Reports.

7.2 Model Normative Framework for Wine

The summary model of a wine regulatory framework outlined in Figure 2, Chapter I was drawn on throughout this dissertation to analyse the wine regulatory frameworks in Virginia, Victoria, France and Italy. This set a framework within which a law or legal regime can be assessed insofar as the regime's objectives are framed in light of broader factors such as culture. It can be drawn upon to assess the key components and their function within a legal system, to articulate an optimum wine regulatory framework for a jurisdiction.

Figure 1 Model Normative Approach to an Optimum Wine Regulatory Framework



The above model drew on the broad model of a wine regulatory framework in Chapter I. The nexus between normative assumptions, a recognisable legal system and valid law is illustrated by reference to the concept of *terroir*. This concept is of central importance in an AOC system which, in theory, the GI system in Australia is built on. While jurisdictions in this dissertation are built on the concept of law and order insofar as Austin defines a 'law' as a "general command",[1546] legal norms are implemented differently. The failure to implement a fully-fledged GI system consistent with norms inherent in an AOC system – such as that in France – strongly indicates the limitations of legal transplantation of legal regimes or laws from one largely incomparable jurisdiction to another. The culture of the legal system can present as a barrier, in this respect. At the same time, a legal system's culture taking legal norms into account, present an opportunity for Virginia and Victoria. Acknowledging that society, culture, politics and the economy have played in shaping a legal system,[1547] it is the individual characteristics of New World jurisdictions that should play a role in framing an optimum wine regulatory framework. Stakeholder interests, in this regard, is the driving force behind the creation of laws. Figure 1 reflects observations made in this dissertation, including that:

(i) there is more than one norm in a legal framework,
(ii) law is a complex creature created with reference to external factors including social and cultural factors; and
(iii) law is therefore capable of evolving, then we can begin to identify operative mechanics between laws (here wine laws) that exist within a legal regulatory framework.

A jurisdiction's constitution, for example, embodies key cultural and historical factors that make up a legal system. here a legal regulatory framework (embodying laws and legal regimes) achieve these objectives, such a framework may be considered "optimum". A qualification of this hypothesis, however, is that objectives can shift over time. Defining what the objectives are, requires an inquiry into consumer behaviour and responses to products in the marketplace, discussed in Chapter VI. What a consumer seeks in the market is very much dependent on the concept of value and reputation – discussed in Chapter VI. While stakeholders are the same in the Old-World and

[1546] See section 2.1.1.
[1547] See section 2.2.

New World, what they look for in assessing information, differs. Chapter VI identified that it is possible, through the approach adopted by a regulatory framework, and through endorsement of third-party entities (such as Consortia) to alter consumer preferences with respect to information.

Therein, within a globalised wine industry is the need to understand crucial dimensions of the operating environment.[1548] Chapter VI presented a unique assessment of the IP regimes that are embodied within wine regulatory frameworks. The focus of this chapter was to clarify, from an economic analysis, what aspects of IP regimes influence decision making of consumers and how they interact with also drive the wine industry in a globally competitive environment. To do this, economic literature, marketing literature, and normative legal theory was drawn on. Chapter VI reverted to the components of the Model approach in Chapter I to identify how a regulatory framework can be structured to address trends in wine markets,[1549] objectives of the industry,[1550] and the needs of stakeholders.[1551] It did this by drawing on the three-tier system model framework to analyse how stakeholder interests shape the internal dimensions of this model.

First, the nature of property being protected from a legal theory perspective in IP regimes forming part of the regulatory framework. Second, the role of the consumer (as an external stakeholder), and the importance of minimizing search costs. Third, how jurisdictions deal with conflicts between trade marks and GIs, Fourth, what is perceived by a consumer to be value enhancing. Based on results, 'community-specific' branding is relevant to a consumer and therefore should be a priority for the wine industry in Virginia and Victoria. There is a need, however, for greater clarification in the interaction between IP regulatory frameworks for the benefit of both consumer and wine industry. This chapter put forward some recommendations for more efficiency in IP regulatory regimes forming part of an optimum regulatory framework for the wine industries in Virginia and Victoria.

Although the heart of this dissertation is not so much a normative account of the protection of wine, but rather how best to regulate and classify it in particular regions of a jurisdiction in the best

[1548] See section 1.2.1.
[1549] See section 1.3.
[1550] See sections 1.2.2, 1.3.2 and 1.5.
[1551] See section 1.2.1.

interests of the jurisdiction, producers and consumers, articulating the context of regulation is a necessary first step.

7.3 A Model of an Optimum Wine Regulatory Framework for Virginia and Victoria

In light of analysis undertaken and observations made in this dissertation, an optimum wine regulatory framework for Virginia and Victoria would between themselves be different. Figure 1, above, is an extension of the model depicted in Figure 2, Chapter I, and represents the complex dynamics involved in classifying a wine regulatory framework. It provided a useful basis for modelling discussion of its respective components that was undertaken in this dissertation.

Figure 2, which utilised and expanded on the aforementioned wine regulatory framework model, illustrates the regulatory and administrative dimensions of an optimum wine regulatory framework for Virginia.

Figure 2 Model of Regulatory and administrative dimensions of an optimum wine regulatory framework for Virginia

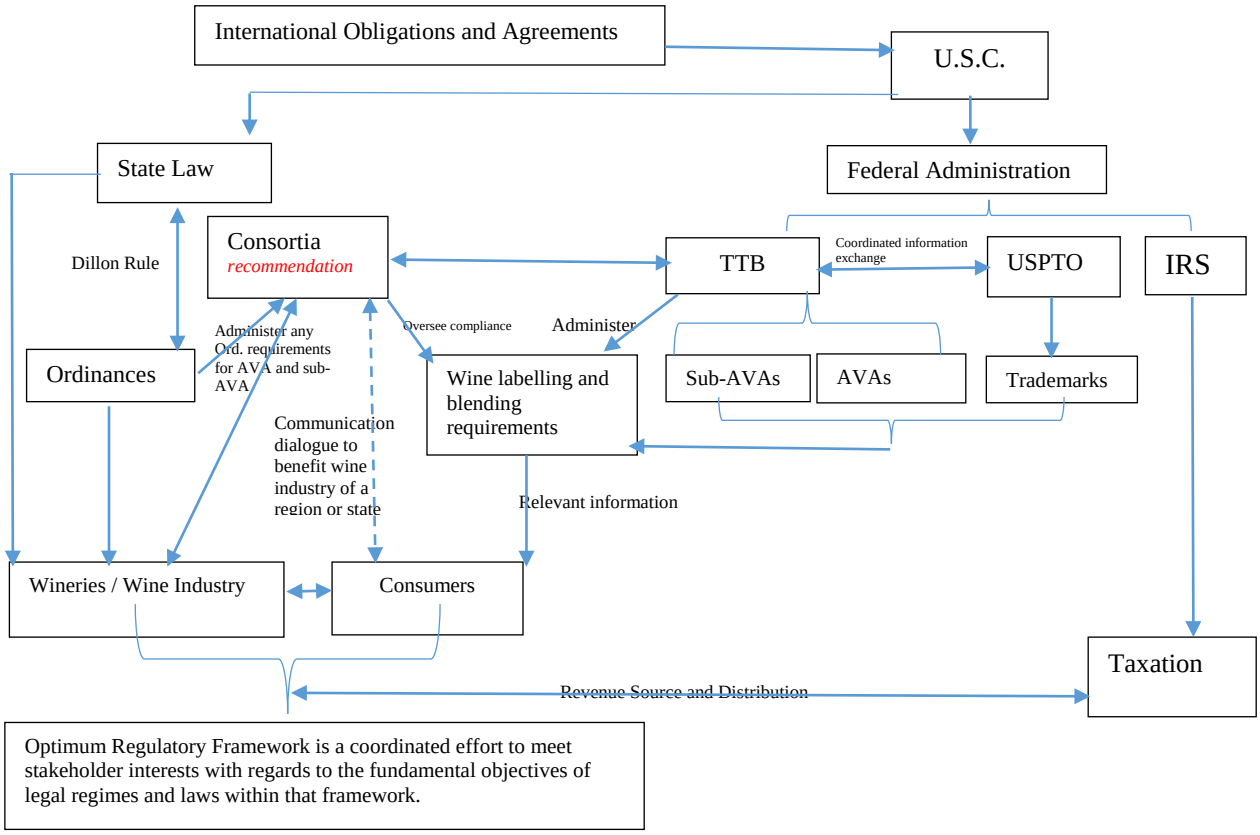
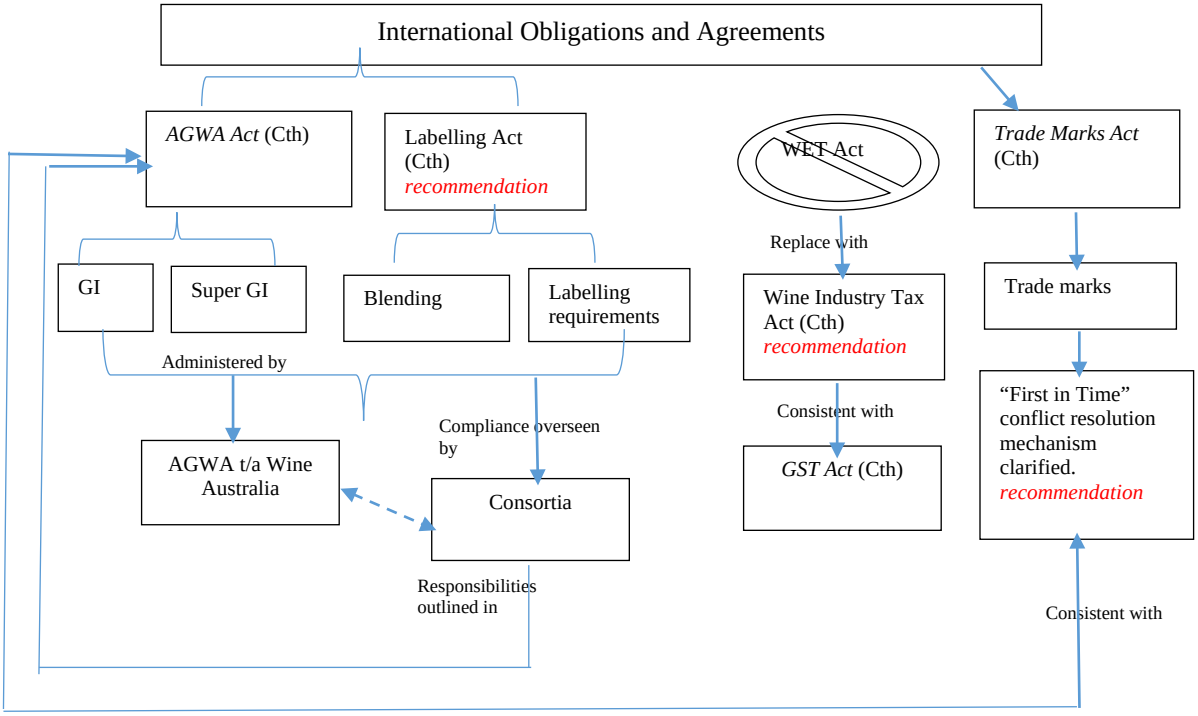


Figure 3 illustrates the regulatory and administrative dimensions of an optimum wine regulatory framework for Victoria.

Figure 3 Model of Regulatory and administrative dimensions of an optimum wine regulatory framework for Victoria.



In both Figure 2 and 3, international obligations have a direct bearing on national legal systems since there is a need to translate those obligations into federal or national laws and legal regimes. Although, in the US, where there is a conflict between a treaty and federal provisions in the USC, US statutes prevail.[1552] Australia introduced minimum GI standards pursuant to the TRIPS Agreement into their federal framework, which has been further articulated by requirements under the EC-Australia Wine Agreement.

Filling in the missing pieces to derive an optimum wine regulatory framework in a jurisdiction requires an understanding of the dimensions of the market in which the wine industry operates (i.e. commerce and supply), the legal system of that jurisdiction and therefore its history and

[1552] 19 U.S. Code §2504(a).

culture of the legal system, sustainability (both environment and economic), broader societal concerns (e.g. health), and broader considerations about legal regimes' interaction with other disciplines (i.e. economics, social science, chemistry science, and marketing).

There has been a notable shift in stakeholder needs and interests in recent years. Consumers are seeking value in wine, and quality wine [from a region], are increasingly aware of environmental considerations.[1553] The wine industry operates in a competitive global environment, where long term economic sustainability is a key driver. This comprises a way of standing out from competitors either through brand recognition and/or quality, and the most effective way of doing so, also adjusting to potential environment changes brought about by climate change. Understanding these dimensions from the perspective of wine as a commodity necessitated considering wine within a supply chain framework. This context assisted to define stakeholder interests and needs.

As such, an optimum wine regulatory framework should be assessed on a 5-year basis to ensure that it is meeting industry and stakeholder objectives. Also, that the administration of the regulatory regime is in line with the goals of that regime.

Recommendation 1: Have a Transparent Regulatory Structure

At the heart of an optimum wine law framework, is the need to eliminate uncertainty about the application of legal regimes and laws, with a view to promote the creation of effective institutions that address key interests of stakeholders.[1554] An optimum regulatory framework should provide a sound basis for the operation of both central and local regulators. Achieving a favourable outcome in the interest of stakeholder groups requires efficiency in regulatory administration and enforcement, which is consistent with Kelsen's concept of legal norms within a legal system.[1555] An optimum regulatory framework should comprise primarily federal statute, and supplementary state statute. There are regulatory authorities administering the wine regulatory framework at a national level.

[1553] See section 6.2.3.
[1554] Dimitri Demekas, *Building Peace in South East Europe: Macroeconomic Policies and Structural Reforms Since the Kosovo Conflict* (World Bank Publications, 2002) 21.
[1555] See section 2.1.2, fn 41.

For example, IP Australia in Victoria and the United States Patent and Trademark Office (USPTO) in Virginia oversee intellectual property and branding. The collection of revenues and protection of the public is overseen by the Alcohol and Tobacco Tax and Trade Bureau (TTB) in the USA and the Australian Taxation Office in Victoria. There are also government statutory service bodies like the Australian Grape and Wine Authority, which oversee everything connected with wine production and distribution at the national and international levels. In order for these organizations to operate efficiently and impartially, their functions and powers should be clearly outlined by the wine legislation.

The *Australian Grape and Wine Authority Act 2013* (Cth), for example, regulate operation of the Australian Grape and Wine Authority. Irrespective of the sphere of influence, wine regulatory bodies should aim not only at ensuring compliance with law, but also at assisting industry actors through providing necessary resources and economic support. To ensure local wine industry stakeholder interests are represented, a State-based Consortia system that oversees the administration of a super-GI system, would be ideal. Whereas AGWA determine and primarily administer the super-GI system and the system of indication of source, IP Australia should oversee resolution between GI and trade mark conflicts through use of the "first in time principle". An effective body to oversee any disputes would be a specialised tribunal (in lieu of the Victorian and Civil Administrative Tribunal) that would be specialised in resolving disputes between stakeholders of the wine industry, which could be extended to agri-businesses, generally.

While a plausible option for Victoria, a consortium might be deemed an illegal conspiracy in the United States – particularly if it had the ability to set prices, set standards, or deny membership to competitors in the same way that jurisdictions such as Italy are able. Perhaps equally importantly, and as mentioned in Chapter VI, even if a consortium could survive a legal challenge, there could be a cultural objection to such a system of regulation.

While a uniform approach to resolving conflicts between IP regimes,[1556] is a viable option within an optimum regulatory framework for Virginia and Victoria, this does not endorse a broad sweeping approach to the wine industry, as Vicki Waye alludes to. Because of the cultural

[1556] See section 6.4.3.

differences between legal systems (generally stated),[1557] there are unique differences between jurisdictions' regard for how history and culture of that jurisdiction be protected and/or recognised.

7.4 Checklist of Recommendations for an Optimum Wine Regulatory Framework for Virginia and Victoria.

Specific recommendations for structural changes of taxation regimes and intellectual property regimes were put forward in Chapters V and VI, respectively. Outlined below, therefore, is a checklist of considerations, taking into account the above model that an optimum wine regulatory framework in Victoria and Virginia should address.

Recommendation 2: Amend the Victorian Tax System to Support Economic Sustainability of the Victorian Wine Industry. [1558]

This was discussed in chapter V. Ideally this would comprise scrapping the WET in its entirety and have a volumetric tax in its place. Such a tax could be centrally regulated under, for instance, a Commonwealth Wine Industry Fund Act. An appropriate normative model to explain the form that an optimum tax regulatory framework that governs the wine industry could be a positive political economy model, since it typically takes the relative 'political' influence of different interest groups as given. In such models, tax reforms should result from changes in the interest group balance of power (here, the consumer and the industry), the structure of the economy and the associated relative costs or distributional effects of different taxes, or the institutional setting that affects the set of political actors who determine tax policy and therein legal framework.

Recommendation 3: Have a State-specific wine industry fund to assist the Victorian wine industry and investment strategies.[1559]

This could be regulated under, for example, a Commonwealth Wine Industry Fund Act. Such an industry fund, whilst overseen by the ATO, would be administered by a State government body and Consortia, in a representative capacity.

[1557] See section 2.4.2.
[1558] See section 5.5.1.
[1559] See section 5.3.3.

Recommendation 4: Labelling laws should distinguish between monitoring behavior and health benefits of wine.[1560]

Although health considerations are important, and consumers should be informed of health risks also benefits of a wine product, the method of communicating health-related information should distinguish between the wine as a commodity (which, for example, embodies the culture of a jurisdiction, and/or unique qualities of a region), and its health benefits and/or dis-benefits, from consumer behavior.

Separating national legislation that sets out the minimum drinking age from a Labelling Act validates this concern, by distinguishing between monitoring behavior (e.g. irresponsible drinking), and broader facets of wine as a commodity. Existing legislation at a national level setting out the minimum drinking age exists. The Australian tax system could be used to discourage excessive drinking through a volumetric tax that would, as mentioned above, ideally operate in place of the WET.

Recommendation 5: Distinguish between a Geographical Indication system and a system of Indications of Source

The regulatory system in Australia is presently one that focuses on indications of source. It is recommended that the present GI boundaries remain, but that two structural changes be implemented.

The first is that a super-GI system be implemented. One of the distinguishing features of a super-GI system would be that it would embody environment sustainability practices unique to a region as part of a *terroir* identifier. The existing 22 GI regions could remain as is 'in form' but, in substance, the regulatory framework, coupled with existing labelling requirements, are merely embodying indications of source.

Accordingly, because the operative provisions of the NAFTA and TRIPS treaties create obligations only with respect to "geographical indications," this definition creates a second test that

[1560] See section 5.5.1.

must be satisfied in addition to the "misleading the public" test established in the operative provisions themselves. That is because not all geographic marks are "geographical indications" within the meaning of the treaty. In other words, nations that are parties to NAFTA and TRIPS must ban[1561] a use of a geographical term or device for a good only when both of the following requirements are satisfied:

> (1) The use leads the public to believe that the good in question came from place A, when in fact it came from Place B; and
> (2) The use is use as a "geographical indication," which means either
>
> > (a) Goods of the type in question that do, in fact, come from Place A have distinctive characteristics that can be attributed to their origin in Place A, or
> > (b) Place A has a reputation for goods of the type in question.

This is consistent with Broude, who maintains that GIs protect and promote the cultural identity of a region or place.[1562] Thus, in sum, to satisfy the second "origin nexus" requirement for protection under a NAFTA- or TRIPS-compliant law, one needs to show either that the purported place of origin contributes some distinctive characteristic to the type of goods in question, or that it is well-known for those goods.[1563] Therein, "quality", in this regard, is preceded by the indefinite article "a" and the adjective "given" (or "particular" in NAFTA), which suggests reference to a particular attribute of the good, not to the fact that the good is reputed to be of superior make or growth. This may, for example, encompass history as part of a cultural and thus objective association of the region in the minds of consumers.

[1561] This term is used as shorthand for the dual obligations to refuse to register a misleading geographic trade mark, and to allow private parties to seek an injunction against misleading geographic indications.
[1562] Ibid. See also Anil K. Gupta, *WIPO-UNEP Study on the Role of Intellectual Property Rights in the Sharing of Benefits Arising from the Use of Biological Resources and Traditional Knowledge* (2004) <http://www.wipo.int/ >.
[1563] I expect that the facts of many cases involving manufactured goods would not reveal an objective origin nexus. Inexpensive transportation of raw materials has drastically reduced the need for many producers to be located near their raw material sources, and methods of refinement and chemical synthesis have made the original place-specific characteristics of raw materials less important to finished products. For example, the chemical composition of oil may vary between oil fields, but by the time the oil is made into polyethylene and delivered to a firm thousands of miles away that moulds polyethylene into a consumer product, those variances are no longer traceable. This is why, as Justin Hughes remarked, "[F]or all practical purposes, the law of geographical indications is about foodstuffs.": See Justin Hughes, 'Champagne, Feta, and Bourbon: The Spirited Debate about Geographical Indications' (2006) 58 *Hastings Law Journal* 45-6.

Community-specific branding[1564] is still relevant to a consumer and therefore the industry,[1565] and should accordingly be fostered through the appropriate IP regime. Because of this, a super-GI system should require both that wine firms within the super-GI be geographically located in that region and, that there be a minimum expectation of farming practices that align with particular qualities and *terroir* of that region.[1566] This recognises that supply chains for GI products differ on account of the fundamental requirement (e.g. blending rules) for the product – irrespective of its origin in terms of manufacturing unit, to exhibit the distinguishing characteristic, quality or reputation that is considered to be essentially attributable to its area of geographical origin. The GIC should retain the administrative function, pursuant to the AGWA Act, of classifying a GI, including a super-GI.

A model treaty governing labelling requirements be introduced by the OECD in conjunction with the WHO and WTO. These bodies, collectively, may be seen to endorse different stakeholder interests, including the wine industry, consumers (from a health perspective), and governments (from a trade perspective). Labelling laws and a model treaty should also set a benchmark for sustainable practices in the wine industry. This is partially achieved in Europe, where related regulation sets the rules for organic wine production. While wine producers cultivate the culture of wine consumption and advertise their products as symbols of affluence and style, authorities should counterbalance these images by clearly pointing to the negative aspects of wine consumption, as education and information are believed to informing consumer purchase decisions. Therefore, in the spirit of consumer protection, in addition, educating consumers on the adverse effects of alcohol consumption should become an essential part of an optimum regulatory framework.

Recommendation 6: Allow scope of blending and new wine styles.

Blending Requirements should be afforded flexibility in both Virginia and Victoria but should not water down the AVA system or GI system. This provides flexibility within a wine regulatory framework for innovation and distinguishing features of wine products, without watering down reputational features of where a grape, for the purposes of producing a wine, is sourced. In

[1564] Kolleen Guy, *When Champagne Became French: Wine and The Making of a National Identity* (The Johns Hopkins University Press, 2003).
[1565] This includes to preservation of the rural environment since people are able to recognize the importance of the land for their continued livelihood. See, section 2.1.4.
[1566] See section 6.3.2.

addition, to facilitate association between quality features of a super-GI, in the case of Victoria, and a sub-AVA in the case of Virginia, blending rules should be strictly followed.

Figure 4 Model Blending rules for Victoria

Level 1 – Super-GI

- *If a grape variety is stated on the label of a super-GI wine, then 100% of the wine must consist of grapes from a super-GI.*
- *The wine label must carry a vintage. 90% of the grapes must be grown during the stated year. The remaining grapes used from prior vintages must adhere to Level 1 requirements.*
- *When blending grapes for a super-GI wine, not more than four grapes make up at least 100% of the wine from that super-GI region.*

Level 2 – Standard GI

- *If a grape variety is stated on the label for other than a super-GI wine, 85% of the wine must consist of grapes from the GI region.*
- *The wine label must carry a vintage. 90% of the grapes must be grown during the stated year. The remaining grapes used from prior vintages must adhere to Level 2 requirements.*
- *When blending grapes other than for a super-GI wine, if two or three grapes make up at least 85% of the wine, each of the grapes that make up 20% or more of the wine must be. If four or five grape varieties are used, and each makes up at least 5% of the wine, each of these grapes must be stated. In addition, the grapes must be stated in the order of importance, such as Cabernet-Merlot when the wine contains more Cabernet Sauvignon than Merlot.*

Level 3 – Clean-skin or "Made in Victoria" wine

- *100% of the grapes must be sourced from a state.*
- *Of those grapes sourced, not more than five grapes varieties can be used, and must be specified in their respective proportions on a wine label.*
- *If a vintage is stated on the label, 80% of the wine must come from that vintage.*

The above tri-level model could be used to distinguish 'quality' wines being those that are sourced from a super-GI, 'standard' wines being those that are sourced from the existing GI regime, and 'generic' wines which may comprise clean-skins and are associated with a broader region such

as 'Victoria'. Clean-skins or "Made in Victoria" wines is a method of dealing with a glut of grapes, while at the same time providing some return on investment to a wine firm through the sale of such wines.

To distinguish clean-skins from Level 1 and 2 wines, a plain-packaging approach should be adopted, where each state has a different label colour, and requirements for labelling outlined in statute.

This would be consistent with the goal of validating the accuracy of information through labelling laws, therefore consumer protection, the Victorian wine industry's objective to enhance understanding of the Victorian wine industry, and afford flexibility to a wine firm who, as part of a collective in a sub-GI, could better distinguish themselves from other Victorian wine firms. This proposal, for consistency and consumer confidence, should be regulated at a national level through a separate Commonwealth Labelling Act, or new Division of the AGWA Act. A schedule in the AGWA Act should outline the super-GI wine regions in Australia. For consistency in implementation, it should be administered centrally alongside labelling laws.

Figure 5 Model Blending rules for Virginia

Level 1 – sub-AVAs

- *If a wine label carries the name of a sub-AVA, 90% of the grapes must only come from that sub-AVA.*
- *The wine label must carry a vintage. 80% of the grapes must be grown during the stated year. The remaining grapes used from prior vintages must adhere to Level 1 requirements.*
- *When a wine label carries the name of a grape variety, the wine must be made from at least 75% of that grape variety.*

Level 2 – AVAs

- *If a wine label carries the name of an AVA, 85% of the grapes must come from that AVA. Not more than 25% of those grapes may come from an adjoining AVA, if it is commercially required by a wine firm.*
- *If a wine label carries the name of a state, 75% of the grapes must come from that state, unless more is required under state law in which case the greater shall prevail.*

- *The wine label must carry a vintage. 80% of the grapes must be grown during the stated year. The remaining grapes used from prior vintages must adhere to Level 2 requirements.*
- *When a wine label carries the name of a grape variety, the wine must be made from at least 75% of that grape variety.*

The above dual-level model could be used to facilitate unique qualities of a wine from a sub-AVA and therein the sub-AVA's regional attributes. Requiring that at least 80 percent of grapes, for the purpose of vintage, addresses wastage of grapes and wine should there be an oversupply in a particular year. This would bring, at least part of the system back into line with initial intentions to implement the French AOC system. At the same time, to facilitate greater transparency in the use of grapes from an adjoining AVA where it is commercially required by a wine firm, means that such a requirement should be statutorily outlined. The above would set a national benchmark for the wine industry in the US, generally. At the same time, it allows flexibility for state implementation and tailoring of requirements in line with expectations and objectives of the wine industry of that state. The view being that states (including Virginia) facilitate migration towards Level 1, and therefore enhanced reputation for quality wine from that state, through funding initiatives, such as tourism infrastructure, and Consortium to promote leadership in the Virginian wine industry.

Virginia's 2020 Vision recommends "establish[ing] more AVA's in Virginia" which seems illogical if the purpose of an AVA is to distinguish qualities unique to a particular region. Loose labelling requirements have the potential to dilutes the essence of an AVA. Accordingly, any attempt to implement objectives in the Strategic Vision should focus on strengthening the existing AVA system, and improved quality outputs be facilitated through realigning the use of AVAs to a single region. Wine products that seek not to distinguish themselves could still avail themselves of reference to a "Made in Virginia" wine. In the case of Virginia, the above model distinguishing between wine firms seeking to pursue 'commercial interests', and those that seek to distinguish 'quality' wines as those associated with a sub-AVA. This is consistent with the notion that there are a range of firms or wineries that are legally and economically distinct units produce the very same product.[1567] The TTB should oversee the collective administration of AVAs but allow administration of sub-AVAs to be undertaken at a State level, through the assistance of Consortium.

[1567] James Chappuis and Peter Sans, 'Actors coordination: governance structures and institutions in supply chains of protected designation of origin' in Bertil Sylvander, Dominiqe Barjolle and F. Arfini (eds) *The Socio-economics of*

Recommendation 7: Adopt a uniform approach to wine labels regulated nationally and administered centrally.

Such labelling laws would not be an overarching equivalent of cigarette plain packaging, which primarily protects consumers' health interests. Such an approach would be deemed unconstitutional under US law. Rather, that labelling laws require a more standard layout of wines to promote effective information exchange of the wine product and the wine's geographic origin. At the same time, to ensure conflicts in the regulatory framework are minimised, labelling laws should consistently reflect demarcation requirements, and regional specifications.

Mandatory labelling laws at a state level would, instead, be an effective way of communicating information about a Virginian wine and increase understanding amongst consumers of wines from Virginia. To be effective in so doing, there is a need to promote Virginian AVAs which, as discussed, does not necessarily involving creation of new AVAs, but rather sub-AVAs. Those sub-AVAs should only be located in Virginia and use of a sub-AVA on a wine label to promote wines from that region should take a more traditional route

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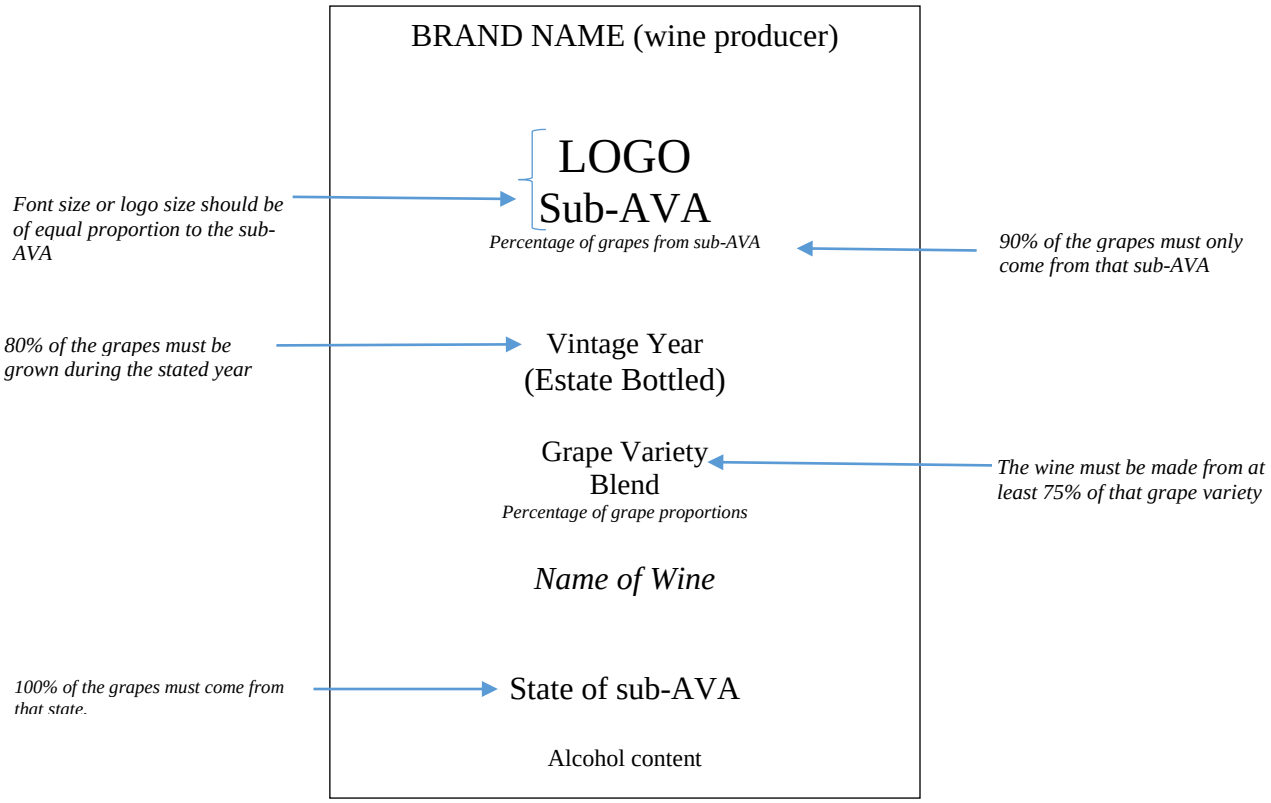
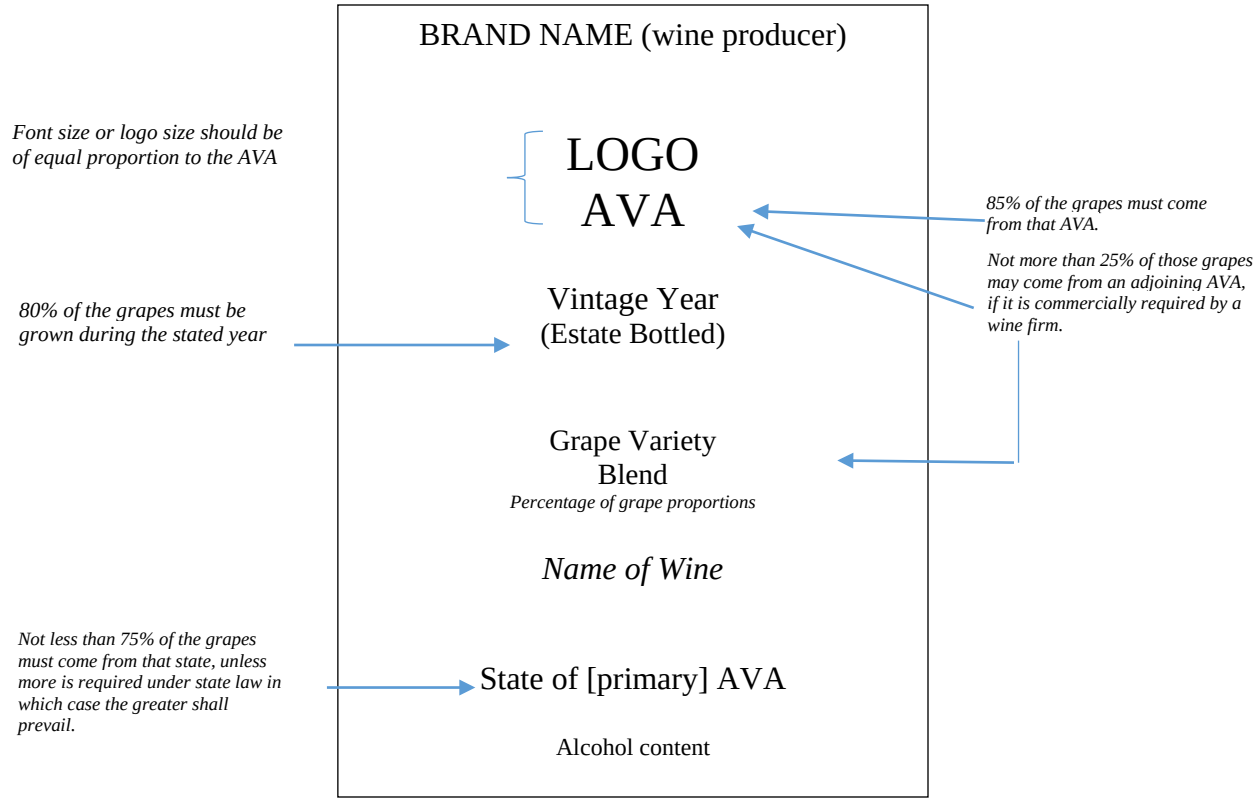
Origin Labelled Products in Agri-food Supply Chains: Spatial, Institutional and Co-ordination Aspects (2000, Actes et Communications) 51-66.

Figure 6 Model Wine label (Level 1 – sub-AVA)



This means that grapes from adjoining sub-AVAs should not be marketed or passed off as grapes from that sub-AVA, even if it is for commercial reasons.

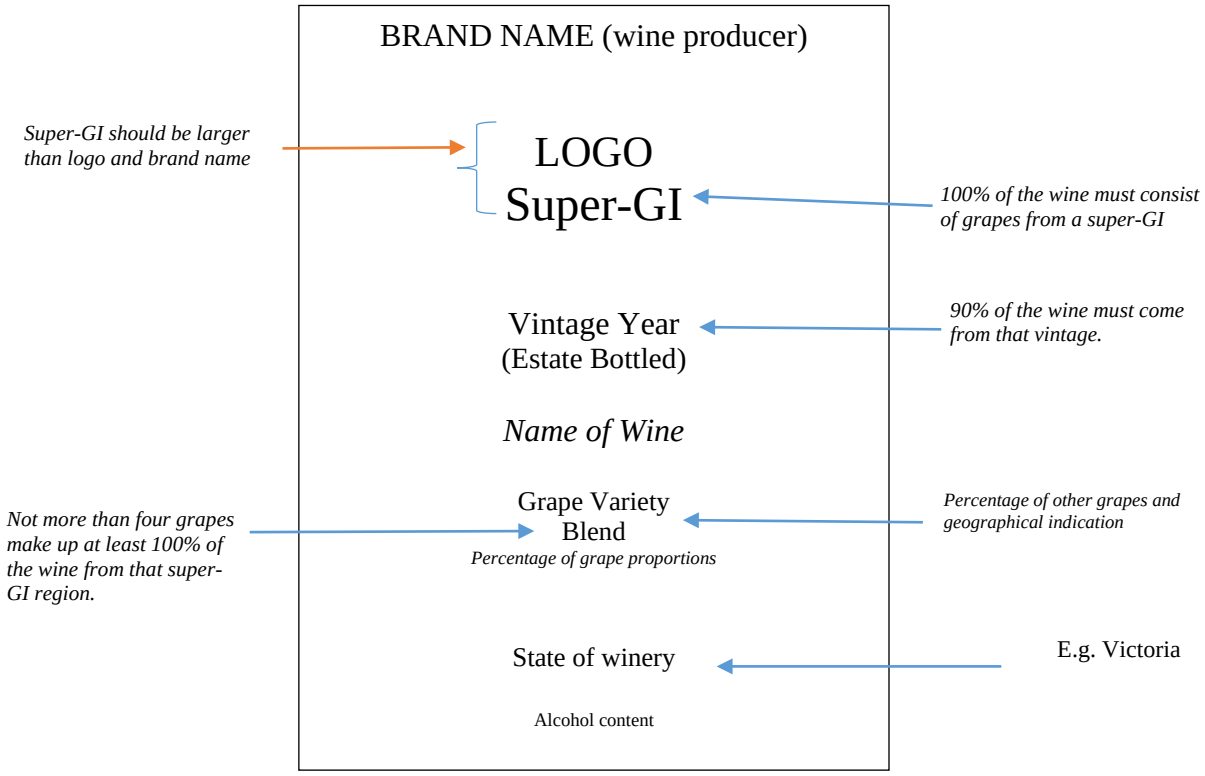
Figure 7 Model Wine label (Level 2 – AVA)



In the case of Australia, and Victorian wines, wine firms falling within a super-GI, labelling requirement should be mandated, centrally administered and regulated.[1568] While this would not impact the ability of a firm to use a mark, colours and designs – thus, the ability to distinguish that wine firm from another in a region – the layout should be consistent (see Figure 8). Font choice and colours should, however, remain discretionary.

[1568] See section 6.7.

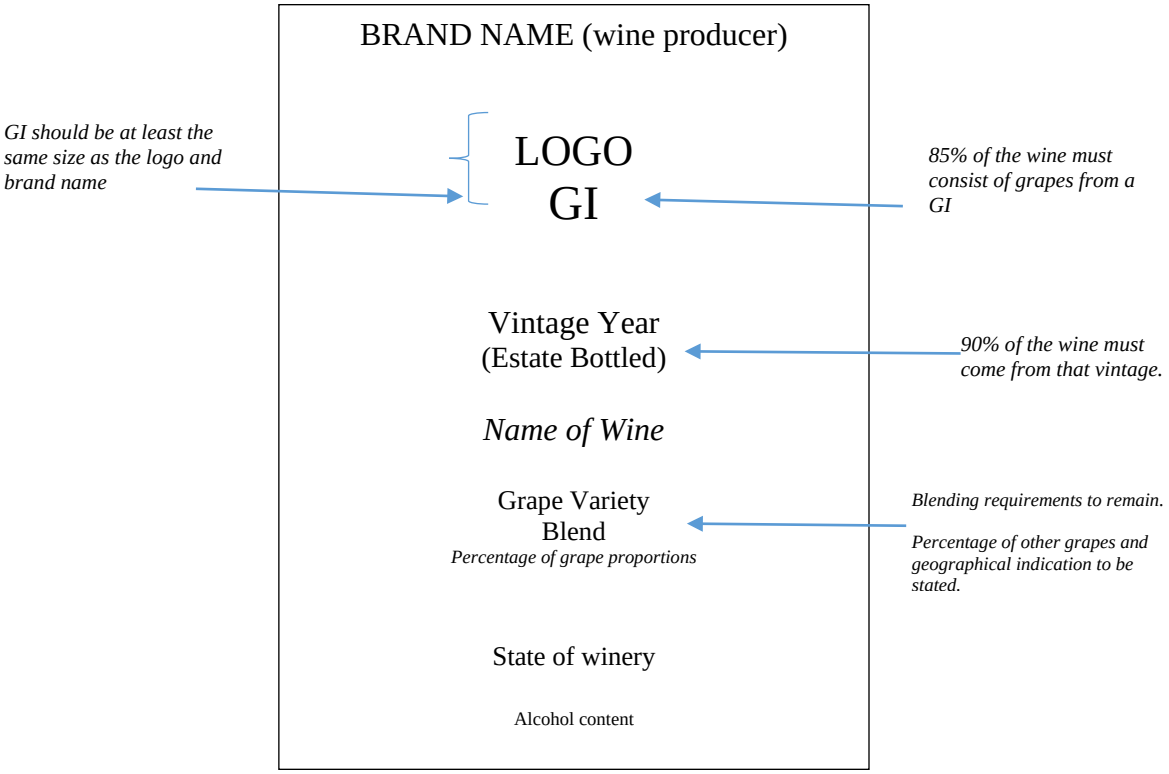
Figure 8 Model Wine label (Level 1 – super-GI)



This could afford a super-GI region the opportunity to have distinguishing features (such as a background colour, or font) thus indicating to a consumer that a wine comes from that super-GI region.

In light of environmental concerns and associated impacts on wine (e.g. smoke tainting), and advanced in oenological practices, limiting use of wine from previous vintages is important for quality and consistency in representing a vintage year. Further, it is recommended that the labelling content and layout requirements for a standard GI be similar to a super-GI in order to create consumer familiarity with information on a wine label with a view to seeking out the wine region (see Figure 9). At the same time, it would lead to constructive competition motivating the drive of GI quality up.

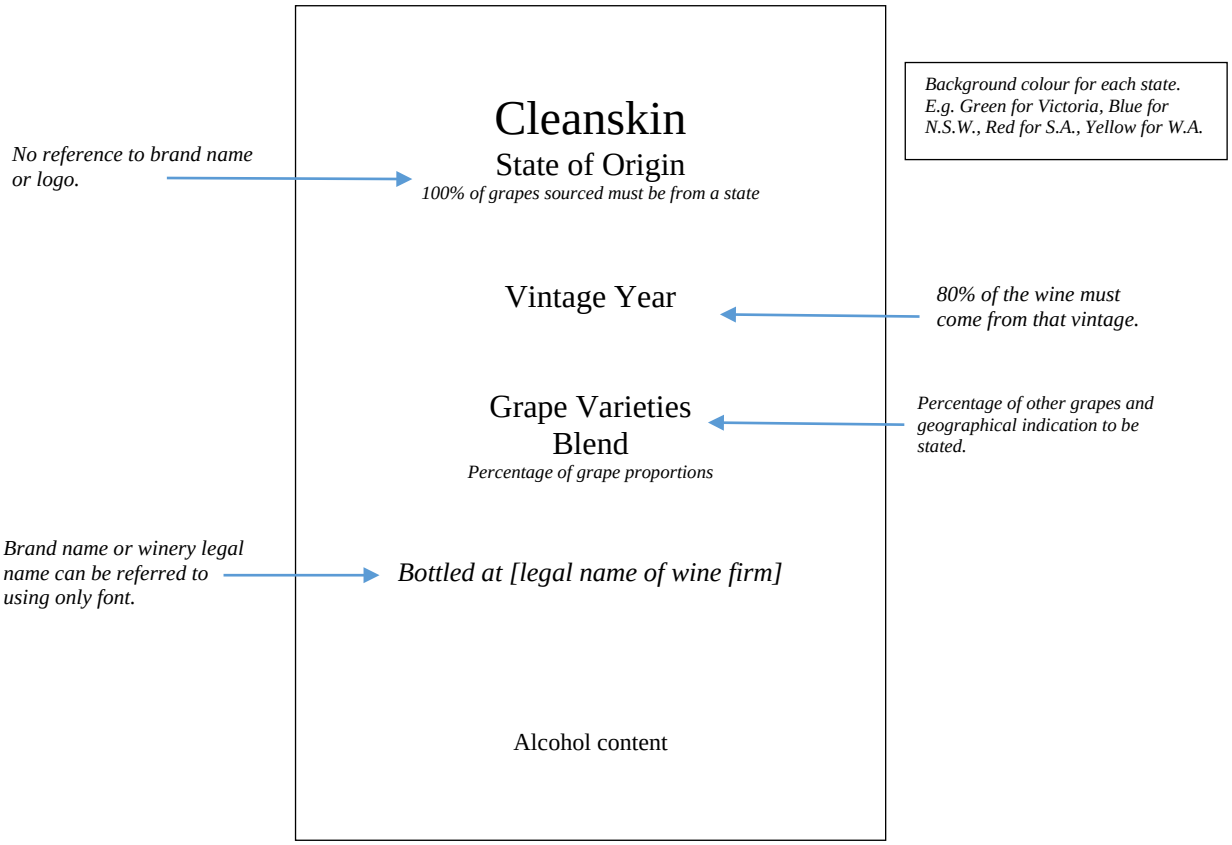
Figure 9 Model Wine label (Level 2 – use of a standard GI)



In addition, individual firms would retain discretion regarding use of a mark and implement designs in accordance with that layout for Level 1 and 2 wines. To accommodate years of grape oversupply, as suggested by reference to 20 percent of wine being derived from a previous vintage, such oversupply may be redirected and used in producing clean-skin wines. The labelling requirements for clean-skins, which would permit grapes to only be sourced from a single Australian state or territory, should ideally be generic in nature to raise awareness of unique and quality attributes of Victorian wines (see Figure 10). A particular colour as a general indication of origin should be adopted for use by each state.[1569]

[1569] In the US, see, e.g., Christian Louboutin S.A. v. Yves St. Laurent Am. Holding, Inc. No. 11-3303-cv (2d Cir. Sept. 5, 2012); Parke, Davis & Co Ltd. v. Empire Laboratories Ltd. ((1963) 41 CPR 121. In Australia, see *Cadbury Schweppes Pty Ltd v. Darrell Lea Chocolate Shops Pty Ltd* (No. 8) [2008] FCA 470; *Telstra Corporation Ltd. v. Phone Directories Company Australia Pty Ltd* [2015] FCAFC 156; *Verrocchi v. Direct Chemist Outlet Pty Ltd* [2015] FCA 234 (regarding IPRs in a colour. The Federal Court in Cadbury Schweppes rejected passing off and trade practices claims in colours). See further, *Southern v How* (1617) 79 ER 400; *Morrocanoil Israel Ltd v Aldi Stores Ltd* [2014] EWHC 1686 (IPEC).

Figure 10 Model Wine label (Level 3 – clean-skin or reference to 'Made in Victoria' wine)



Since labelling laws draw on consumer protection and IP holders' rights – therefore different stakeholder interests – a centrally administered government entity is preferable. This could either be IP Australia or establishing a sub-committee of the AGWA. To facilitate effective administration, consortia could be vested with a consultative role to the industry to facilitate compliance of labelling and blending laws. As previously identified, however, a consortium (even if it could survive a legal challenge), would be unlikely in Virginia.

Recommendation 8: Greater visibility of quality wines in the market

Uniformity and clear guidelines with respect to region classifications, labelling and blending laws are but part of enhancing visibility of a region or jurisdiction's wine. There is a need, in addition, to facilitate communication of these attributes to domestic and international markets.

Broader structural considerations such as FTAs and PTAs operate to open up market gateways for a jurisdiction to export goods. These dynamics were discussed in Chapter V. In addition to challenges to break into export markets, the export market needs to be economically sustainable. As previously discussed, exports of Australian wine has increased over the past 6 years. The perception has been that, due to the glut of grapes in Australia, a large portion of exported wines have not been high quality, which leads to an associated perception in the export market. The selling factor then becomes the 'pizazz' factor – or, rather, the kangaroo on the bottle or reference to 'Made in Australia'. To increase market presence of quality Victorian wines, the answer is not to water down the price of such wines (as this can also have a negative impact on consumer perception of quality), but rather to appeal to niche demands of a particular export market first, before expanding more broadly. For example, consumers in the People's Republic of China (PRC) and Hong Kong are gaining an appreciation for quality wines.

Another option to enhance the visibility of both Virginian and Victorian quality wines could also be achieved through promotion and advertising of wines on a rotating basis, by domestic and international airlines.

On a market-based assumption, it would make better sense to permit more accessible market presence of Virginia wine through direct cellar door sales, fiscal support (e.g. grants, or tax credits) for the transition from vineyard to winery, and independent wine retail outlets. This would also assist the tourism industry. In Virginia, maintenance of a state wine fund derived from county property taxes, or a portion of state sales tax, would be an ideal method of supporting local tourism. Furthermore, if the United States moves to a territorial system of taxation,[1570] then it may be plausible to introduce a specific agricultural rebate system similar to the WET system that is applicable to agri-businesses in general.

In the case of Virginia, any such funds should be directed to not limit producers' opportunities to develop, innovate, and expand, and it ensures that both large-scale and small wineries can secure their place in the wine market. Other initiatives could include offering R&D

[1570] Tax Foundation, Designing a Territorial Tax System: A Review of OECD Systems (1 August 2017) 1 <http:taxfoundation.org>

credits through the taxation system or set aside revenue raised from industry taxes to offer federal or national grants to assist tourism in regions.

While Both the Virginia and Victoria Wine Industry Strategy outline the need to create greater market presence of their respective wines. Informing a consumer of a wine's source and origin is something that regulators should focus on addressing. Efficient communication channels of information about a wine's source necessitates coupled with the identified objective to have greater presence of Victorian and Virginian wines requires, in addition to market presence, a method of effectively communicating the source of a wine to consumers so that they make an informed purchasing decision.

7.5 Concluding Remarks

Both Victoria and Virginia are in a position to capitalise on changes in the wine regulatory framework. Insofar as sustainability practices are concerned, unlike the Old-World, where community measures such as the CAP, a strictly administered GI (referred to in a broad sense) regime that preserve established wine making practices, and wine blending requirements, may pose as a barrier to effectively implementing environmental sustainability, there are options through the effective use of tax regimes, IP regimes, and other laws to facilitate an optimum wine regulatory framework that balances stakeholder interests through consistency with the underlying objectives of those regimes.

There is a need to strike a balance between key stakeholder interests, including those of the industry, consumer and broader social needs; otherwise, the policy would not respond to the fundamental principles of capture theory.[1571] In the case of Virginia and Victoria, this dissertation has made several recommendations that are ripe for the picking by these budding New World jurisdictions.

First, such a framework should consider all systems and institutions essential for the development of the business.[1572] Since wine is a globalised commodity, it should be an effective

[1571] See section 2.4.6 (identifying capture theory).
[1572] See section 1.2.4.

framework that harmoniously manages interests of the consumer, industry, and government, and incorporated public interests,[1573] within a pluralist society.[1574] It is not the place for a regulatory framework to overtly dictate consumer preference of wine. But such a regulatory framework can protect public health interests and provide information to consumers through mandating labelling laws and having a centralised government authority overseeing the administration of this. More should be done to enhance the reputational value of regions in a jurisdiction. Promotion of a region's culture or history by supporting tourism, offering tax incentives to facilitate sustainability of the industry.

Furthermore, an optimum regulatory framework successfully manages all dimensions and possible activities related to winemaking including production, labelling, shipping, taxation, advertising, and consumption, paying much attention to the market requirements, competitiveness, and allocation of resources. Some processes, such as creating value through formulating a benchmark of quality, should be left up to the industry itself.

Although, this dissertation focussed on the production phase of the wine supply chain, which is of importance since this phase impacts later steps in the wine supply chain.[1575] An optimum framework should therefore be sensitive to local peculiarities of winemaking, climate, cultural identity, history, and economic conditions of the country to provide the most effective laws for the given location.[1576] Its focus was proposing an optimum regulatory framework for Virginia and Victoria by drawing on the Old-World experience of the French and Italian regulatory frameworks. At the same time, this dissertation provided useful guidelines for assessing regulatory changes with respect to the wine industry in other New World jurisdictions.

An optimum regulatory framework governing the wine industry is best classified as a synthesis – an opus! – of the policies and regulations of a jurisdiction that is achieved by critically analysing the policies and regulations, identifying and eliminating their flaws, and combining the more cogent aspects or measures. It is abundantly apparent that the framework of laws governing aspects of winemaking in one country may not be universal,[1577] since acceptability and applicability

[1573] See section 2.4.6.
[1574] See section 2.2.1.
[1575] See section 1.1.4.
[1576] See section 2.3.1 (discussing legal transplantation theory).
[1577] See section 1.2.1.

within each jurisdiction's laws develop in accordance with its distinct historical, political, economic, and socio-cultural dynamics and factors. Both Virginia and Victoria are in the process of assessing how best to support the long-term viability of the wine industry in their respective jurisdictions. Adopting new or modified regulatory measures to achieve optimality and balance the interests of stakeholders are therefore timely.

APPENDICES

Appendix I

Figure 1 Wine Supply Chain

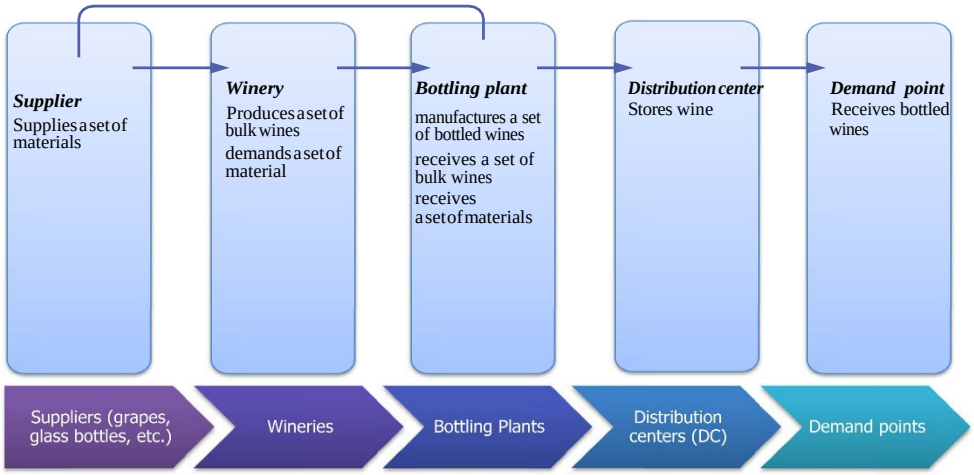


Figure 2 Summary Model of a Wine Regulatory Framework

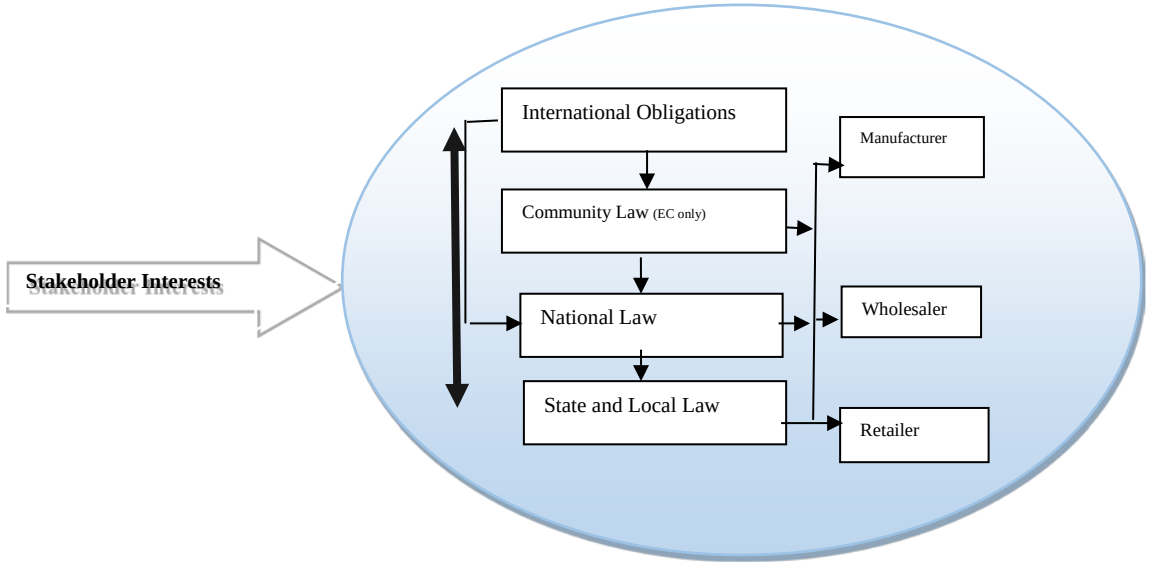
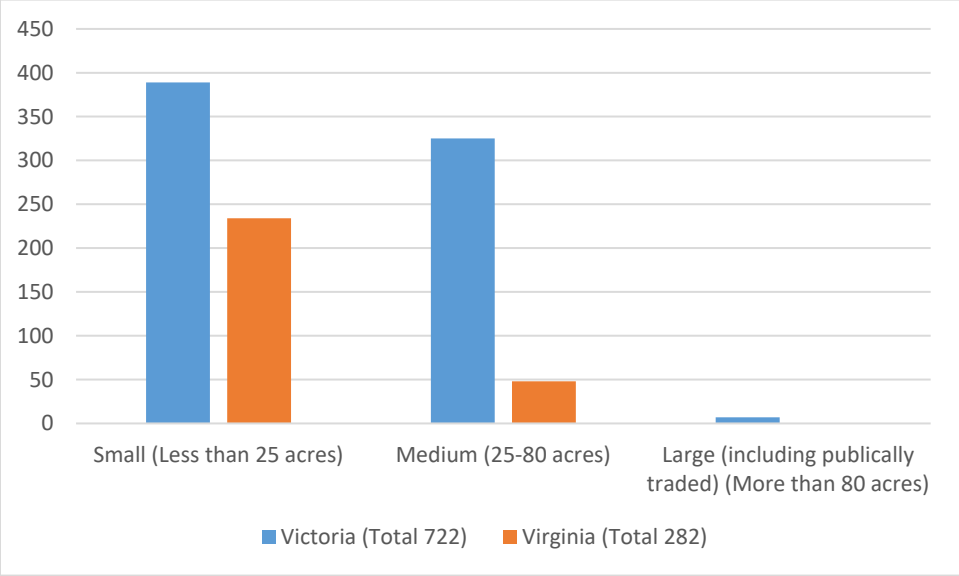


Figure 3 Comparison of Size of Firms in Victoria and Virginia as at 10 November 2016



Source: Wine Australia; Virginia Wine Board

Table 1 Size of Firms in Victoria and Virginia as at 10 November 2016

	Small (Less than 25 acres)	**Medium (25-80 acres)**	**Large (including publically traded) (More than 80 acres)**
Victoria (Total 722)	389	325	7
Virginia (Total 261)	234	27	0

Source: Wine Australia; Virginia Wine Board

Appendix III

Figure 1: Classification Requirements for Wines (France)

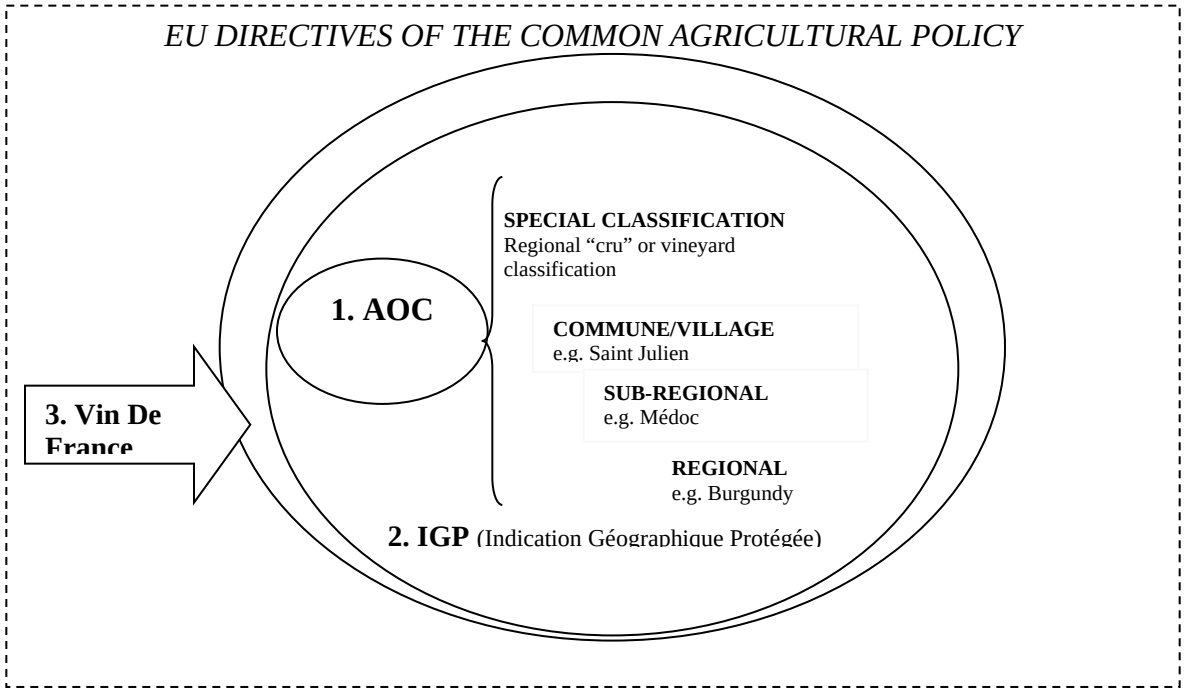
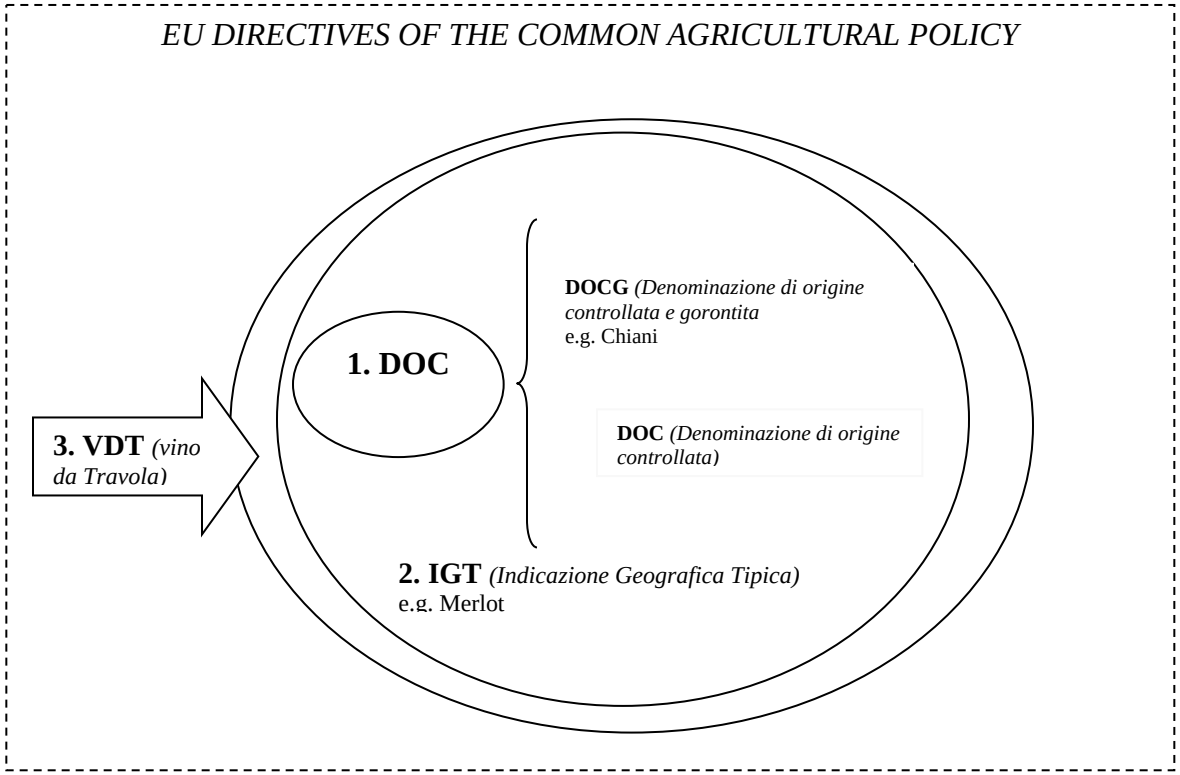


Figure 2: Classification Requirements for Wines (Italy)



Appendix IV

Figure 1 National Wine Law Framework of Australia

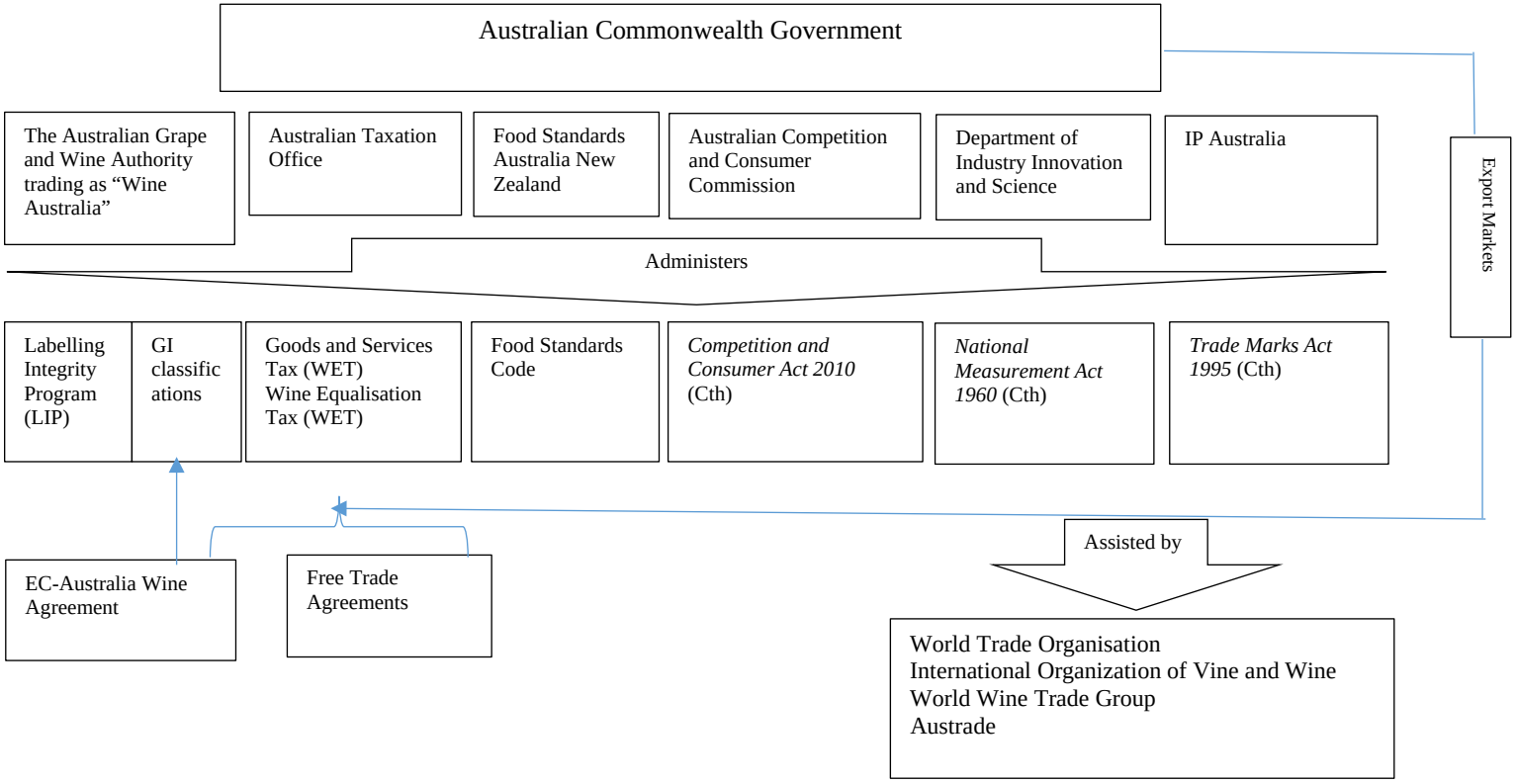
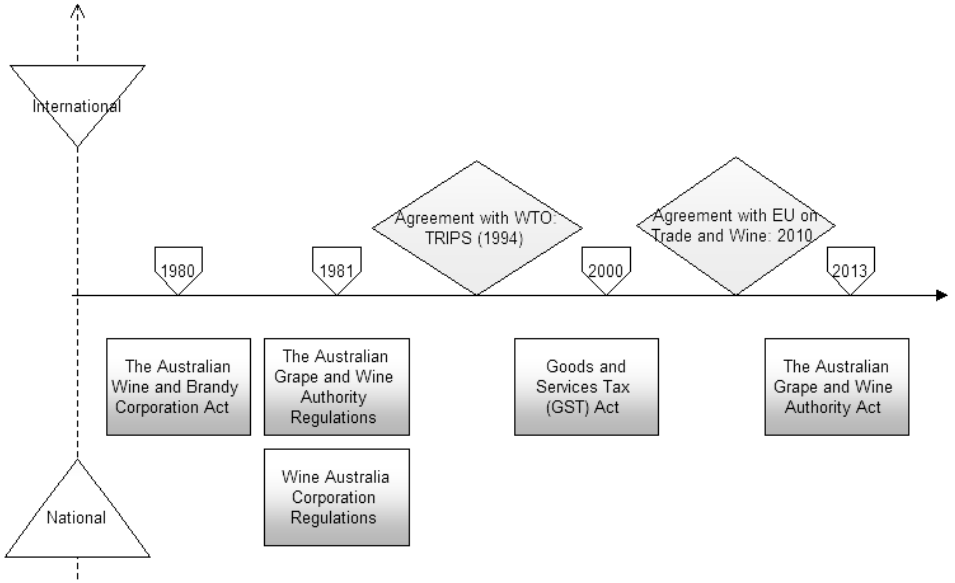


Figure 2 Chronology of Direct Wine Laws Regulating the Victorian Wine Industry from 1980



Source: Wine Australia

Figure 3 Virginia's Wine Law Framework

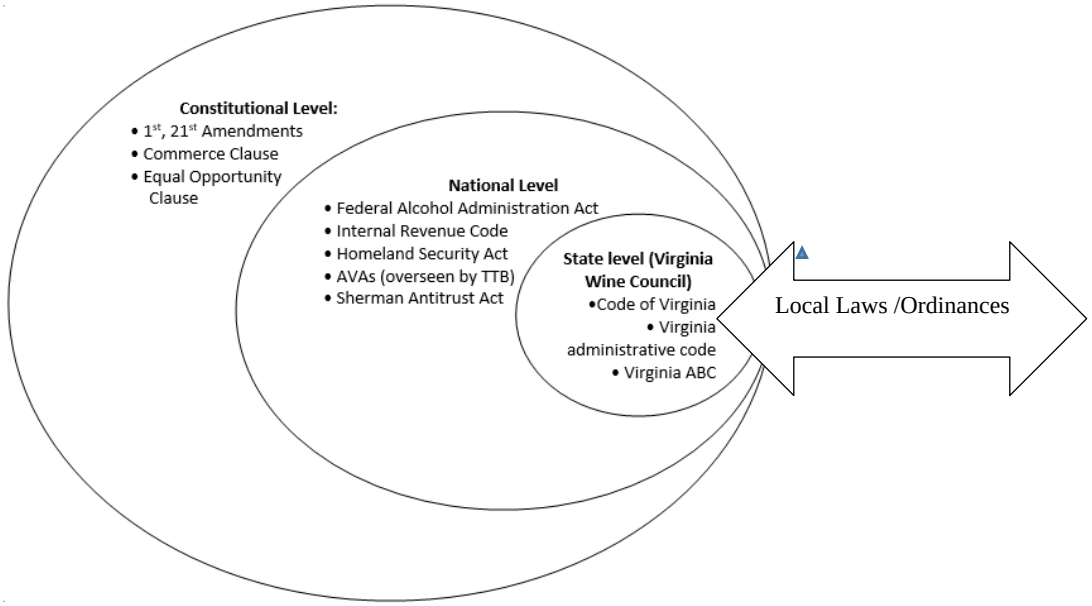
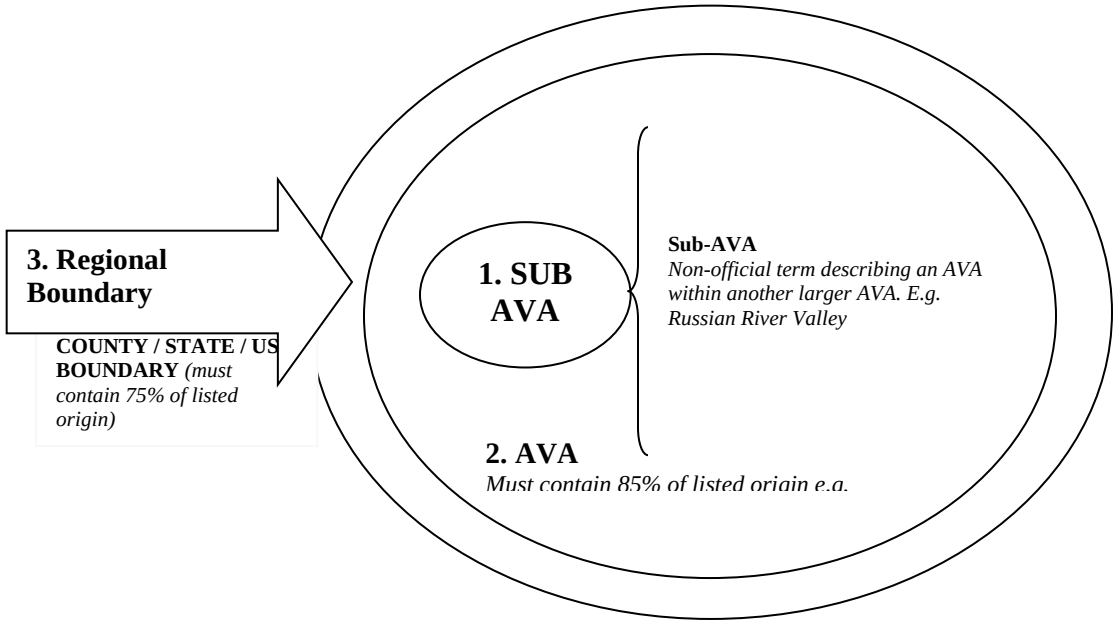
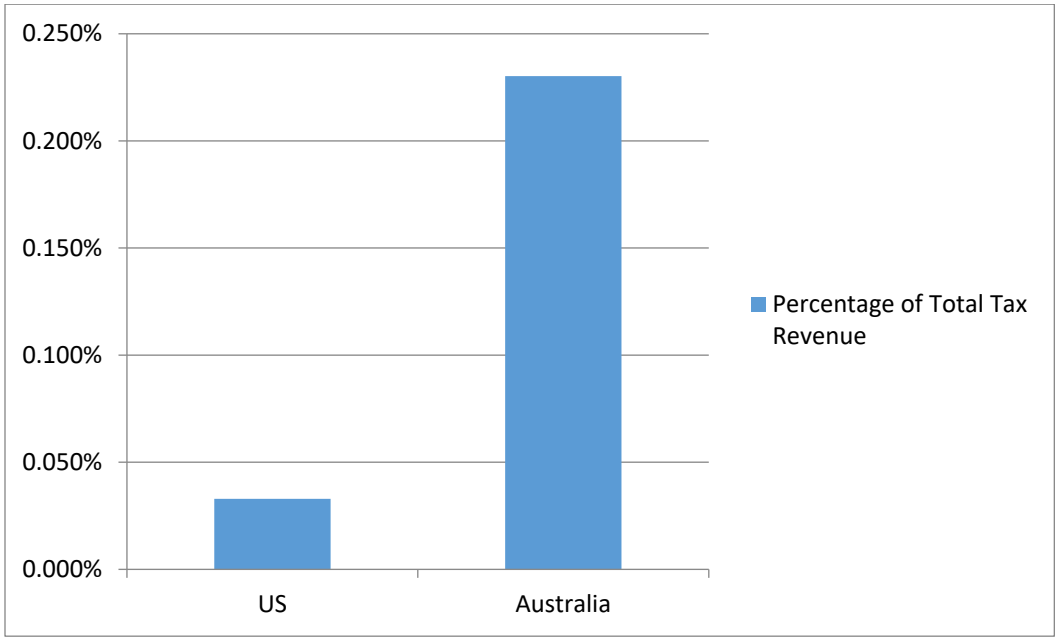


Figure 4 Classification Requirements for AVAs (US)



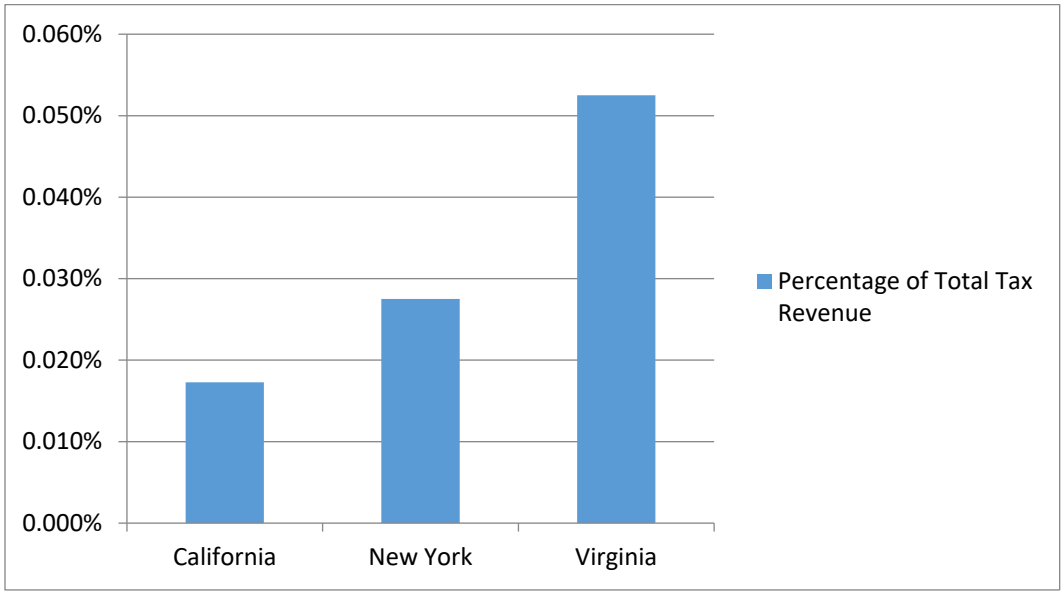
Appendix V

Figure 1 Wine Tax Revenue versus Total Tax Revenue



Source: OECD and Australian Bureau Statistics

Figure 2 State Tax Revenue on Wine as a Percentage of Total State Tax Revenue



Source: United States Census Bureau

Figure 3 Causal Relationship between Increased Alcohol Taxes and Decreased Alcohol Consumption

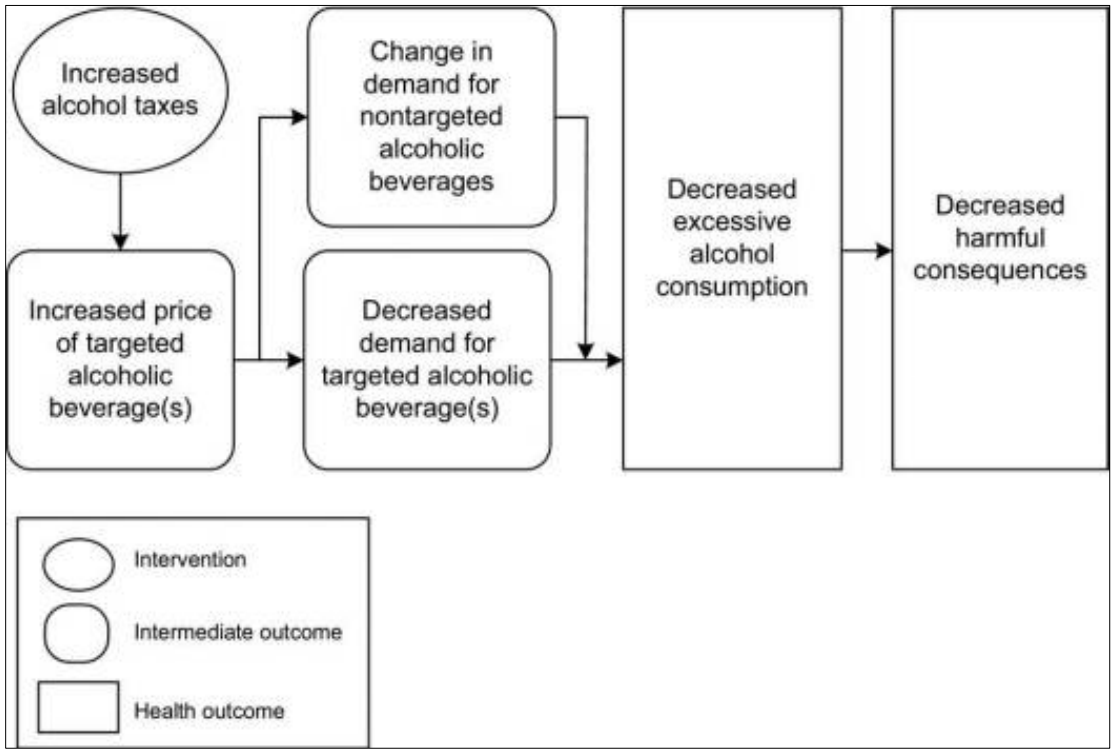
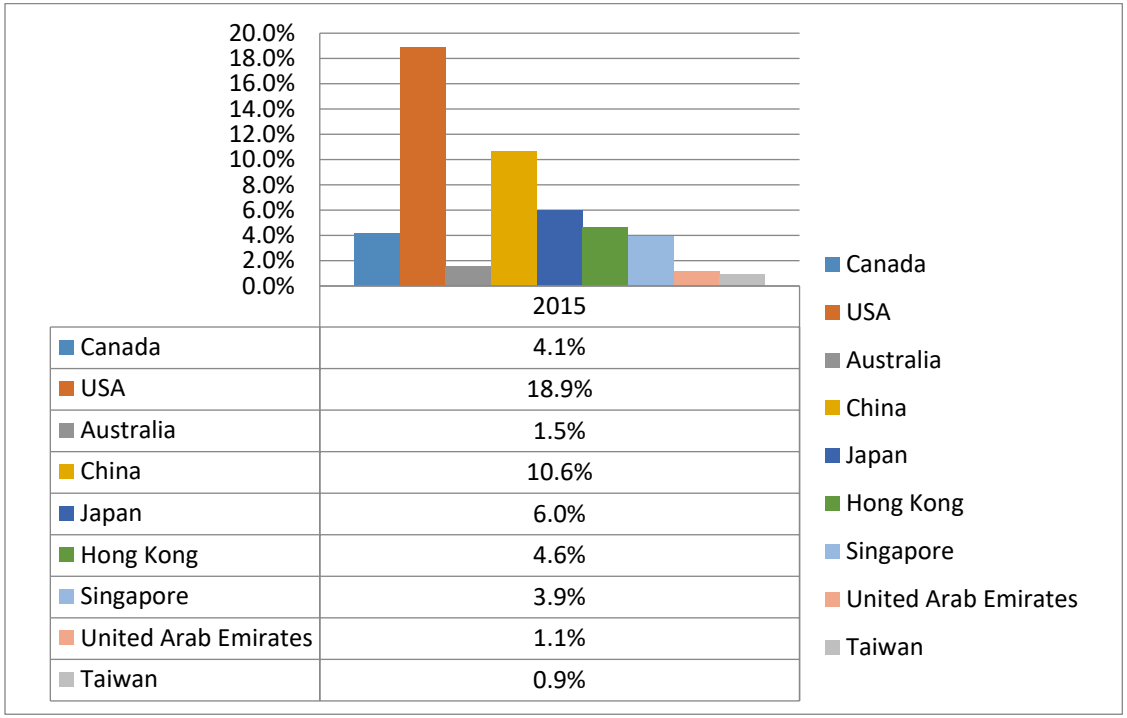


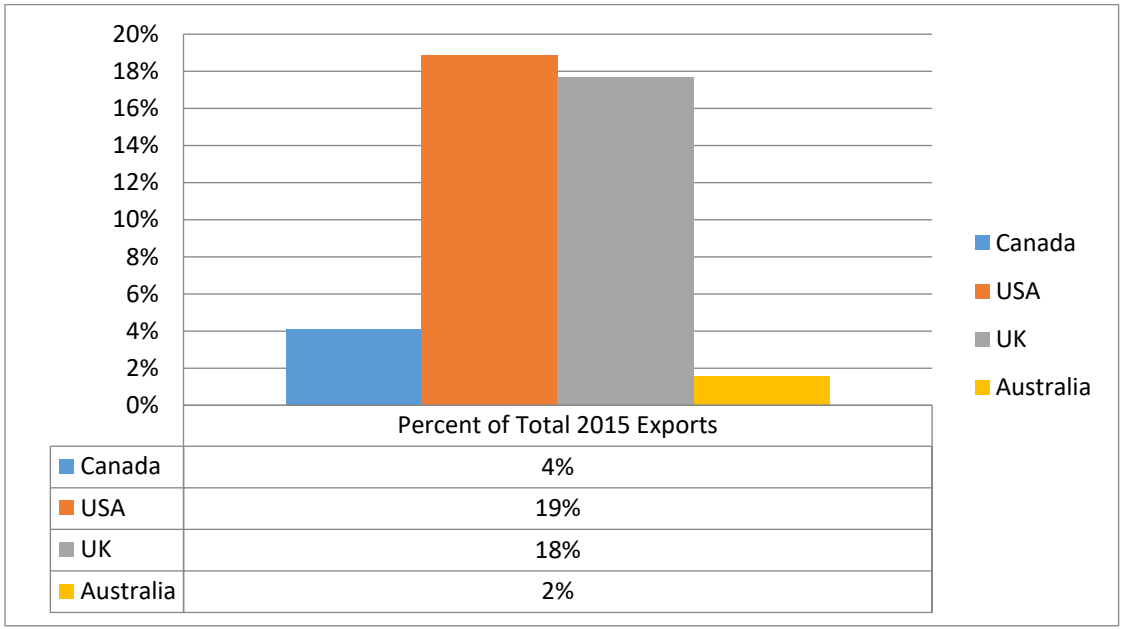
Figure 4 2015 French Wine Exports Outside Europe



	2015
Canada	4.1%
USA	18.9%
Australia	1.5%
China	10.6%
Japan	6.0%
Hong Kong	4.6%
Singapore	3.9%
United Arab Emirates	1.1%
Taiwan	0.9%

Source: GAIN Report

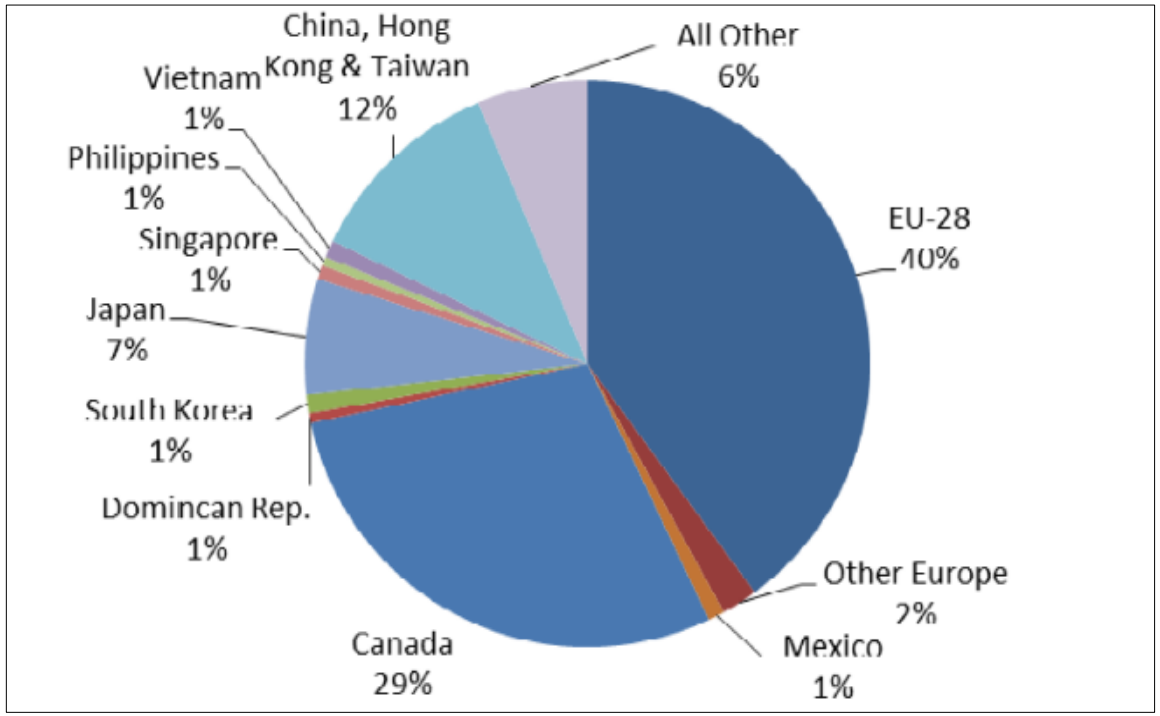
Figure 5 2015 French Wine Exports to Canada, US, UK, and Australia



	Percent of Total 2015 Exports
Canada	4%
USA	19%
UK	18%
Australia	2%

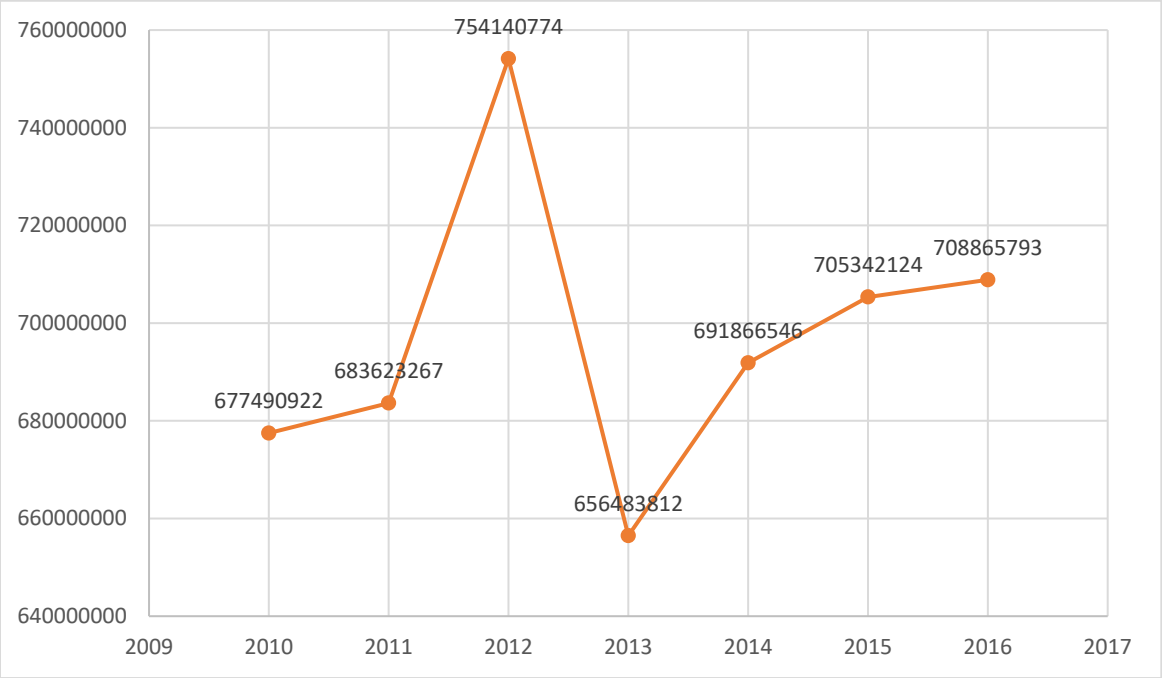
Source: GAIN Report

Figure 6 US Wine Exports by Destination



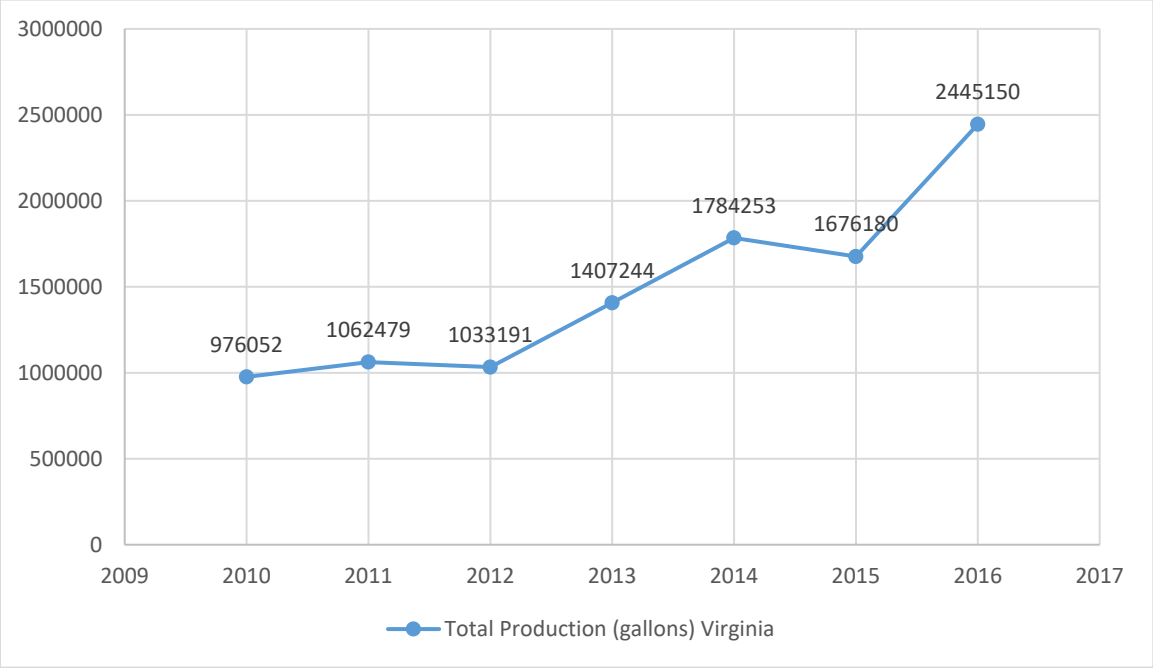
Source: Wine Institute

Figure 7 Total Production (gallons) United States



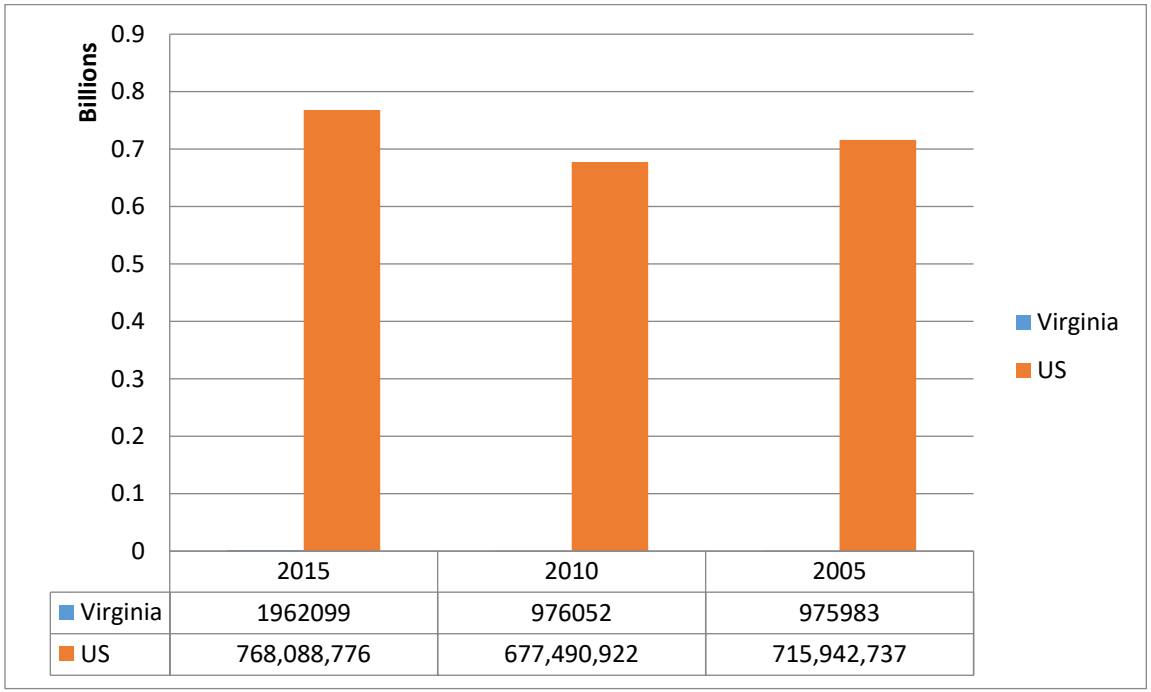
Source: United States Census Bureau

Figure 8 Total Production (gallons) Virginia



Source: United States Census Bureau

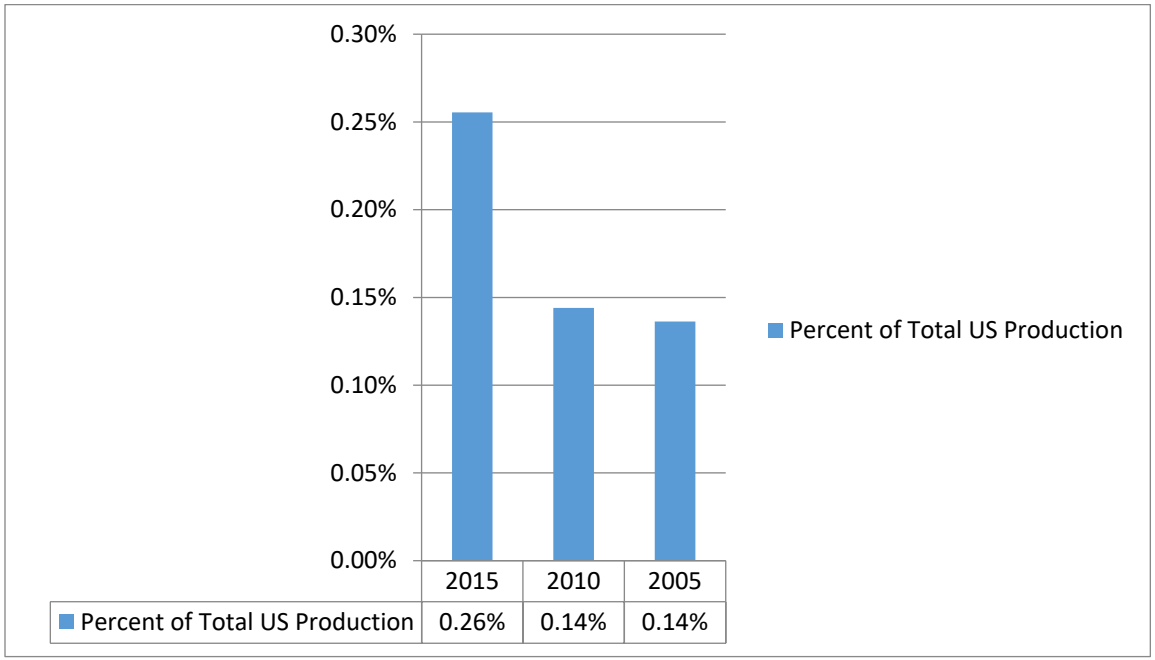
Figure 9 Virginia versus US Production



	2015	2010	2005
Virginia	1962099	976052	975983
US	768,088,776	677,490,922	715,942,737

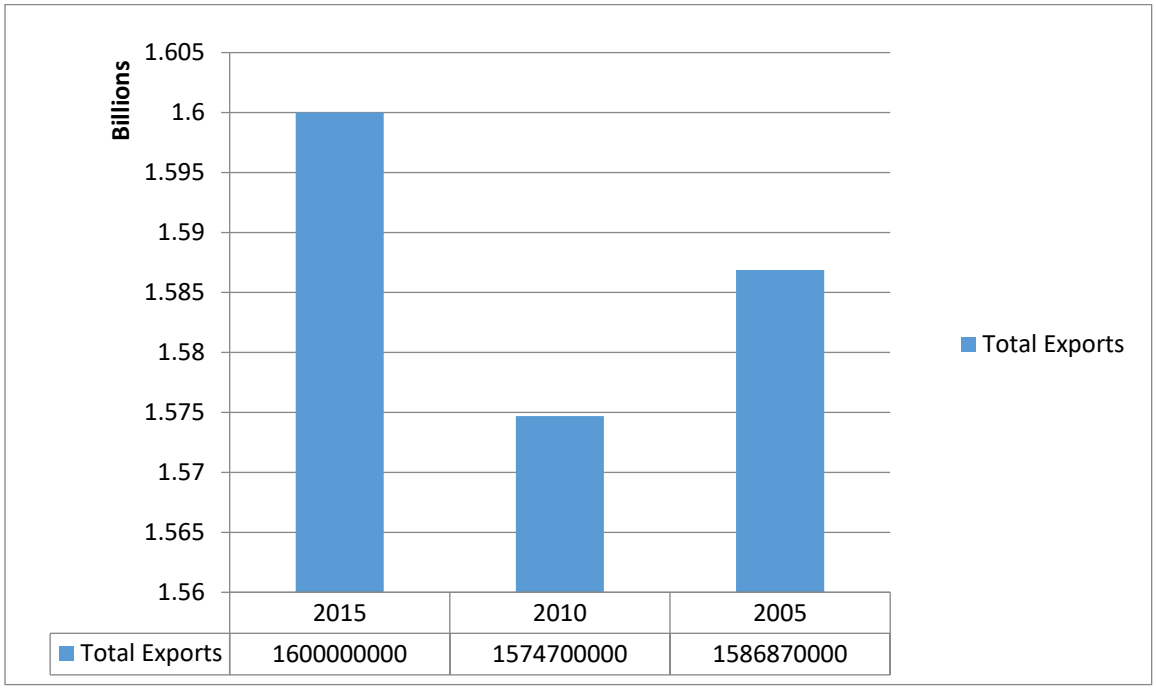
Source: TTB

Figure 10 Virginia Production Percentage of Total US Production



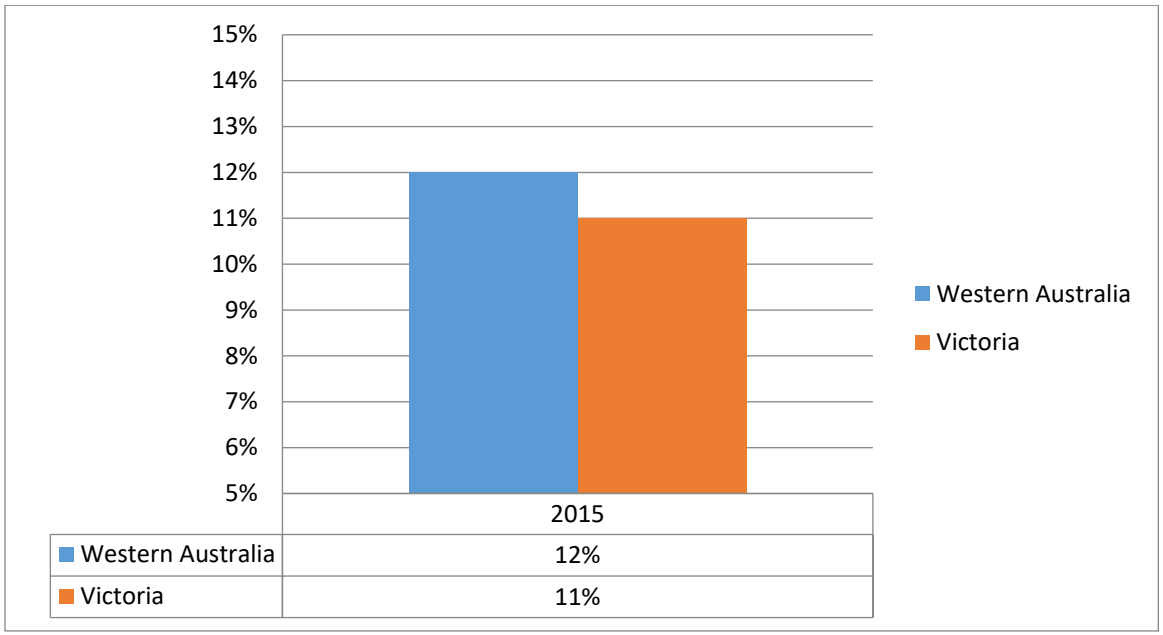
Source: TTB

Figure 11 Total Australian Exports of Wine



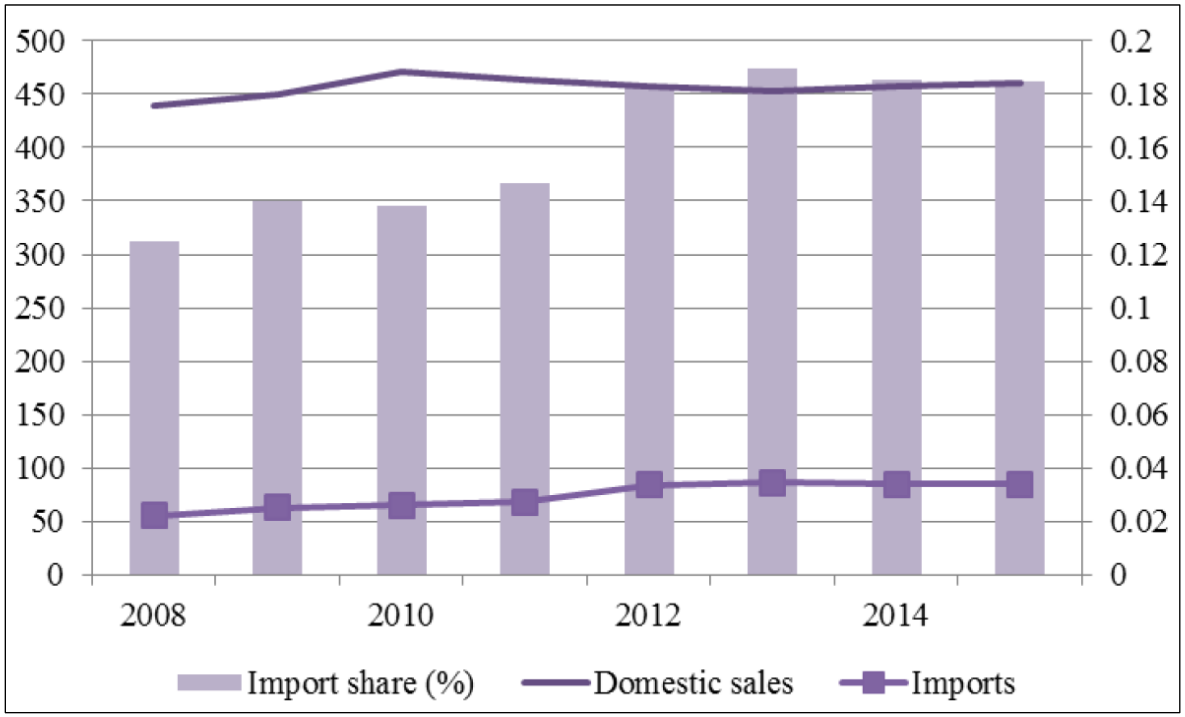
Source: Wine Victoria and University of Adelaide Wine Economics Database

Figure 12 Exports from Western Australia and Victoria



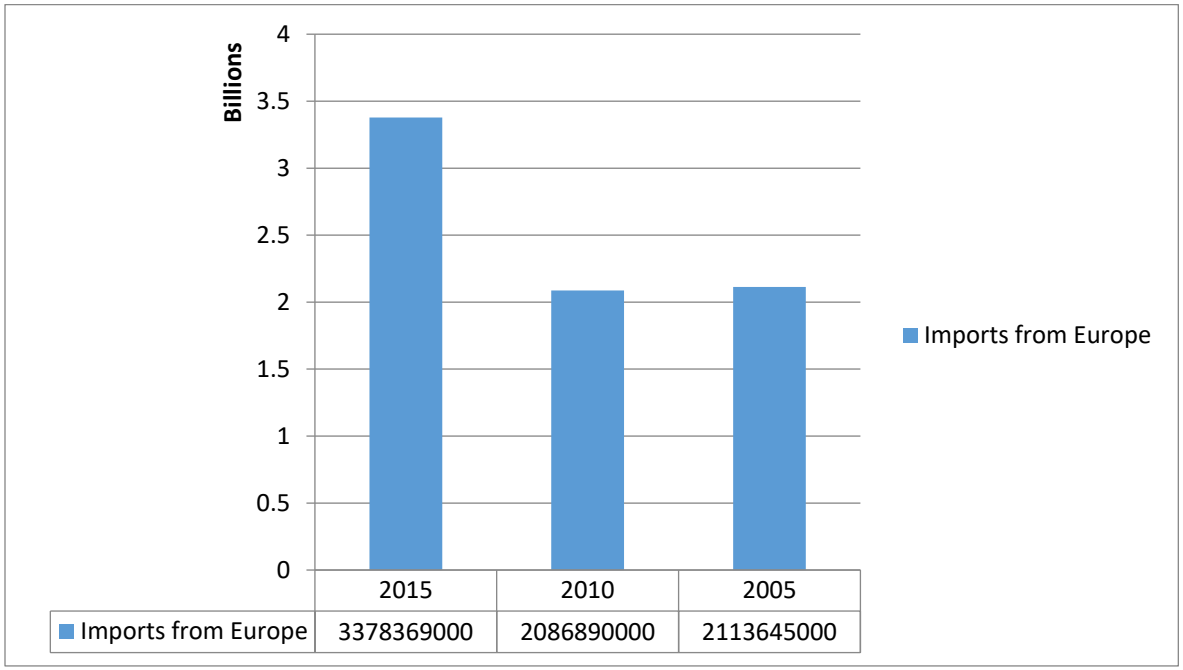
Source: Wine Victoria

Figure 13 Domestic wine sales and import share (2008-2014)



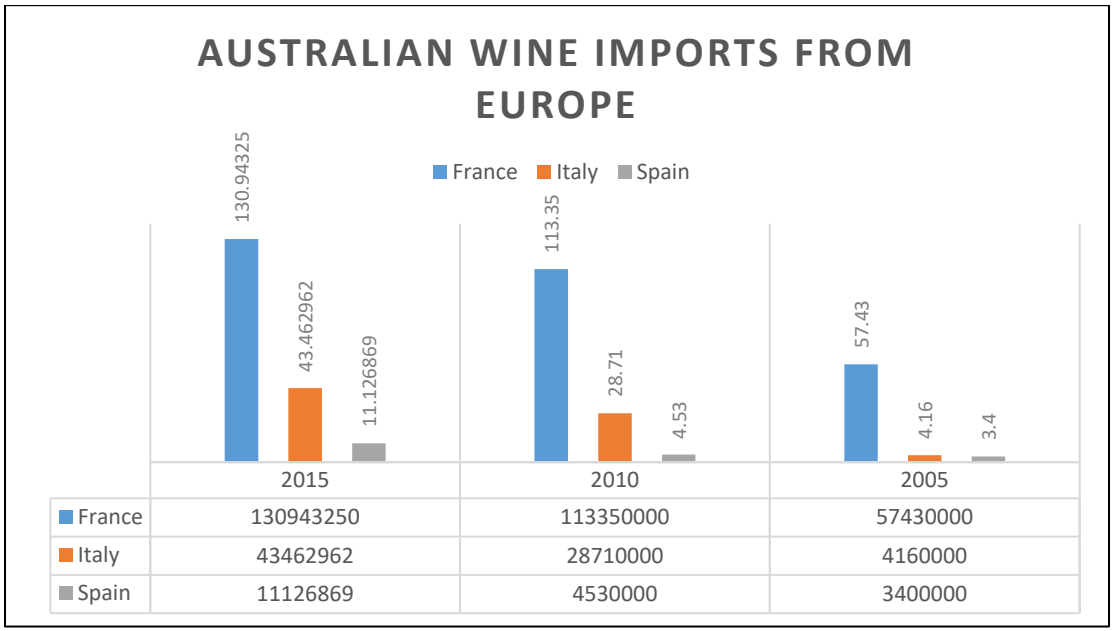
Source: Australian Winemakers Federation

Figure 14 US Wine Imports from Europe



Source: Europa

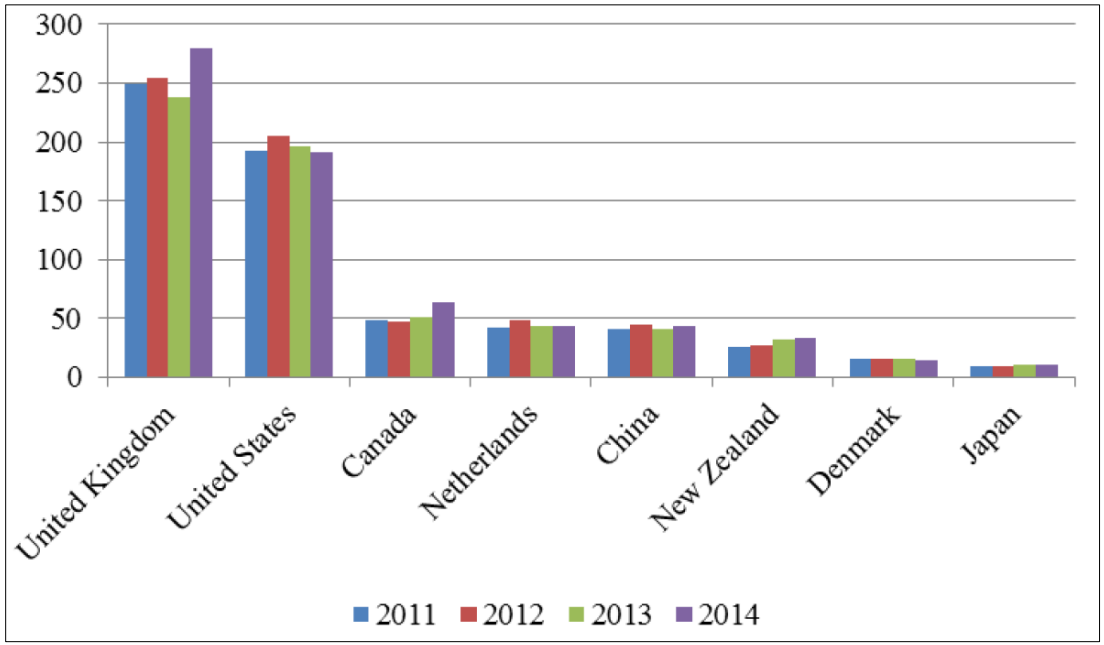
Figure 15 Australia Imports of Wine from Europe



	2015	2010	2005
France	130943250	113350000	57430000
Italy	43462962	28710000	4160000
Spain	11126869	4530000	3400000

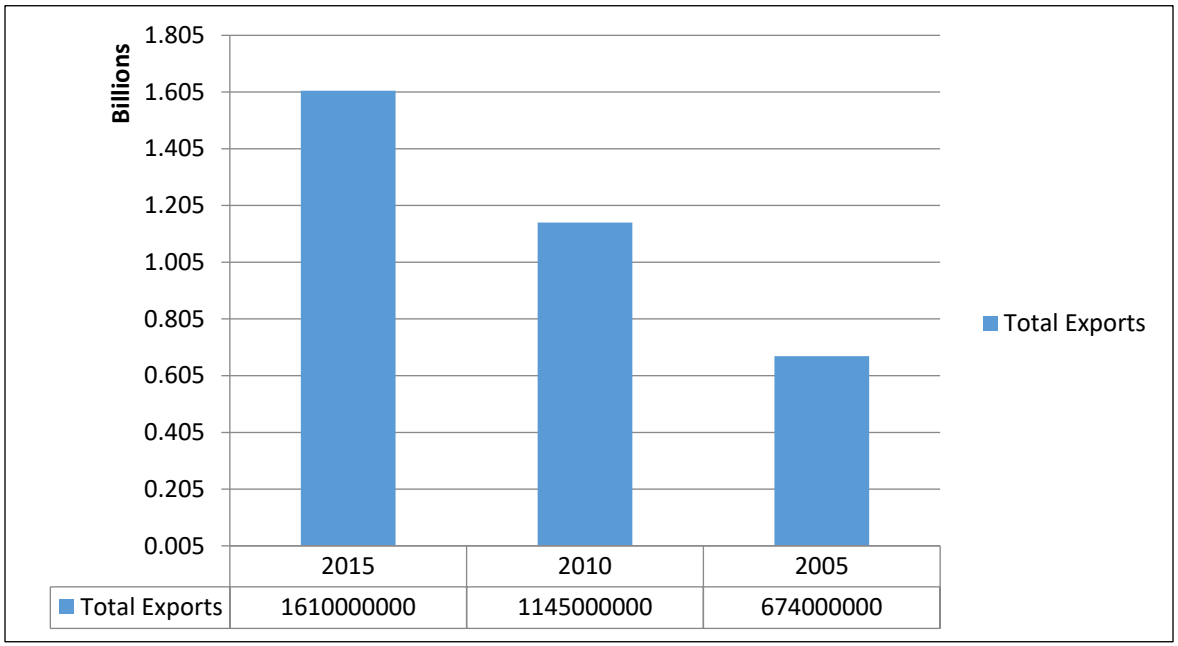
Source: Wine Victoria; University of Adelaide Wine Economics Database; Euoropa.

Figure 16 Australian Wine Exports by Country, 2011-2014 (ML)



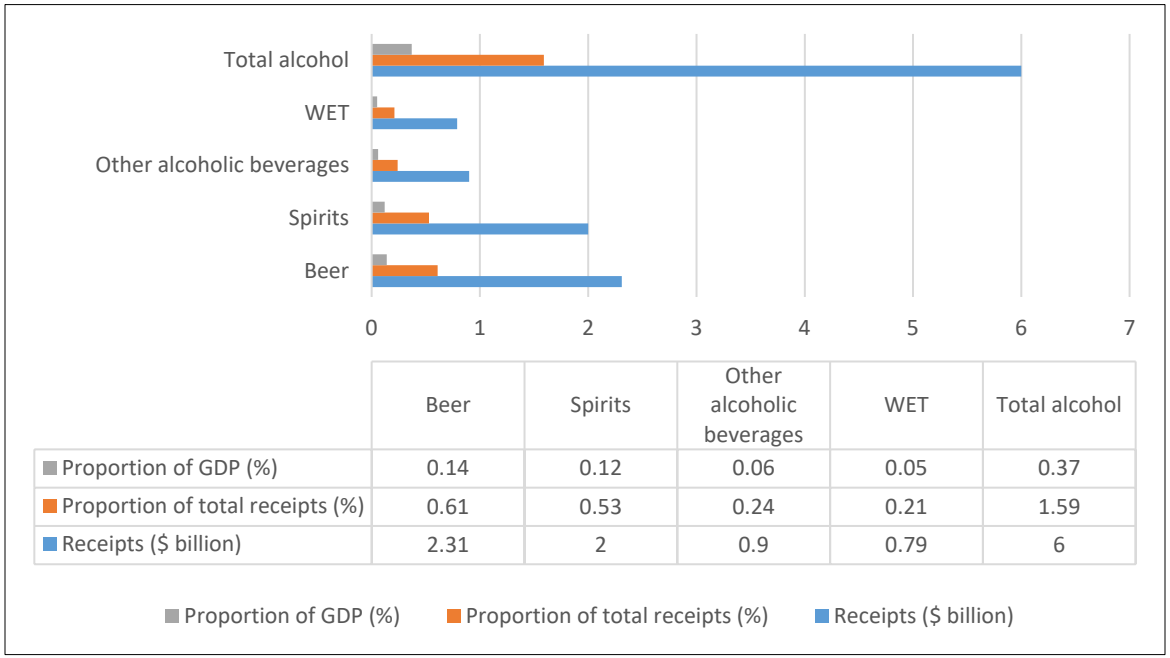
Source: Global Trade Atlas

Figure 17 Total US Wine Exports (US$)



Source: Wine Institute

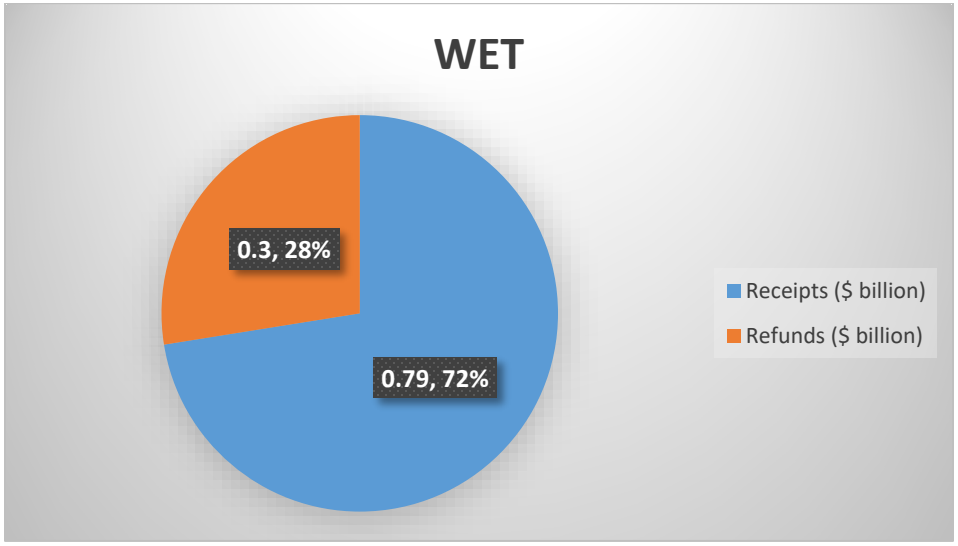
Figure 18 Taxation receipts from alcohol in 2014–15



	Beer	Spirits	Other alcoholic beverages	WET	Total alcohol
Proportion of GDP (%)	0.14	0.12	0.06	0.05	0.37
Proportion of total receipts (%)	0.61	0.53	0.24	0.21	1.59
Receipts ($ billion)	2.31	2	0.9	0.79	6

Source: Australian Government (2015) data

Figure 19 WET rebate as a proportion of revenue sourced from WET in 2014–15



Source: Australian Government (2015) data.

Table 1: Total Investment Costs by Equipment Category and Winery Size US($)

Cost Category	2,000	4,000
Receiving and Delivery Equipment	$58,023.75	$91,319.75
Cellar Equipment	$36,987.00	$52,986.00
Material Handling (e.g. tractors)	$51,520.00	$68,752.00
Refrigeration System	$34,187.00	$69,872.00
Fermentation & Storage	$49,800.45	$74,775.75
Tasting Room	$3,675.95	$42,843.95
Plant & Office	$402,388.00	$507,207.00
Total Investment	$636,582.15	$907,756.45

Table 2: Total Variable Costs and Winery Size US($) 2014

Cost Category	2,000	4,000
Packaging and Preparation of Wine (ex. labour)	$82,496.40	$215,855.20
Labour Costs	$47,140.80	$238,576.80
Running costs (incl. utilities)	66,782.80	113,608.00
Total Variable Cost	$196,420.00	$568,040.00
Per Unit		
$/Case	$98.21	$142.01
$/Gallon	$41.30	$59.72
$/750 ml	$8.18	$11.83

Table 3: Net Income Per Case (Accounting Standards)

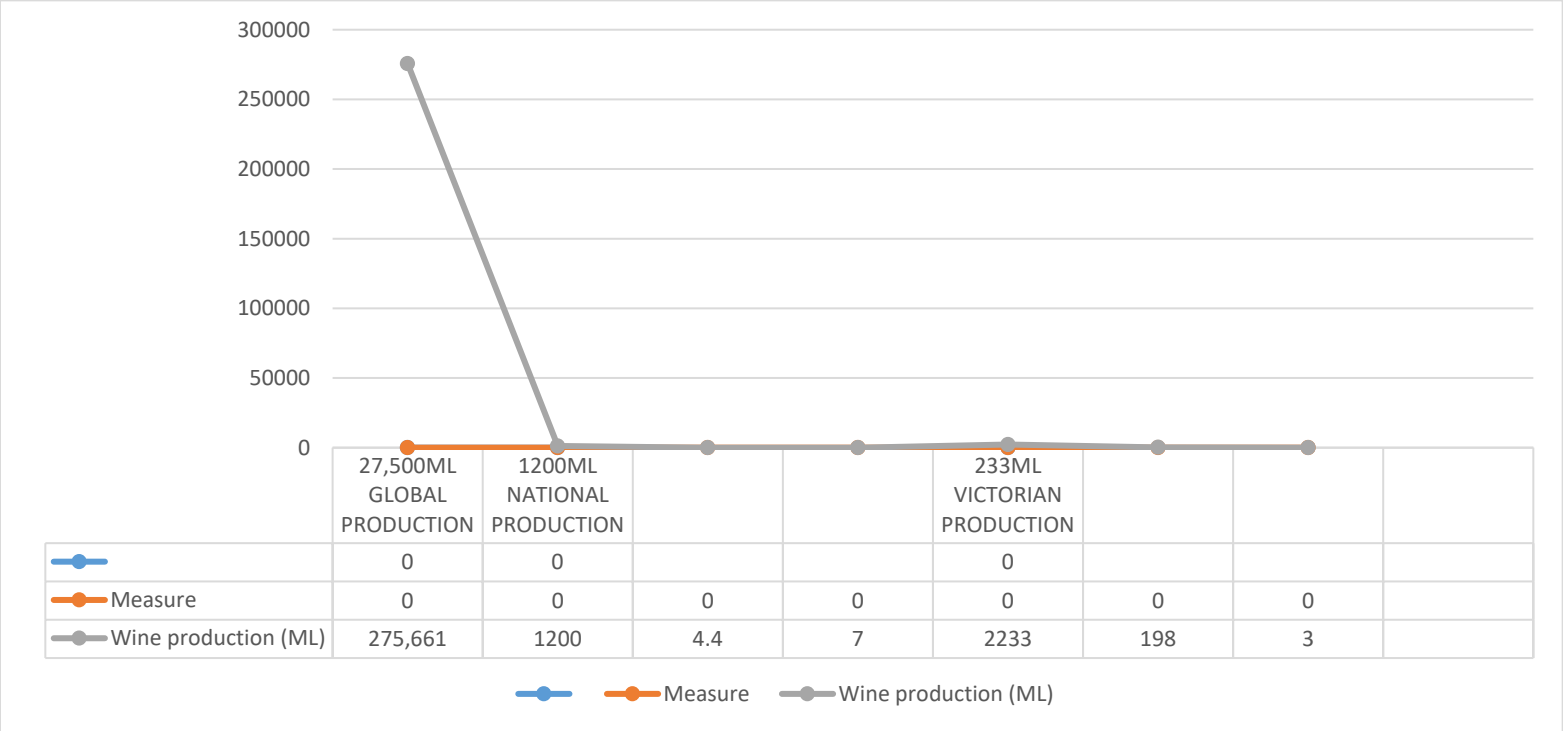
	2000	4000
80% sold	1600	3200
Average wine sale amount	17	21
Income($)	27200	27200
Income($)/Case	204	204
Expenses($)/Case	$98.21	$142.01
Net Income	**$105.79**	**$61.99**

Table 4: Depreciation Summary

	Grapevines planted prior to October 2004	**Grapevines planted after October 2004**
Rate of depreciation	25% per annum	13% per annum
Time period for write-off of establishment costs	4 years	8 years
Income year of first claim	Year when vines first used in the business	Year of first commercial season
Tax provision	Special provision for grapevines	Grapevines treated same as all horticultural plants

Appendix VI

Diagram 1 Number of farms and vine hectares from 1982 to 2010



Source: *Istat*, *Agricultural Census* 1982, 1990, 2000, 2010

Diagram 2: Questionnaire Circulated on Survey-Monkey (Screen view of survey)

Ethics approval was granted by William and Mary on 29/06/2015, Protocol ID: PHSC-2015-04-28-13388-sahinchliffe. Reciprocal approval was granted by Victoria University.

Screen 1

Background

The purpose of this survey is to identify the needs of wineries and vineyards in the wine industry in Virginia and Victoria. It forms part of a PhD Dissertation undertaken by Sarah Hinchliffe. This survey uses the Nicosia Model of consumer behaviour to examine the link between the effect of providing consumers with different information and their decision making. Click **here** to access further information about the Nicosia Model was provided.

Participation

Your participation is optional. You may opt-in to this survey in order to participate.

Time

It is estimated that this survey will take 10 minutes to complete. There are 27 questions, 19 of which are multiple choice and 8 of which invite your written response.

Opt in

Screen 2

Opt-in

By participating, I agree that all personal information will remain confidential and that all efforts will be made to ensure that I cannot be identified (except as might be required by law).

I agree that data gathered in this study is done with anonymously and securely, and may be used for future research.

Continue **Exit**

Screen 3 (Scroll down / up)

Continue

Q1 Where do you presently live?

(a) Virginia
(b) Other

Q2 How old are you?

(a) 21-25
(b) 26-35
(c) 36-45
(d) 46+

Q3 How often do you consume a glass of wine?

(a) More than once per week
(b) Once per week
(c) Once per month
(d) Rarely / special occasions only

Q4 What is the average price of a bottle of wine that you drink (USD)

(a) $5-$20
(b) $21-50
(c) $51-$100
(d) $101+

Q5 What influences your choice of wine more?

(a) Price
(b) Origin
(c) Name of Winery
(d) Brand Name of Wine

Q6 Would you prefer to buy a wine (similar price / variety) from France or Italy?

(a) France
(b) Italy

Q7 What influenced your choice in the previous questions (max 20 words)?

Q8 Would you prefer to buy a wine (similar price / variety) from France or Nappa Valley?

(a) France
(b) Nappa Valley

Q9 What influenced your choice in the previous questions (max 20 words)?

Q10 Would you prefer to buy a wine (similar price / variety) from Nappa Valley or Virginia?

(a) Nappa Valley
(b) Virginia

Q11 What influenced your choice in the previous questions (max 20 words)?

Q12 Would you prefer to buy a wine (similar price / variety) from Virginia or Victoria?

(a) Virginia
(b) Victoria (Australia)

Q13 What influenced your choice in the previous questions (max 20 words)?

Q14 Would you prefer to buy a wine (similar price / variety) from Australia or Europe?

(a) Australia
(b) Europe

Q15 What influenced your choice in the previous questions (max 20 words)?

Q16 Which would you purchase for a close friend that you would also consume?

(a) High quality wine at $120 per bottle
(b) Low quality wine at $15 per bottle
(c) A wine recommended by a shop assistant (with good knowledge of wine) costing $25
(d) A local wine that you have previously tried and didn't like (low quality) at $15 per bottle

Q17 What influenced your choice in the previous question?

(a) Price
(b) Quality
(c) That I have tried it before, even though it is low quality
(d) That a third party recommended it

Q18 Where did you purchase the most recent bottle of wine you consumed?

(a) Local grocery store
(b) Cellar door
(c) Wine/Spirit Store
(d) Other

Q19 Which do you associate?

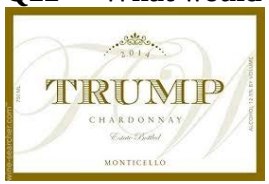
(a) High Quality = High Price
(b) Low Quality = Low Price

Q20 In the following picture of a label, what are you drawn to the most?

(a) Origin (Australia)
(b) Origin (Gippsland)
(c) Name of Winery
(d) Year of Vintage
(e) Brand Name of Wine
(f) Variety
(g) Red/White
(h) Alcohol Volume

Q21 What influenced your choice in the previous questions (max 20 words)?

Q22 What would influence your purchase of the following wine label, from the contents of the label?



(a) Origin (Country)
(b) Region
(c) Brand “TRUMP”
(d) Year of Vintage
(e) Alcohol Volume
(f) Variety
(g) Red/White

Q23 What influenced your choice in the previous questions (max 20 words)?

Q24 In the following picture of a label, what are you drawn to the most?

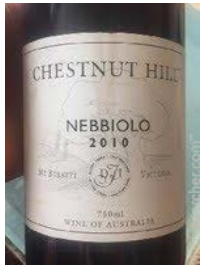
(a) Origin (Country)
(b) Region
(c) Name of Winery
(d) Year of Vintage
(e) Brand Name of Wine
(f) Variety
(g) Picture
(h) Alcohol Volume

Q25 What influenced your choice in the previous questions (max 20 words)?

Q26 What do you expect to see on a wine label of a wine that you have never heard of, that would influence your purchasing decision?

(a) Origin (Country)
(b) Region
(c) Name of Winery
(d) Year of Vintage
(e) Brand Name of Wine
(f) Variety
(g) Red/White
(h) Alcohol Volume

Q27 Consider the following label of a Victorian wine.



Which of the following would you select?

(a) I would pay $20 for a non-organic wine
(b) I would pay $25.00 if the label stated that it was an organic wine

SUBMIT

Screen 4

Thank you for participating in this survey!

Close

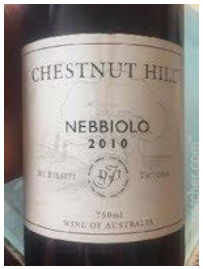
Table 2: Summary of Data Collected from Survey Participants

#	Question	(a)		(b)		(c)		(d)	
1	Where do you presently live?	**Virginia**	235	**Other**	1				
2	How old are you?	**21-25**	192	**26-35**	24	**36-45**	7	**46+**	13
3	How often do you consume a glass of wine?	**More than once per week**	25	**Once per week**	98	**Once per month**	75	**Rarely / special occasions only**	38
4	What is the average price of a bottle of wine you drink? (local currency USD)	**$5-$20**	185	**$21-$50**	44	**$51-$100**	7	**$101+**	0
5	What influences your choice of wine more?	**Price**	195	**Origin**	33	**Name of Winery**	5	**Brand Name of Wine**	3
6	Would you prefer to buy a wine (similar price / variety) from France or Italy?	**France**	201	**Italy**	35				
7	What influenced your choice in the previous question?	The most common answer was that there was a perception that "French wine were better". 4 participants that selected Italy, said that they were Italian or had an Italian heritage.							
8	Would you prefer to buy a wine (similar price / variety) from France or Nappa Valley?	**France**	190	**Nappa Valley**	46				
9	What influenced your choice in the previous question?	The most common answer was that there was a perception that "French wine were better", or that there is "greater choice" of wine in France.							
10	Would you prefer to buy a wine (similar price / variety) from Nappa Valley or Virginia?	**Nappa Valley**	210	**Virginia**	26				
11	What influenced your choice in the previous question?	Most answers said that they knew the Nappa Valley. Those that selected Virginia commented that it was 'local' and that they wanted to support local. Of those that selected Virginia, 20 either grew up or live in Virginia.							
12	Would you prefer to buy a wine (similar price / variety) from Virginia or Victoria?	**Virginia**	196	**Victoria**	40				
13	What influenced your choice in the previous question?	Strong correlation between where a person was from, and where the wine was generally from.							

14	Would you prefer to buy a wine (similar price / variety) from Australia or Europe?	**Australia**	109	**Europe**	127				
15	What influenced your choice in the previous question?	Common answers included: knowledge of wine industry in Australia; and that wine available from Australia was cheaper and "tasted good". Those that selected Europe, mentioned either: greater choice, that there was an assumption of better quality wine for the price, or that there was an assumption about "greater choice".							
16	Which would you purchase for a close friend that you would also consume?	**High quality wine at $120 per bottle**	109	**Low quality wine at $15 per bottle**	106	**A wine recommended by a shop assistant (with good knowledge of wine) costing $25**	18	**A local wine that you have previously tried and didn't like (low quality) at $15 per bottle**	3
17	What influenced your choice in the previous question?	**Price**	116	**Quality**	37	**That I have tried it before, even though it is low quality**	63	**That a third party recommended it**	20
18	Where did you purchase the most recent bottle of wine you consumed?	**Local grocery store**	68	**Cellar door**	12	**Wine/Spirit Store**	154	**Other**	2
19	Which do you associate?	**High Quality = High Price**	203	**Low Quality = Low Price**	33				
#	**Question**	**(a)**	**(b)**	**(c)**	**(d)**	**(e)**	**(f)**	**(g)**	**(h)**
20	In the following picture of a label, what are you drawn to the most?	**Origin (Australia)** 45	**Origin (Gippsland)** 3	**Name of Winery** 31	**Year of Vintage** 4	**Brand Name of Wine** 87	**Variety** 8	**Red/White** 58	**Alcohol Volume**

									
21	What influenced your choice in the previous question?	The label was plain; The label was clear and so looking for the origin was appealing.							
22	What would influence your purchase of the following wine label, from the contents of the label? 	**Origin (Country)** 3	**Region** 76	**Brand "TRUMP"** 123	**Year of Vintage** 2	**Alcohol Volume**	**Variety** 9	**Red/White** 23	
23	What influenced your choice in the previous question?	There was a strong correlation between the political climate and the brand, Trump, indicating a positive connection between marketing or media and consumer preference.							
24	In the following picture of a label, what are you drawn to the most? 	**Origin (Country)** **16**	**Region** **17**	**Name of Winery** **11**	**Year of Vintage** **2**	**Brand Name of Wine** **34**	**Variety** **56**	**Picture** **96**	**Alcohol Volume 4**

25	What influenced your choice in the previous question?	Toscana was aesthetically pleasing. Some people said that, since they did not understand Italian and were not 'wine experts', they did not know the difference between the name of the winery and name of the wine itself, which influenced their decision. 4 participants said that because they did not know where Toscana was in Italy, or whether 2004 was a good Vintage year, they did not select Vintage year. Whereas, Vintage year is often a contributory factor to their wine purchase decision.							
26	What do you expect to see on a wine label of a wine that you have never heard of, that would influence your purchasing decision?	**Origin (Country)** **189**	**Region**	**Name of Winery** **14**	**Year of Vintage** **1**	**Style of Wine** **11**	**Variety** **2**	**Red/White** **20**	**Alcohol Volume** **0**

27	Consider the following label of a Victorian wine.  Which of the following would you select?	**I would pay $20 for a non-organic wine** 66	**I would pay $25.00 if the label stated that it was an organic wine** 170

Ethics approval was granted by William and Mary on 29/06/2015, Protocol ID: PHSC-2015-04-28-13388-sahinchliffe. Reciprocal approval was granted by Victoria University.

Diagram 3: Ethics Approval

Protocol Details

88-sahinchliffe

Basic Info

Protocol ID:	PHSC-2015-04-28-13388-sahinchliffe
Protocol Title:	Wine Law Industry Research
Overall Status:	approved
Protocol Timeline:	Year 1 of 1
Committee(s):	PHSC
Campus:	Main
CC Email Addresses:	sahinchliffe@wm.edu

Comments

Actions

Status Info

Submitted:	2015-04-28 07:56:14 by sahinchliffe
Overall Status:	**approved** since 2015-06-29
PHSC Status:	**approved** since 2015-06-29

Date Info

Upload additional files - browse for a file then choose any save option below to upload it.	

▼PHSC-Protocol Description

CONTINUING PROTOCOL-If this is an annual renewal of a previously approved protocol, please indicate here that either (1) the new protocol is identical to the previously approved protocol (other than dates), or (2) briefly summarize any differences between the previously approved and present protocol.	NA
Participants - Describe how/where subjects will be recruited, how many will participate in research, and their general characteristics such as age and gender. When appropriate, describe unique characteristics required for subjects' participation in study.	Participants will be adult students and faculty in the Mason School of Business. An anonymous survey (compiled on Survey Monkey) will be distributed to a general faculty and student list. Participation will be optional. Owners or managers of wineries and vineyards in Virginia, and Victoria (Australia) may also be contacted to participate, initially via email. An interview, with those that opt-in, will then subsequently be conducted over the phone or in person. Surveys and possible interviews with participants.
Methods - Describe methods used to collect and analyze your data.*	
Brief Rationale - Within context of literature, explain why this work is important.	To identify the needs of wineries and vineyards in the wine industry in Virginia and Victoria.
Privacy and Confidentiality - Include any statements necessary about protecting the privacy or confidentiality of collected data. 'Anonymous' is used when subjects' identities are not known. 'Confidential' is used if even indirectly - i.e. coding system - it is possible to connect a subject's responses/data to his/her true identity. If confidentiality is used, proper security must be assured by keeping code key under 'lock and key' conditions with only the investigator having access to that key.	I understand that all personal information will remain confidential and that all efforts will be made to ensure I cannot be identified (except as might be required by law) I agree that data gathered in this study may be stored anonymously and securely, and may be used for future research
Results - Explain how subjects will be apprised of outcome.	Results will be presented at in a PhD dissertation. Results are normally presented in terms of groups of individuals. If any individual data are presented, the data will be totally anonymous, without any means of identifying the individuals involved.
Consent Form - Include the text of the form to be used in obtaining informed consent. In certain circumstances, where the signed informed consent form could link subjects to the data, the investigator may request waiving the requirement to obtain signed informed consent. If requesting such a waiver, please include justification. The investigator must still obtain informed consent, even if only verbally, after explaining to the subject the purpose of the research, procedures to be used, and subject's rights.	I confirm that I have read and understand the Participant Information Sheet I have had the opportunity to ask questions and had them answered I understand that all personal information will remain confidential and that all efforts will be made to ensure I cannot be identified (except as might be required by law) I agree that data gathered in this study may be stored anonymously and securely, and may be used for future research I understand that my participation is voluntary and that I am free to withdraw at any time without giving a reason. I agree to take part in this study
Will this project be subject to an Inter-	NA

institutional Authorization Agreement?	

PHSC-Personnel Qualification

List personnel who will be performing the proposed procedures/research and indicate the training and number of years of experience of each person performing the procedures proposed. Personnel who will be collecting or potentially coming in contact with human tissues or fluids (e.g. blood or saliva collection), must be trained and ALSO obtain approval from the Institutional Biohazard Committee (IBC) by completing and submitting the IBC HUMAN TISSUE/FLUID REGISTRATION FORM. This form must be updated and resubmitted if any personnel changes occur.*	NA
Upload CITI (Collaborative Institutional Training Initiative, https://www.citiprogram.org/) training certificate(s) of completion for all personnel working under this protocol. The uploaded document must be PDF.*	citiCompletionReport7829024.pdf

PHSC-General Registration Information

Your William and Mary role:*	Faculty
Is this activity externally funded?*	Yes
Name of agency funding this project	Self

PHSC-General Protocol Information

Will the participants be from a William and Mary course?	Yes
If No, they will be from:	students and faculty (Mason School of Business) and vineyards/wineries
Will the participants be under 18 years old?	No
Can proper informed consent be obtained in advance of research?	Yes

Does this study involve any procedures likely to produce psychological or physical stress (e.g., failure, anxiety, pain, invasion of privacy, etc.)?	No
Is deception (active misleading) involved in the study?	No
Will subjects be informed that they may terminate participation at any time without penalty?	Yes

Must this form be reviewed by other institutions?	No
If Yes, please list each institution below, and indicate approval status. When this is approved by the other institution(s), please append a copy of the IRB approval(s) to this protocol for record retention/documentation purposes.	

▼PHSC-IAA: Inter-institutional Authorization Agreement

Name the agency you wish to enter in to an IAA with and the appropriate personnel to contact.	NA
Is this project externally funded? If so, please enter the agency name and index number for the grant associated with this project.	Self - NA

Appendix VII

Figure 1 Model Normative Approach to an Optimum Wine Regulatory Framework

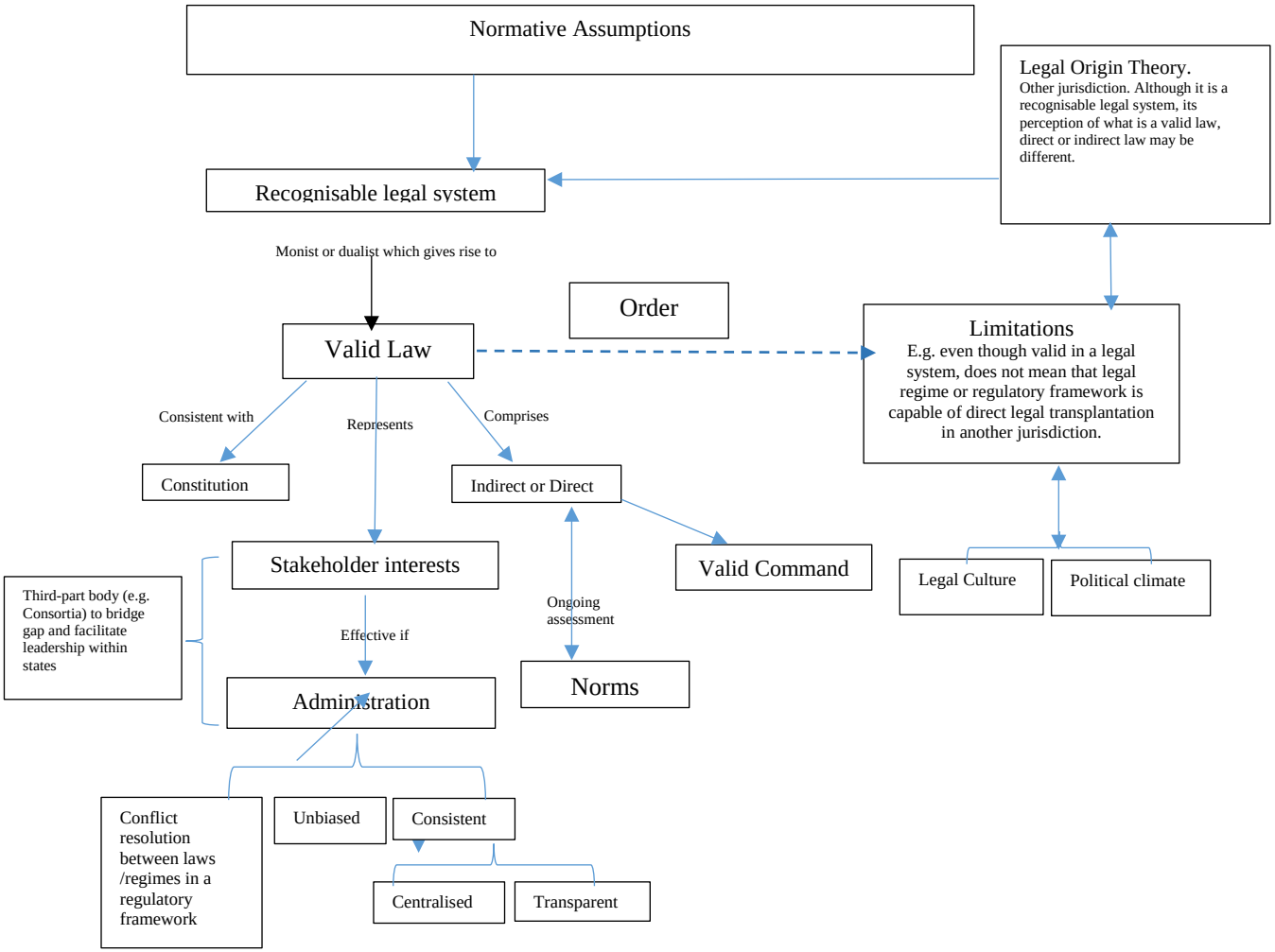


Figure 2 Model of Regulatory and administrative dimensions of an optimum wine regulatory framework for Virginia

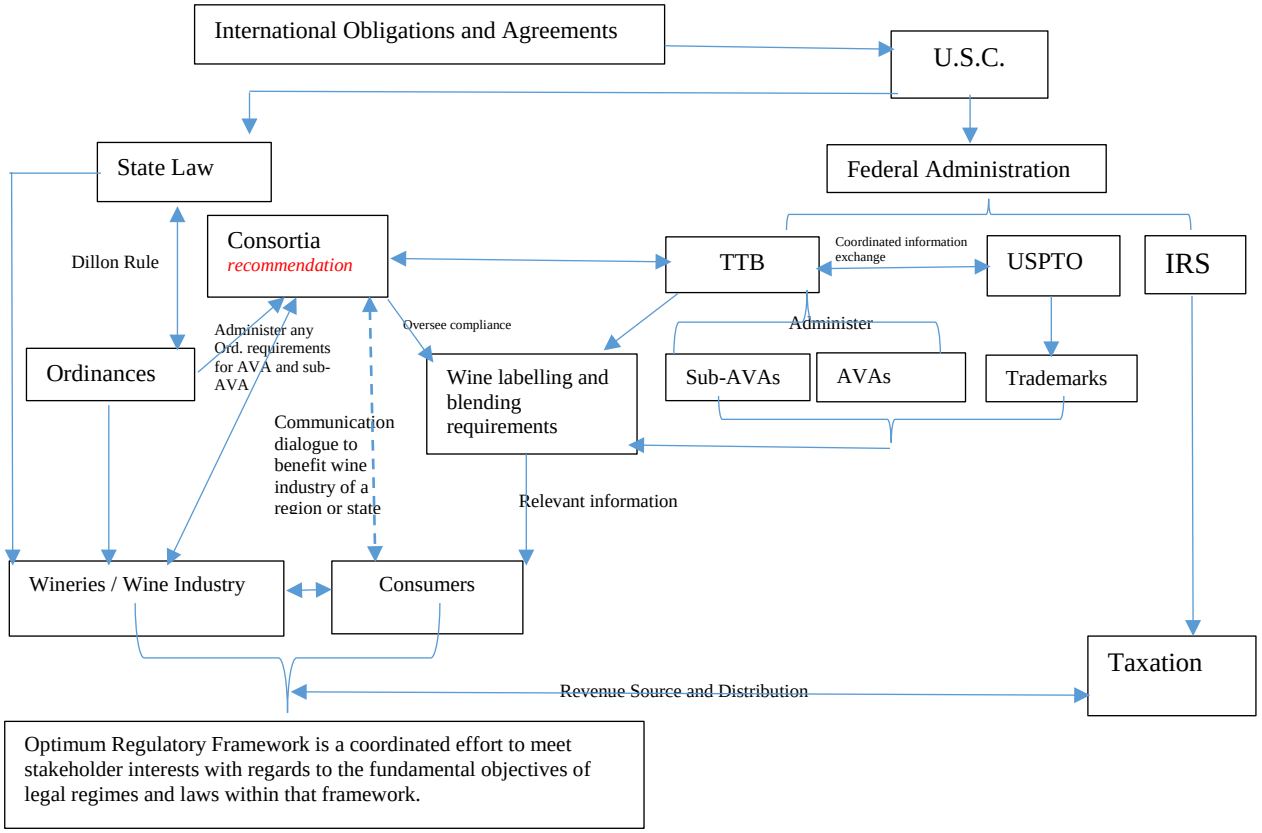


Figure 3 Model of Regulatory and administrative dimensions of an optimum wine regulatory framework for Victoria.

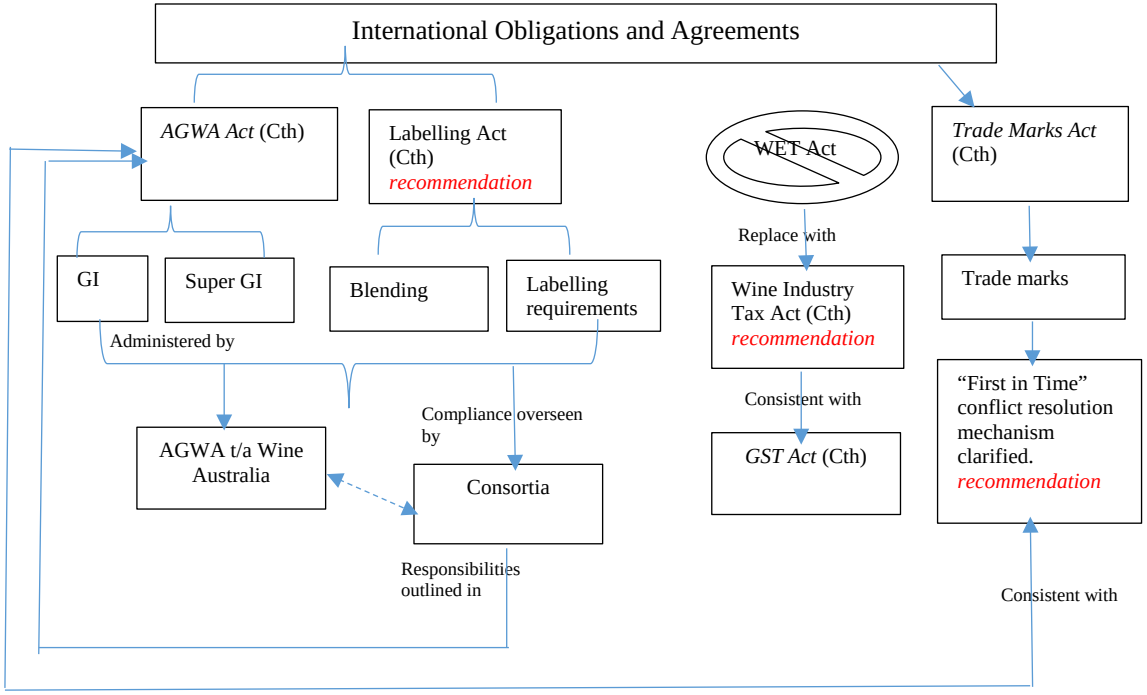


Figure 4 Model Blending rules for Victoria

Level 1 – Super-GI

- *If a grape variety is stated on the label of a super-GI wine, then 100% of the wine must consist of grapes from a super-GI.*
- *The wine label must carry a vintage. 90% of the grapes must be grown during the stated year. The remaining grapes used from prior vintages must adhere to Level 1 requirements.*
- *When blending grapes for a super-GI wine, not more than four grapes make up at least 100% of the wine from that super-GI region.*

Level 2 – Standard GI

- *If a grape variety is stated on the label for other than a super-GI wine, 85% of the wine must consist of grapes from the GI region.*
- *The wine label must carry a vintage. 90% of the grapes must be grown during the stated year. The remaining grapes used from prior vintages must adhere to Level 2 requirements.*
- *When blending grapes other than for a super-GI wine, if two or three grapes make up at least 85% of the wine, each of the grapes that make up 20% or more of the wine must be. If four or five grape varieties are used, and each makes up at least 5% of the wine, each of these grapes must be stated. In addition, the grapes must be stated in the order of importance, such as Cabernet-Merlot when the wine contains more Cabernet Sauvignon than Merlot.*

Level 3 – Clean-skin or "Made in Victoria" wine

- *100% of the grapes must be sourced from a state.*
- *Of those grapes sourced, not more than five grapes varieties can be used, and must be specified in their respective proportions on a wine label.*
- *If a vintage is stated on the label, 80% of the wine must come from that vintage.*

Figure 5 Model Blending rules for Virginia

Level 1 – sub-AVAs

- *If a wine label carries the name of a sub-AVA, 90% of the grapes must only come from that sub-AVA.*
- *The wine label must carry a vintage. 80% of the grapes must be grown during the stated year. The remaining grapes used from prior vintages must adhere to Level 1 requirements.*
- *When a wine label carries the name of a grape variety, the wine must be made from at least 75% of that grape variety.*

Level 2 – AVAs

- *If a wine label carries the name of an AVA, 85% of the grapes must come from that AVA. Not more than 25% of those grapes may come from an adjoining AVA, if it is commercially required by a wine firm.*
- *If a wine label carries the name of a state, 75% of the grapes must come from that state, unless more is required under state law in which case the greater shall prevail.*
- *The wine label must carry a vintage. 80% of the grapes must be grown during the stated year. The remaining grapes used from prior vintages must adhere to Level 2 requirements.*
- *When a wine label carries the name of a grape variety, the wine must be made from at least 75% of that grape variety.*

Figure 6 Model Wine label (Level 1 – sub-AVA)

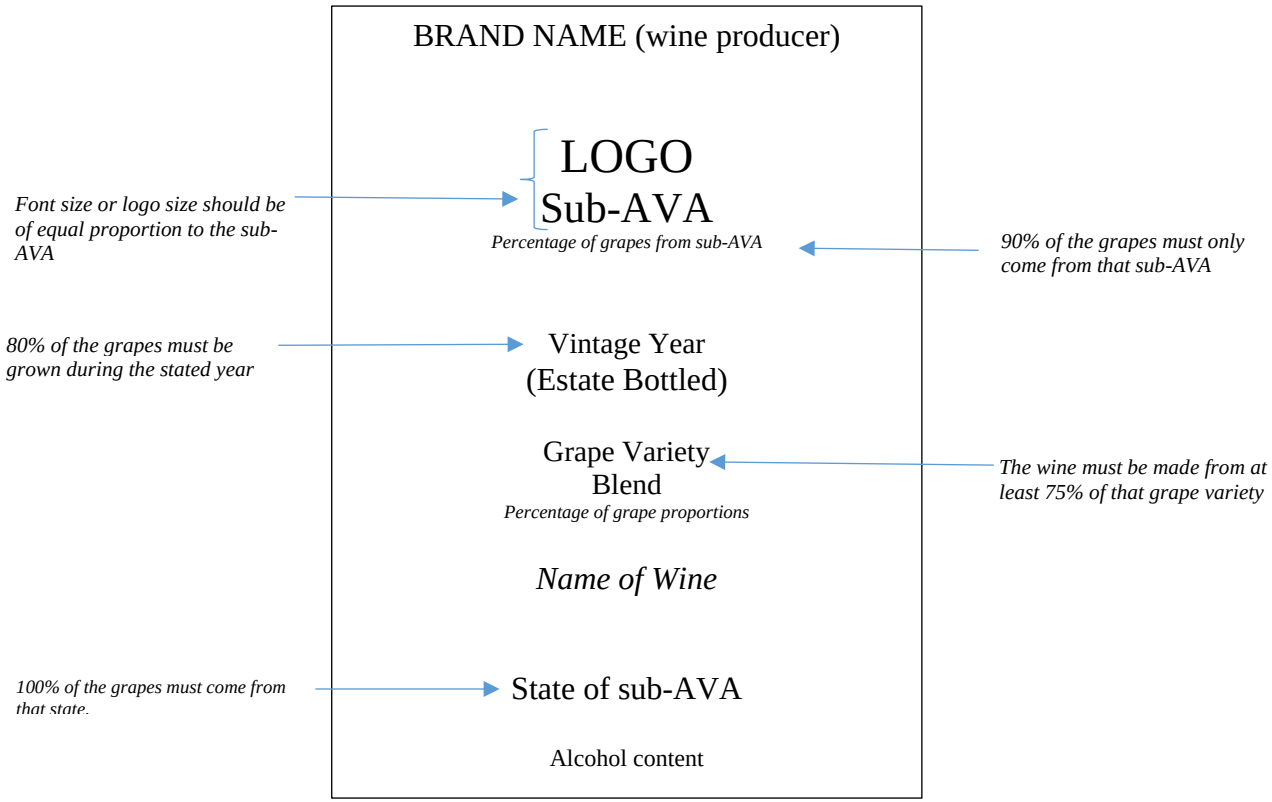


Figure 7 Model Wine label (Level 2 – AVA)

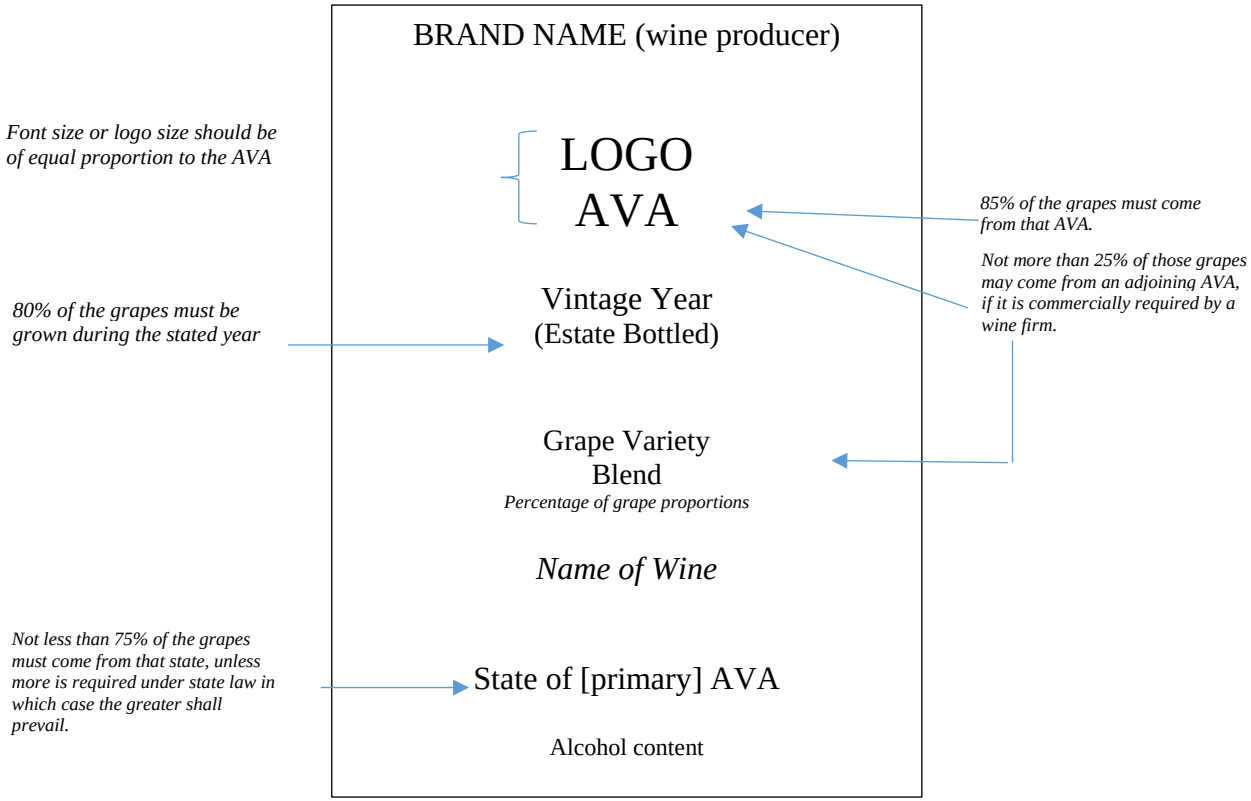


Figure 8 Model Wine label (Level 1 – super-GI)

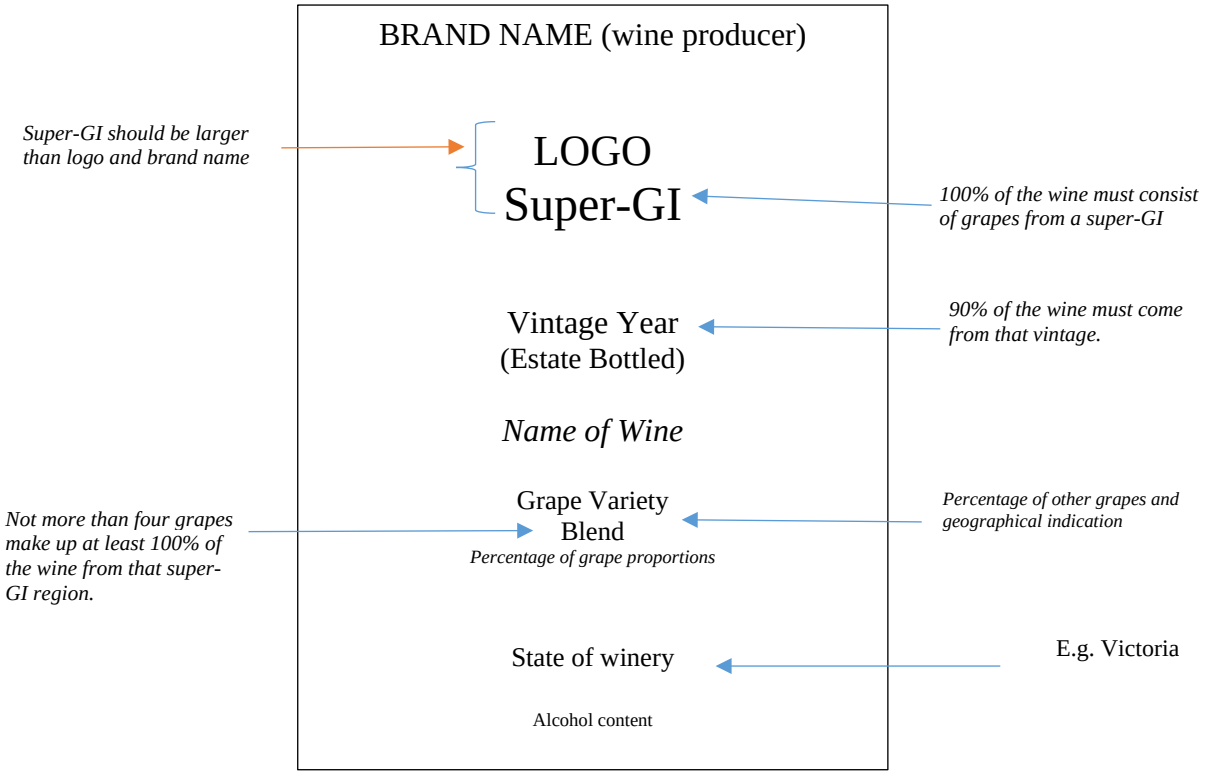


Figure 9 Model Wine label (Level 2 – use of a standard GI)

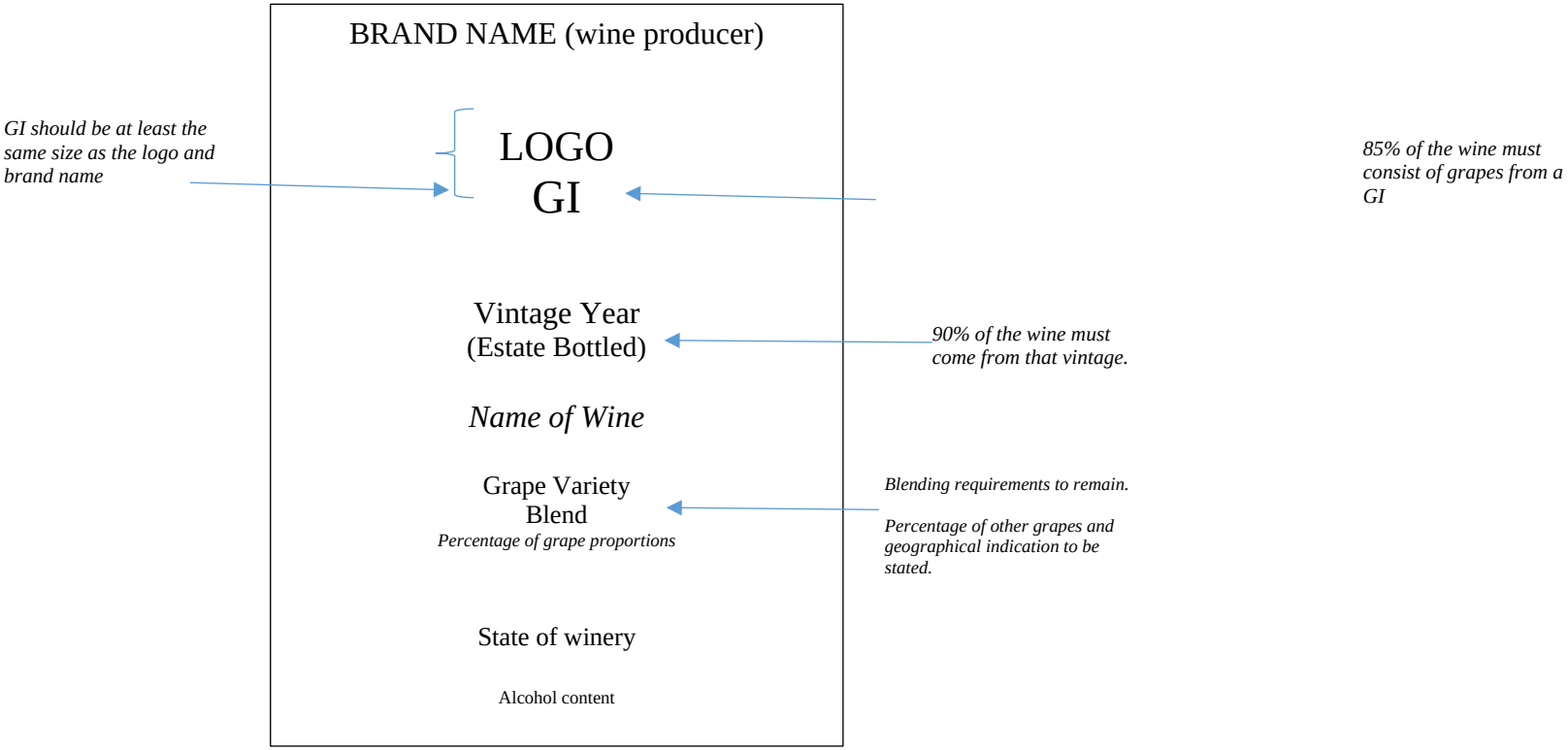
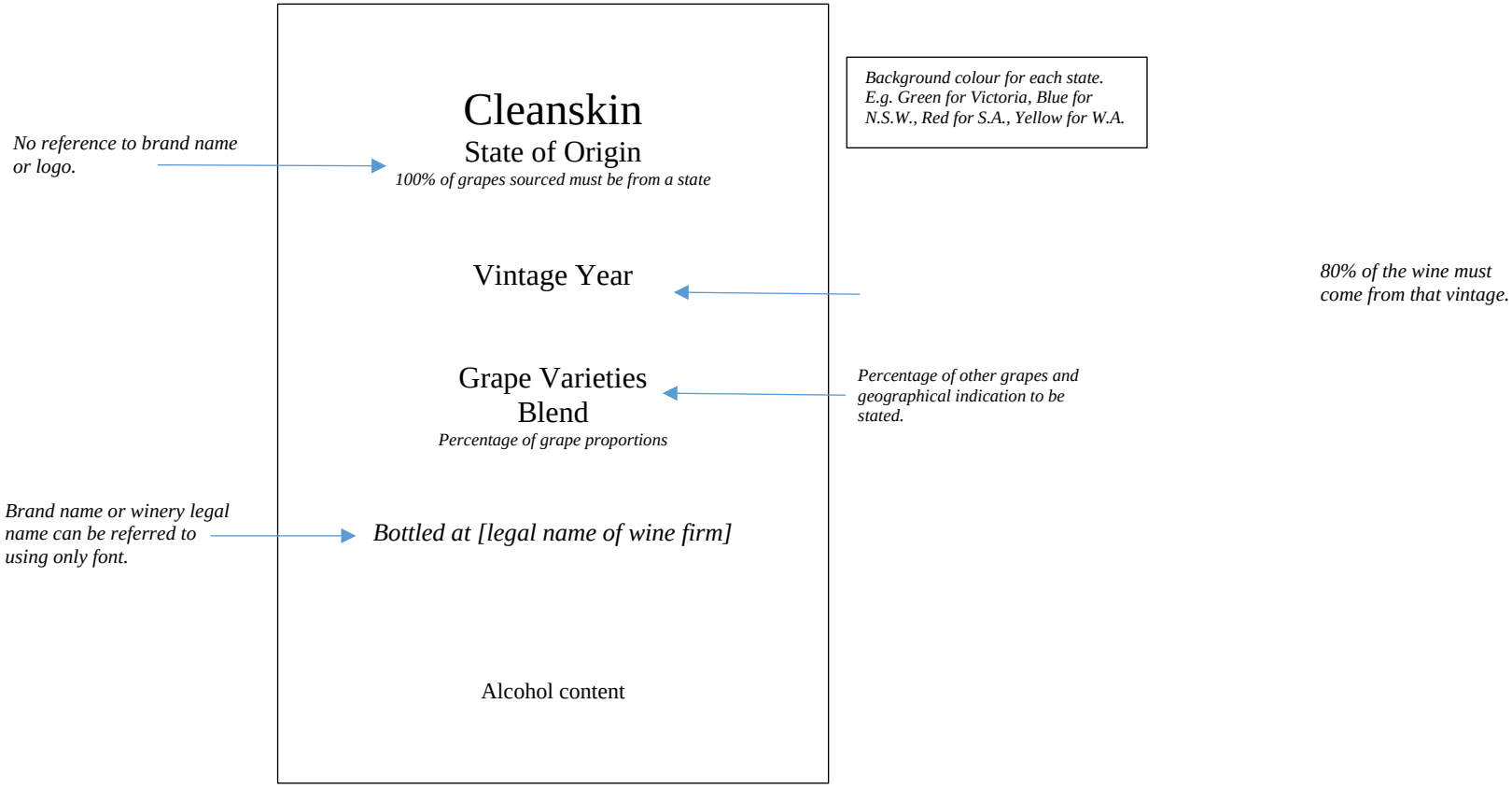


Figure 10 Model Wine label (Level 3 – clean-skin or reference to 'Made in Victoria' wine)



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