

**Re King Valley VIGNERONS INC and GEOGRAPHICAL INDICATIONS COMMITTEE (V2004/1376)**

**Re BAXENDALES VINEYARDS PTY LTD and Others and GEOGRAPHICAL INDICATIONS COMMITTEE and Party Joined (S2004/429)**

ADMINISTRATIVE APPEALS TRIBUNAL

PRESIDENT DOWNES J

19–21, 26–28 April, 1–5 May, 6 September, 18 October 2006 — Sydney

[2006] AATA 885

**Primary industry — Viticulture — Wine industry — Identification of area comprising “King Valley” region — Whether one region or two — Determination of boundaries — (CTH) Australian Wine and Brandy Corporation Act 1980 ss 3, 4, 40A, 40P, 40Q, 40T, 40V, 40W, 40Y — (CTH) Australian Wine and Brandy Corporation Regulations 1981 regs 23, 24, 25.**

The respondent, Geographical Indications Committee, had determined the boundaries of the geographical indication “King Valley” pursuant to s 40T of the Australian Wine and Brandy Corporation Act 1980 (Cth). There were two applications for review before the tribunal: one brought by King Valley Vignerons Inc, a cooperative of vineyard owners, proposing one region to be called King Valley, and the other by a group of vineyard owners in the proposed Whitlands High Plateau region, proposing two regions. The issues before the tribunal were whether there should be one region or two regions for the area and issues relating to boundaries.

**Held**, in determining that there should be one region for the area called “King Valley”:

(i) Each criterion set out in reg 25 of the Australian Wine and Brandy Corporation Regulations 1981 (Cth) for determining geographical indications had to be addressed.

(ii) The phrase “grape growing attributes” in reg 24 was to be given its ordinary meaning and not be restricted to the matters listed in reg 25(i).

(iii) Regulation 25(a), whether the area falls within the definition of a subregion, region, zone or other area, stated a necessary but not a sufficient condition precedent for classification. The other criteria in reg 25 were more associated with discretionary considerations as to whether an area which satisfied the condition precedent should be classified.

(iv) The definitions of “region” and “subregion” in reg 24 contemplated degrees of discreteness and homogeneity. All the competing areas satisfied the minimum requirements of reg 24. Although there was greater homogeneity in the plateau and ridges than in the whole valley, that did not deprive the whole valley from qualification as a region.

(v) Each of the criteria not associated with viticulture or wine-making point to the wider King Valley being classified as a region. In addition, although there were differences in the grapes grown, in growing techniques, in climate and in soils between the two areas, when giving these matters full weight and incorporating them with the other criteria, the King Valley and the Whitlands High Plateaux areas were not separate regions.

(vi) In determining the boundaries of the region it was inappropriate to include land on which wine grapes would not be grown, and to exclude land on which wine grapes might be grown in the future. The boundaries should not follow the boundaries of state forests or national parks.

(vii) Decision under review set aside.

*L De Ferrari* instructed by *Jeff Francis*, Business and Property Lawyer, for the applicant (V2004/1376).

*D Agresta* instructed by *Iles Selley Lawyers* for the applicant (S2004/429).

*G Gretsas* instructed by *Gretsas & Associates* for the respondent.

**President Downes J.**

**The issue: to determine a wine region or regions near the King River in Northern Victoria**

[1] The King River rises in the Victorian Alps which are part of Australia's Great Dividing Range. Its source is near Mt Howitt in the Thorn Range, a watershed between the King River and the Howqua River. The Victorian snowfields are nearby. The peak of Mt Howitt is 1742 m. The King River first flows through steep country then gentler ridges and plateaux and finally a flat plain before entering the Ovens River shortly before it joins the Murray River. It is accordingly part of Australia's largest river system. The river is dammed at Lake William Hovell to enable its flow to be regulated. By world standards the King River is not a long river. It travels some 90 km north from its source to its confluence with the Ovens River.

[2] Throughout the lower part of the King Valley (from nearly 1000 m above sea level to its lowest point at about 150 m) a major agricultural pursuit is wine grape growing. Vineyards are planted side by side with farms growing tobacco and hops but grape production appears now to be the leading agricultural pursuit. Wine grapes were first grown in the valley well over a century ago but there has been substantial growth in the area in the last three decades.

[3] The task of the tribunal is to identify a wine region or regions for the area and to name them. Broad though the tribunal's task is, it has been made somewhat easier by having interested parties presenting it with alternatives supported by evidence and by having assistance from the Geographical Indications Committee which has statutory authority to define and name wine regions in Australia. It is an original determination by this committee which is being reviewed by the tribunal.

**The dispute: one region or two?**

[4] Two broad issues have emerged. The first is whether there should be one region for the whole valley or whether there should be two regions. There is no dispute that there should be a region called the King Valley. However, one interested group submits that an area including the highest country in which grapes are grown should be a separate region called the Whitlands High Plateaux. A second issue arises as to whether any separate plateaux region should include two ridges to the north of the main plateau. I must decide a number of other issues relating to boundaries. The number of matters to be taken into account in determining the major issues should not be underestimated. However, the broad issues that I have outlined are the major matters for my consideration.

**The determination: one region called the King Valley**

[5] I have decided that there should be one region for the area. It will be called the King Valley. There is a strong case for an area of higher country associated with the Whitlands area being made a subregion but that matter is not before me for consideration. The Geographical Indications Committee must now determine claims for subregions.

### The parties

[6] There are two applications before the tribunal. One application was made by a group led by Dr William Hardie and Mr James Baxendale. They propound the two regions. They own vineyards in the proposed Whitlands High Plateaux region. They are supported by some other vineyard owners in the area. 5

[7] The other application was made by a cooperative called King Valley Vignerons Inc. It used to be called King Valley Grapegrowers Association. Its members include vineyard owners from throughout the area including owners from the proposed Whitlands High Plateaux region. King Valley Vignerons propose one region to be called the King Valley. 10

[8] The respondent to both applications is the Geographical Indications Committee.

### The Australia/European community wine agreement

[9] In *Comité Interprofessionel du Vin de Champagne v NL Burton Pty Ltd* (1981) 38 ALR 664, champagne manufacturers failed to secure an injunction restraining the use of the word “champagne” in Australia to describe sparkling wine not associated with the champagne region of France. This was largely because there was no reputation in Australia sufficiently associating sparkling wine called champagne with the champagne region of France. 15 20

[10] In the 1980s, Australian wine exports, including exports to Europe, were increasing. The Chernobyl disaster of 1986 gave this trade a boost. However, the traditional use of European, particularly French, wine descriptions such as Champagne, Bordeaux (or Claret) and Bourgogne (or Burgundy) on Australian wine labels inhibited exports to places where these names could not be used. 25

[11] These imperatives led to discussions between Australia and the European Union relating to a possible agreement on trade in wine. An agreement was made in January 1994. It was styled “Agreement between Australia and the European Community on Trade in Wine, and Protocol”, 26–31 January 1994, [1994] ATS 6 (entered into force 1 March 1994). The agreement prohibits the use of French names in Australia. It provides for Australian “geographical indications and traditional expressions” referred to in Annex II to the agreement, to be protected from misuse in the European Community. Annex II identifies “South-Eastern Australia or one of the following names of States/Territories, zones, regions or sub-regions of wine-producing areas”. The places identified include, relevantly, the state of Victoria, the zone of North East Victoria, the region King Valley and the following subregions: 30 35

Cheshunt

Edi

Hurdle Creek

Markwood

Meadow Creek

Milawa

Myrree

Oxley

Whitfield

Whitland

The North East Victoria Zone also includes the region of Ovens Valley with the following subregions: 40 45 50

Beechworth  
Buffalo River Valley  
Buckland River Valley  
Mount Beauty  
Porpunkah

**The legislation: Australian Wine and Brandy Corporation Act 1980 (Cth)**

[12] In anticipation of the making of the agreement with the European Community the parliament passed amendments to the Australian Wine and Brandy Corporation Act 1980 (Cth). The Act, as amended, recognised the agreement generically. For example, the following object was added to the objects section (s 3):

- (e) to enable Australia to fulfil its obligations under prescribed wine-trading agreements ...

The phrase “prescribed wine-trading agreements” was defined to include “an agreement relating to trade in wine” with the European Community: s 4.

[13] The amendments inserted a new part in the Act (Pt VIB) entitled “Protection of Certain Names and Expressions”. Section 40A in the new Part is as follows:

*40A Object of Part*

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
- (b) for certain other purposes for which the Parliament has power to make laws; and this Part is to be interpreted and administered accordingly.

[14] Part VIB establishes a regime for the determination of “geographical indications for wine” (s 40P). “[G]eographical indication’, in relation to wine” is defined in s 4 to mean:

- (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 or expression.

Neither “region” nor “locality” are expressly defined in the Act.

[15] A Geographical Indications Committee is established by Pt VIB. Its primary functions are (s 40P(1)):

- (a) to deal with applications for the determination of geographical indications for wine in relation to regions and localities in Australia (*Australian GIs*) in accordance with this Part; and
- (b) to make determinations of Australian GIs in accordance with this Part.

The Committee can determine geographical indications on its own initiative as well as in response to an application: s 40Q. The Committee consists of three members: a presiding member appointed by the Australian Wine and Brandy Corporation and two members appointed on the nomination of a winemakers’ organisation and a wine grape growers’ organisation (s 2 of the Schedule to the Act).

[16] The way in which the Committee is to go about its tasks is prescribed by a number of sections of the Act. Section 40T(1), relating to the making of determinations, is among the most important:

40T *Making of determinations*

- (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 word or expression to be used to indicate that area or those areas. 5
- (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.

[17] Amendments to the Australian Wine and Brandy Corporation Regulations 1981 (Cth) (Pt 5) prescribe criteria. The relevant provisions are as follows: 10

*Part 5 Criteria for determining geographical indications*

23 *Determining geographical indications*

For the purpose of making determinations under section 40T of the Act, the Geographical Indications Committee is to have regard to the criteria set out in this Part. 15

24 *Interpretation*

In this Part:

“*region*” means an area of land that:

- (a) may comprise one or more subregions; and
- (b) is a single tract of land that is discrete and homogeneous in its grape growing attributes to a degree that:
  - (i) is measurable; and 20
  - (ii) is less substantial than in a subregion; and
- (c) usually produces at least 500 tonnes of wine grapes in a year; and
- (d) comprises at least 5 wine grape vineyards of at least 5 hectares each that do not have any common ownership, whether or not it also comprises 1 or more vineyards of less than 5 hectares; and 25
- (e) may reasonably be regarded as a region.

“*subregion*” means an area of land that:

- (a) is part of a region; and
- (b) is a single tract of land that is discrete and homogeneous in its grape growing attributes to a degree that is substantial; and 30
- (c) usually produces at least 500 tonnes of wine grapes in a year; and
- (d) comprises at least 5 wine grape vineyards of at least 5 hectares each that do not have any common ownership, whether or not it also comprises 1 or more vineyards of less than 5 hectares; and
- (e) may reasonably be regarded as a subregion. 35

“*wine grape vineyard*” means a single parcel of land that:

- (a) is planted with wine grapes; and
- (b) is operated as a single entity by:
  - (i) the owner; or
  - (ii) a manager on behalf of the owner or a lessee, irrespective of the number of lessees. 40

“*zone*” means an area of land that:

- (a) may comprise one or more regions; or
- (b) may reasonably be regarded as a zone.

25 *Criteria for determining geographical indications*

For the purposes of subsection 40T (2) of the Act, the Committee is to have regard to the following criteria: 45

- (a) whether the area falls within the definition of a subregion, a region, a zone or any other area;
- (b) the history of the founding and development of the area, ascertained from local government records, newspaper archives, books, maps or other relevant material; 50

- (c) the existence in relation to the area of natural features, including rivers, contour lines and other topographical features;
- (d) the existence in relation to the area of constructed features, including roads, railways, towns and buildings;
- (e) the boundary of the area suggested in the application to the Committee under section 40R;
- (f) ordinance survey map grid references in relation to the area;
- (g) local government boundary maps in relation to the area;
- (h) the existence in relation to the area of a word or expression to indicate that area, including:
  - (i) any history relating to the word or expression; and
  - (ii) whether, and to what extent, the word or expression is known to wine retailers beyond the boundaries of the area; and
  - (iii) whether, and to what extent, the word or expression has been traditionally used in the area or elsewhere; and
  - (iv) the appropriateness of the word or expression;
- (i) the degree of discreteness and homogeneity of the proposed geographical indication in respect of the following attributes:
  - (i) the geological formation of the area;
  - (ii) the degree to which the climate of the area is uniform, having regard to the temperature, atmospheric pressure, humidity, rainfall, number of hours of sunshine and any other weather conditions experienced in the area throughout the year;
  - (iii) whether the date on which harvesting a particular variety of wine grapes is expected to begin in the area is the same as the date on which harvesting grapes of the same variety is expected to begin in neighbouring areas;
  - (iv) whether part or all of the area is within a natural drainage basin;
  - (v) the availability of water from an irrigation scheme;
  - (vi) the elevation of the area;
  - (vii) any plans for the development of the area proposed by Commonwealth, State or municipal authorities;
  - (viii) any relevant traditional divisions within the area;
  - (ix) the history of grape and wine production in the area.

*Note* In determining a geographical indication under subsection 40Q(1) of the Act, the Committee is not prohibited under the Act from having regard to any other relevant matters.

[18] Under the Act, the Committee is required to make an interim determination, to publish the terms of the determination and to invite submissions relating to the determination: s 40V. A final determination is then to be made after considering any submissions: s 40W. Application may be made to the Administrative Appeals Tribunal for review of a final determination: s 40Y.

### **Topography**

[19] The King River flows in a northerly direction although slightly west of north. Its confluence with the Ovens River is near the city of Wangaratta.

[20] Travelling south from Wangaratta the first vineyards are encountered near Milawa to the south of the Ovens River which flows north westerly to its confluence with the King River. The land is very flat. The elevation is about 150 m above sea level. The road south follows the King River slightly to its west and accordingly is located in the lowest part of the valley. Vineyards have been established right through this flat area.

[21] The first grape growing in the area was commenced near Milawa in the mid-nineteenth century. The Brown family were the pioneers. Brown Brothers is today the largest grape grower and wine maker in the area. Its wine-making operations are centred at Milawa.

[22] As one drives south the foothills of the Victorian Alps emerge. Mount Buffalo is to the south east. The foothills of the Alps are immediately to the east as one approaches Moyhu about 25 km to the south of Wangaratta. At this point the elevation of the King River is about 180 m. The road now passes between foothills to the east and two ridges to the west. These ridges, running roughly north-south and beside one another, will assume some importance. The nearest to the King River is called Bald Hill and the furthest is called Mount Bellevue. There is a valley between the ridges through which the Bogy Creek runs. It joins the King River north of Moyhu. 5 10

[23] The two ridges ultimately merge in a plateau called the Tolmie Plateau or the Whitlands Plateau which also assumes importance in this matter. I will refer to the larger plateau extending south as the Tolmie Plateau and to a smaller area, which was the subject of much evidence in this case, as the Whitlands Plateau. The larger area includes land south-east and south-west of Archerton and south of Toombullup. 15 20

[24] The Bogy Creek Valley rises from about 200 m at the northern end of the ridges to about 400 m at the point where the ridges join the Whitlands Plateau. The ridges vary in height but in the central portions are generally above 400 m. The top of Mount Bellevue is at 622 m and the top of Bald Hill is at 660 m. Where the ridges join the plateau they narrow and form a saddle which in the case of Mount Bellevue drops to about 400 m and in the case of Bald Hill to nearly 500 m. 25

[25] The Bogy Creek dissects the Whitlands Plateau although it is fair to say that its valley is narrow and relatively shallow. Nevertheless, at a point, for example, in the Whitlands Plateau, where the Bogy Creek is at 460 m, the vineyards to its east, including Brown Brothers Whitlands vineyard, are above 700 m and nearly to 800 m. Most of the plateau is 600 m or higher and it rises to nearly 1000 m. All the established vineyards except one are located on the eastern side of the Bogy Creek in what might be described as the continuation of the Bald Hill ridge. The one exception is Burder's vineyard which is located in the south west of the plateau at about 800 m. 30 35

[26] Vineyards have been established in the last three decades on both ridges and on the plateau, beginning with a Brown Brothers vineyard called "Whitlands" on the plateau. Brown Brothers followed this vineyard with a vineyard called "Banksdale" towards the northern end of the Mount Bellevue ridge. The vineyards on the plateau other than Burder's are mostly located near the eastern edge of the plateau along the Mansfield Whitfield Road. They are close to the 700 m contour line which appears to mark the top of the escarpment of the plateau. 40

[27] The main part of the King Valley begins to rise more steeply south of Moyhu as the river passes between the Bald Hill ridge and the foothills of the Alps. It is slightly above 200 m near the King Valley township and at 250 m at Whitfield deep into the valley between the foothills and the ridge. Whitfield is some 50 km south of Wangaratta. Vineyards are established on the valley floor and on the lower slopes of the Bald Hill Ridge but not to the east in the Alpine foothills. By the point where established vineyards cease to be found, past 45 50

South Cheshunt, the river is nearly at 350 m. It then climbs to the wall of a weir at Lake William Hovell at 400 m. Thereafter the river valley is in the mountains where it is fed by many creeks before it finally reaches its source. There is no practical prospect of vineyards being established in this country.

[28] To the east of the King River and the south of the Ovens River flows the Rose River. It joins the Buffalo River which flows into Lake Buffalo and eventually feeds the Ovens River near Myrtleford. The Rose Valley, which is some 13 km south east of Cheshunt South, is at approximately 400 m. No vineyards are presently established there but the valley may be suitable for viticulture.

[29] To the west of Mount Bellevue and the Whitlands Plateau is another valley in which the Fifteen Mile Creek flows. It joins the Ovens River north of Wangaratta after the Ovens River's confluence with the King River. The Fifteen Mile Creek flows through the flat plain south of Wangaratta quite close to the King River. The King River joins the Ovens River at the eastern end of the city of Wangaratta. The Fifteen Mile Creek flows past the western edge of the city. At this point the rivers are only 3 km apart.

### **Geology**

[30] A significant characteristic of the geology of the area is a fault line running from north-west to south-east between the two ridges and the plateau; that is to say, south of the ridges and north of the plateau. To the north of the fault line are folded ordovician sandstones and shales. The ridges are capped with tertiary basalts. To the south are late devonian rhyolite volcanics overlain in the south-east by early carboniferous redbeds. Both the volcanics and the redbeds are overlain by some tertiary basalt caps. I base these findings on the evidence of Dr John Webb.

[31] The ordovician sandstones and shales are nearly 460 million years old. The devonian rhyolites and the redbeds are about 300 million years old. The basalts are, however, much younger. They are about 40 million years old and result from basalt flows from volcanoes to the south. At the time of this volcanic activity the ordovician material was much more prominent although it still formed a plateau which led to the plain. Indeed, the basalt flowed in valleys. Because basalt is resistant to erosion, the floors of the valleys in which the basalt was deposited have remained, while adjacent areas have eroded. In the result, the two present ridges represent what was once valley floors.

[32] The basalt also flowed across the devonian rhyolites. That structure is erosion resistant so that the plateau on which the basalt was deposited has resisted erosion even where no deposits of basalt are found. The area to the north, which is the plain, was and is quaternary alluvium.

[33] Tertiary basalt deposits are found today along the top of the Bald Hill Ridge, along parts of the Mount Bellevue Ridge and in pockets on the Whitlands Plateau as well as on the larger Tolmie Plateau. The tertiary volcanic material, or Tvo as it is known, which is in situ, is by no means continuous. It only covers a small part of the plateau and the ridges, although it is quite extensive on Mount Bellevue. This material provides the soil where it is present. Erosion has displaced some of the material and deposits of it can be found on the lower slopes of the plateau and ridges. These deposits, which are generally deeper than the Tvo in situ, are known as Tvo colluvium. They are admixed, to some extent, with



other soils. The Tvo is red in colour. It is quite noticeable. Much of the Tvo colluvium is nearly as rich in colour as the Tvo in situ notwithstanding that it is admixed with other soils.

[34] The vineyards that have been established on the plateau and the ridges have nearly all been planted on the Tvo in situ. Some of the vineyards in the valley and on the lower slopes of the ridges and the plateau have been planted on Tvo colluvium. 5

### Soil

[35] The principal geological structures which underlie the soils are the ordovician sandstones, the devonian rhyolites, the quarternary alluvium and the basalt deposits. However, there are a variety of soils throughout the valley. These include colluvial and alluvial soils. The soils can change over small distances. This is not surprising because colluvial soils are soils that have arrived at their position after movement from upland areas and alluvial soils have arrived at their position as the result of action by water. 10 15

[36] It is not possible to categorise the valley by reference to a small number of soil types and areas. Nevertheless, the Tvo soils in situ do stand out as soils which are confined to identifiable areas and are plotted on geological maps because of their origins. For the rest, however, although the soils may have characteristics associated with the areas in which they are found, they are not amenable to simple classification. The variety of soils contained in the quaternary alluvium is particularly diverse. 20

[37] It follows that soil classification is generally not a particularly useful basis for considering the zoning of the area. This seems particularly so when the evidence establishes that modern viticultural practices permit most soils to be rendered suitable for grape growing. 25

[38] The Tvo soils in situ do seem to me, however, to provide an important qualification to the above. First, they are easily identified. Second, the boundaries between these and other soils are quite clear. Third, although other soils are always found nearby, the Tvo in situ is largely confined to the two ridges and the Tolmie Plateau. Finally, and this seems to me to be quite significant, it is on the Tvo soils that the vineyards have been established. There is considerable evidence before me of the viticultural properties of different soils. The evidence extends to the viticultural properties of the Tvo soils both in situ and colluvium. Differing opinions have been offered as to the comparative virtues of the soils between themselves and with other soils. Against the differing opinions that have been offered as to the relative merits of Tvo soils there is one outstanding fact, namely, that the growers themselves have chosen the Tvo soils in situ on the ridges and the plateau to plant their vines. 30 35 40

### Climate

[39] Climate is recognised by all the witnesses as the most important matter in determining viticultural properties. Climate is subject only to limited human intervention. The most critical aspects of climate are temperature and rainfall. Both are affected by latitude and altitude, particularly temperature. Rainfall is affected by many factors. 45

[40] Changes in latitude are not significant enough to lead to meaningful variations in the area under consideration but changes in altitude are. The evidence establishes that daily maximum temperatures on the Whitlands Plateau 50

are less than at Milawa. The evidence also establishes that nightly minima tend to be higher on the ridges and the edge of the plateau because of the effect of cold air drainage. Warm air rises and cold air settles. Where this permits substantial vertical movement of air such as from ridges and the edges of plateaux there is a consequent movement of warm air to the ridges and plateaux and of cold air to the valleys.

[41] It was accepted by all the experts that an atmospheric lapse rate of about 0.6°C per 100 m generally occurs in free atmosphere. However, temperatures measured near the ground reflect other variables in addition to elevation. Cold air drainage is an illustration. Other factors also operate.

[42] It follows that when the experts advising the parties in the case attempted to produce meaningful evidence relating to temperature changes within the area their figures were not completely consistent and were not entirely convincing. Two factors seem to me to underlie these problems. First, however objective the evaluations attempted to be, subjective considerations inevitably emerged. Thus, questions arose as to what were the best measurements for comparison. Dr Smart, an expert retained by the Whitlands High Plateaux Group, primarily worked with mean January temperature. These figures missed the effect of cold air drainage. In a way his evidence was counter productive so far as the Whitlands High Plateaux case was concerned because it failed to show a favourable distinction between plateaux and valleys, namely, the beneficial effects of cold air drainage. Second, the various temperature measures did not yield particularly meaningful results when they were used to assess whether two places reasonably close to one another demonstrated recordable temperature differences.

[43] What the evidence does confirm, however, is that average mean temperatures and maximum temperatures are higher in the lower parts of the valley than the highest parts of the plateau. This is not surprising. It is confirmed by school level geography studies and life experience itself.

[44] Rainfall comparisons suffer from the same problems when comparing places close together. However, it came as no surprise to me to hear that the rainfall on the ridges and the plateau is higher than in the valley and that the rainfall increases with elevation.

#### **Viticultural practices**

[45] Other evidence that was before me included evidence related to viticultural practices and, in particular, the arched cane system of pruning, otherwise known as the guyot system. This is to be contrasted with the more traditional spur pruning, also known as cordon train pruning.

[46] Arched cane pruning is predominantly used in cooler climates. The vines are pruned to canes rather than two bud spurs. Other cool climate practices include narrower gaps between rows and closer planting of vines.

[47] Arched cane pruning is significantly used in the proposed Whitlands High Plateaux region. However, there is also evidence that spur pruning is employed in the proposed region. Arched cane pruning is used in some vineyards at lower levels. The evidence did not uniformly show narrower rows and spacings as elevation increased.

[48] Although the evidence is not all one way it does show a tendency towards greater use of cool climate techniques on the plateau and ridges than in the lower valley.

### The expert evidence

[49] The expert evidence in this case was detailed and thorough. I am not surprised that the parties undertook such a thorough analysis of issues such as geology, soil and climate. As will appear, I consider all this to be relevant. It does not, however, follow that I need to address all issues in detail. My task is to look at issues of “discreteness and homogeneity” in the area rather than to examine and resolve every detailed dispute. Resolving all the issues which arose will not help me in my task. 5

[50] The task of the tribunal is to identify a region. A region must have a boundary. Wherever the boundary is drawn, it will often be impossible to assert that the land on one side of the line is any different to the land on the other side of the line. Determining a region of any kind and defining precise boundaries for it, is necessarily an artificial exercise. Nature generally does not draw bright line boundaries. 10 15

[51] This is a problem that some of the evidence encountered. If one takes the sides of the plateau and the ridges, it can be difficult to say that any meaningful difference in any of the relevant factors, or the factors overall, can be identified between contours 50 m apart. The narrower the distance between contours the more difficult the problem. Yet this fact should not blind the assessor to undoubted changes that are found over greater distances. The problem is that a basis for classification into two regions will often be a substantial difference between the heart of one proposed region and the heart of the other in circumstances where the change is gradual and no obvious dividing line emerges. Yet that does not mean that there should not be a classification into two regions. Local factors may yield a satisfactory basis for defining a boundary but they are less likely to assist in the prior decision of whether there should be a division into two regions at all. 20 25

[52] The expert witnesses who gave evidence on behalf of the King Valley Vignerons were Associate Professor Brian Finlayson (geographer), Dr Robert van de Graaf (soil scientist), Dr John Webb (geologist) and Dr Johan Bruwer (wine marketing expert). 30

[53] The Whitlands High Plateaux Group adduced expert evidence from Dr Richard Smart (viticultural consultant with a particular interest in climate), Dr John Gladstones (viticultural consultant), Dr Ian Sargeant (soil scientist), Mr Vic Patrick (viticulturalist) and Dr Peter Dry (viticulturalist). To these should be added Dr William Hardie and Mr James Baxendale who, although they are the principle figures proposing a Whitlands High Plateaux region, are also viticulturalists and were previously senior viticulturalists with Brown Brothers. 35 40

### Other witnesses

[54] In addition to the expert witnesses, there was evidence from many winegrowers in the area. The bulk of these witnesses made affidavits for King Valley Vignerons and supported the claim for one region for the whole valley. Some of this evidence was confined to the witnesses’ preference with brief reasons. Other evidence addressed the issues. In addition, there was evidence from senior representatives of wine companies: Ross Brown (Brown Brothers), Robert Wyndham Hill Smith (Samuel Smith & Son Pty Ltd: Yalumba), and Leanne De Bortoli (De Bortoli Wines Pty Ltd) 45 50

### **The evidence generally**

[55] No serious issues as to the credibility of individual witnesses arise. Some evidence, particularly the evidence of vineyard owners, was strongly put. However, that is not surprising. There is no objectively correct answer. Only the preferable decision can be reached from an available range. Most of the interested witnesses had firm views as to what the preferable decision should be.

[56] My findings of fact appear both above and below. They are based on an assessment of the totality of the evidence as appears from my reasoning itself. Because issues of credibility do not arise and having regard to the tribunal's statutory obligation under the Administrative Appeals Tribunal Act 1975 (Cth) to be "fair, just, economical, informal and quick" (s 2A) and to conduct the proceedings "with as little formality and technicality, and with as much expedition" as possible: s 33(1). I have not dealt separately with the evidence of each of the witnesses.

[57] I was taken on an extensive 2-day view of the whole area. On the view I was accompanied by the legal representatives, a number of the experts and some of the winegrowers. The independent experts who went on the view included Professor Finlayson, Dr Sargeant, Dr Smart, Dr van de Graaf and Dr Webb. The respondent's legal representative took extensive photographs which were made available to me and which I have viewed.

### **The meaning of the legislation**

[58] Much was made in argument in this case of the meaning of the phrase "grape growing attributes" in reg 24. In particular, there was debate as to whether reg 25(i), in effect, provided a definition of this phrase. King Valley Vignerons submitted that "grape growing attributes" means:

... those matters that are listed under reg 25(i). The expression does not have an ordinary language meaning.

[59] Although the drafting of the relevant parts of the Act and the regulations is not as clear as it might have been, I do not think it is difficult to understand the scheme. Particular sections and regulations are to be construed in their context and by reference to the scope, subject-matter and purpose of the Act. It is appropriate, however, first to attend carefully to the relevant text.

[60] Regulations 23 to 26 are contained in Pt 5 of the regulations which is titled "Criteria for determining geographical indications". Regulation 23, under the heading "Determining geographical indications", requires the Committee "[f]or the purpose of making determinations under s 40T ... to have regard to the criteria set out in this Part". Regulation 24, under the heading "Interpretation", as one would expect from the heading, says nothing about how the decision-making task is to be undertaken. It simply defines "region", "subregion", "wine grape vineyard" and "zone" as used in the Part. Regulation 25, under the heading "Criteria for determining geographical indications", somewhat repetitively requires the Committee to have regard to the criteria there set out "for the purposes of subsection 40T(2) of the Act".

[61] There is only one provision in Pt 5 in which the words "region", "subregion", or "zone" are used. It is in reg 25(a) which states the first criterion. Elsewhere, as well as additionally in reg 25(a), the word "area" is used (compare reg 25(e) to (i) inclusive). Accordingly, the strict scheme of s 40T and reg 25

requires reference to the definition of “region” and “subregion” in reg 24 only for the purpose of applying reg 25(a). Regulation 25(a) seems only to state one of the criteria to be taken into account.

[62] I see little value in asking whether the phrase “grape growing attributes” in the definition of “region” in reg 24 is in some way confined to only those criteria contained in reg 25(i). Of course the words of reg 25(i) are part of the context in which the whole of reg 25 must be considered, but that is quite different from suggesting that one provision governs the other. I prefer the approach of addressing each part of reg 25 in the light of the facts before me and by that means, arriving at “the correct or preferable decision”: *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577; 2 ALD 60. 5 10

[63] The submission that “grape growing attributes” in reg 24 means the “attributes” in reg 25(i) may be prompted by a reference to discreteness and homogeneity in both regulations. However, I cannot see how the suggested construction follows. The construction proposed by the King Valley Vignerons involves the tail wagging the dog. 15

[64] I find the submission that that phrase “grape growing attributes” does not mean what those words ordinarily mean to be quite unhelpful. In response to the submission that the phrase was intended to mean exclusively the list of loosely related sub-criteria contained in reg 25(i), some of which have nothing to do with grape growing attributes, common sense compels one to look for an alternative rational explanation. I can find no rational explanation for the proposed construction. Giving the words their “ordinary language meaning” seems to me to be the rational approach. It was said by King Valley Vignerons that the history of the adoption of the ultimate form of the regulation, as recounted in the affidavit of John Pendrigh (a member of the board of the Australian Wine and Brandy Corporation at the time of the negotiation of the agreement with the European Community and a member of the negotiating team), required “grape growing attributes” to relate only to the sub-criteria in reg 25(i). I have read the material relied upon and I am unpersuaded. In any event, I think that the clarity of the regulations as enacted precludes such a conclusion. 20 25 30

[65] There are also other indicators that point away from the construction that has been proposed by King Valley Vignerons. The phrase “geographical indication” appears a number of times in the Part. One of these places is in the introductory words of reg 25(i). The definition of “geographical indication” in s 4 of the Act has been set out above. It goes so far as to refer to “a particular quality, reputation or characterisation of the wine”. That is hardly consistent with “grape growing characteristics” not only not extending to wine-making characteristics but also not including obvious grape growing characteristics within the ordinary meaning of the term merely because they are not identified in the sub-criteria of one of nine criteria. This is particularly so when there are other criteria and one in particular (reg 25(a)) which are much more directly related to reg 24. I will return to this question below. 35 40

**Evaluation of the criteria in reg 25** 45

*(a) [W]hether the area falls within the definition of a subregion, a region, a zone or any other area;*

[66] This is the first criterion. It requires reference to the definition in reg 24. That requires attention, among other things, to the potential identification of an area “that is discrete and homogeneous in its grape growing attributes”. For 50

reasons I have given, I see no basis for concluding that the legislature intended me to ignore the ordinary meaning of the phrase “grape growing attributes”. Not only do I see no basis for such a confined approach, but the scope, subject-matter and purpose of the Act and the context in which regs 24 and 25 appear, as well as common sense, seem to me to support a construction which accords with the ordinary meaning of the words.

[67] The submissions which supported the narrow construction of the phrase referred me to the objects of the Act and particularly to the commercial nature of the objects. Commercial exploitation of food and drink products is ultimately directed at consumption. For present purposes the relevant consumers are wine drinkers both within and outside Australia. Major issues for wine consumers are quality and cost. A major factor in quality is the quality of the fruit. One of the obvious purposes of a system of labelling wine according to regions is a holding out that there is a homogeneity of some kind associated with wines from the same region. It cannot simply be a matter of satisfying natural curiosity as to what part of the world a wine comes from. The homogeneity must be associated with the characteristics of the wine and the fruit from which it is made. The present classification process is ultimately about labels. A regional classification derived without reference to ordinary concepts of grape growing characteristics might well lead to consumers being misled because they are likely to assume that wine produced from grapes grown within the same region will exhibit similar attributes. I do not think the regulation requires a contrary construction. Nor do I think that any of the canons of construction, including purposive construction, require a contrary conclusion.

[68] Regulation 25(a) poses a question. It is the only criterion which does pose a question. Although this does not seem to me to be entirely free from doubt, the question appears to require an affirmative answer before an area will qualify for further consideration for classification as a subregion or region. It would hardly be possible to classify an area as a region if it did not answer the definition of region. An area, for example, which did not produce at least 500 t of wine grapes in a year would not seem to qualify. So viewed, reg 25(a) states a necessary but not a sufficient condition precedent for classification. The other criteria are more associated with discretionary considerations as to whether an area which satisfies the condition precedent, should be classified.

[69] The phrase “or any other area” in reg 25(a) does create a difficulty for such a construction but the context nevertheless seems to me to compel the construction at which I have arrived.

[70] The question posed by reg 25(a) is one of major significance. I prefer to defer my detailed analysis of it until I have addressed the other criteria.

***(b) [T]he history of the founding and development of the area, ascertained from local government records, newspaper archives, books, maps or other relevant material;***

[71] The evidence placed little emphasis on history. However, it is plain that the area was settled for agricultural purposes. These purposes included cropping and grazing. Grape growing and wine making became part of these activities more than a century ago. However, at that time, there were, no doubt, other more important agricultural pursuits. The presence of a core road following the path of the King River suggests that the valley was, as one would expect, developed progressively but as a whole.

[72] Wangaratta emerged as the market centre for the valley and other surrounding centres and it is effectively the provincial capital.

*(c) [T]he existence in relation to the area of natural features, including rivers, contour lines and other topographical features;*

[73] These features have already been covered. The principal valley of the King River presents as a unified geographical feature. The ridges, plateaux and foothills are all visible from the floor of the valley. Indeed, some of the vineyards on the higher altitude areas can be seen from the floor of the valley.

[74] To my mind the valley, its sides, ridges, plateaux and the foothills are all part of a geographical whole. However, within that whole, the ridges, plateaux and foothills provide a contrast. The valley floor and lower slopes are naturally distinct from the plateaux, ridges and tops of foothills.

[75] The case of the King Valley Vignerons was that a division between the valley and the ridges on the one hand and the plateau on the other, was more natural than a division between the valley on the one hand and the ridges and the plateau on the other. I cannot agree.

[76] King Valley Vignerons argue that the ridges are geologically different to the plateau, as well as being lower and narrower. All this may be accepted, although with some qualification. For example, the Boggy Creek provides a narrow valley through the proposed Whitlands Plateaux region. However, despite the older geological history being different, the basalt soil found in both the plateau and the ridges, which has more recent origins, logically brings them together. Moreover, the presence of the basalt soils has viticultural significance, as the evidence that that is where the vines are planted elegantly demonstrates. Most importantly, however, the contrast between a valley floor and escarpments topped by ridges and plateaux is not lessened by arguments about the relative width and elevation of the ridges and the plateau. The valley is so different from the plateau and ridges that arguments about relative differences between different parts of these higher areas are not persuasive.

[77] Detailed evidence was presented to show that the sides of the plateau escarpment were steeper and higher than the sides of the ridges. Undoubtedly they are. Again, however, the difference between the escarpments as a whole and the valley floor speaks much more of a distinction than does the relative differences between the height and steepness of the sides of the ridges and the plateau.

[78] Argument was also raised about the similarity of conditions found on the sides of the escarpments where vineyards are found and on the tops of the ridges and the plateau. The vineyards on the plateau are nearly all located close to the edges. Such argument raises again the problem of drawing a line. A claim that two areas are distinct is not refuted by saying that the distinction is not clear at the dividing line if it is clear between the two areas as a whole.

[79] Although the Fifteen Mile Creek and the Rose River do not flow into the King River, they flow in the same direction and ultimately in the same plain. All three flow into the Ovens River. They are accordingly part of the same river system. It is fair to say that the Fifteen Mile Creek is more closely associated with the King Valley than is the Rose River. It flows into the Buffalo River and then the Ovens River before that river runs in the same plain as the King River. It is further away from the King River and separated by higher country. Nevertheless, there is a sound basis for finding a connection between all three rivers.

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One important matter to note is that neither the Fifteen Mile Creek area nor the Rose River area appear suited to classification as separate regions.

***(d) [T]he existence in relation to the area of constructed features, including roads, railways, towns and buildings;***

[80] Wangaratta is the commercial hub of the area. It is to the north of the valleys in question and at the confluence of the King River and the Ovens River (after the Rose River has flowed into the Ovens River through the Buffalo River and before the Fifteen Mile Creek has joined the Ovens River).

[81] Travelling from west to east could involve crossing the Fifteen Mile Creek, the King River and the Ovens River. It is not surprising, then, that the major roads run north–south between the valleys. A further reason for this is possibly the location of Wangaratta at the northern end of the valleys. Wangaratta is located near the Hume Highway which is the major road trunk to Melbourne and the main highway between Australia’s largest cities, Sydney and Melbourne. Wangaratta is also close to the main rail line between Sydney and Melbourne and has its own direct rail link to Melbourne.

[82] There are no major towns in the King Valley itself. The major towns in the area are either on the Hume Highway, such as Benalla, or located further east, such as Myrtleford and Beechworth. The Rose River is in one sense more associated with Myrtleford than Wangaratta. However, Myrtleford is smaller than Wangaratta and the only “all weather” and most convenient access to the Rose Valley appears to be through the King Valley, Whitfield and Cheshunt rather than through Myrtleford and the Buffalo River Valley.

***(e) [T]he boundary of the area suggested in the application to the Committee under section 40R;***

[83] There were, of course, two applications before the Committee and now before me.

[84] The King Valley Vignerons application encompasses the whole of the King Valley proper from its source to its confluence with the Ovens River. It also includes the Fifteen Mile Creek Valley and the Rose Valley. The northern part of the boundary is approximately also the boundary of the Shire of Oxley. It excludes the city of Wangaratta by following Jordans Lane and Clarkes Lane, adjoining roads that are aligned east–west, just south of Wangaratta. From the junction of Jordans Lane with the Hume Highway, the boundary proceeds in a south south-westerly direction past Glenrowan and then turns south south-east. This section of the boundary approximates the shire boundary but exactly follows the boundary of the existing Glenrowan wine region. Near Toombullup, in the Tolmie Plateau, it strikes the southern boundary of the North East Victoria Zone which it follows south-easterly high up into the Victorian Alps near the colourfully named Mount Buggery. This is what it is called on official maps. From there, the boundary proceeds more or less due north to the south-west corner of the Alpine Valleys Region, thereafter following the western boundary of that region to the Ovens Valley. It follows the Ovens River north-west, more or less, to Clarkes Lane. This river boundary is the shire boundary. The boundary of the proposed region with the Alpine Valleys Region is slightly west of the shire boundary. In other words, the Alpine Valleys Region includes part of Oxley Shire.



[85] The Whitlands High Plateaux application covers land wholly within the area claimed by King Valley Vignerons in their application. It is located in the western part of the King Valley area near the southern end of the part where grapes are presently planted. It includes most of the Bald Hill Ridge and most of the Mount Bellevue Ridge. The boundary is irregular in shape. It broadly follows the 500 m contour line in the north-west and east and the Upper Fifteen Mile Creek in the south-west. The Upper Fifteen Mile Creek is chosen for the boundary for a length in which it flows at approximately 500 m. For the northern part of the Mount Bellevue Ridge the boundary is the 400 m contour line. 5

[86] The present Whitlands High Plateaux claim is not identical to the claim originally proposed to the Committee. King Valley Vignerons used the changes as a basis for criticism and challenge. The current proposal and its characteristics should be subject to scrutiny in accordance with the legislation. Changes may throw up matters worthy of examination on this question. However, nothing turns on change as such. I see no basis for criticism and certainly no basis for rejecting a proposal merely because it involves a change which may lead to the proposal avoiding a prior defect. I accordingly intend primarily to address the proposal as it now is. 10 15

[87] The most contentious aspect of the detail of the Whitlands High Plateaux proposal relates to its northerly part, namely the ridges and particularly the way in which the ridges are joined to the plateau to make one region. 20

[88] Notwithstanding the fact that the definition of "region" in reg 24 applies only to the parts of the regulations in which the term is contained, it seems clear that a determined region should satisfy the terms of the definition. The definition requires a region to be "a single tract of land". Accordingly, it would seem that two areas of land could never together be a region however close together they were and however "discrete and homogenous in [their] grape growing attributes". 25

[89] The problem which the Whitlands High Plateaux Group faced was that although they have broadly chosen the 500 m contour line as the boundary of the proposed region, parts of the northern part of the Mount Bellevue ridge, which are proposed for inclusion in the region, are nearly as low as 400 m and, at the points where the ridges meet the plateau, there are two saddles at and below 500 m. The 400 m contour line has accordingly been chosen as the boundary of the proposed region in the northern part of the Mount Bellevue Ridge. To exclude the saddles would create one region containing three parts. A further problem is that the ridges are narrow at these points, thereby creating difficulties in terms of finding a satisfactory boundary line which is not artificial. These problems are confounded by the fact that there are vineyards in the area and defining a boundary without dissecting at least one vineyard is difficult. 30 35 40

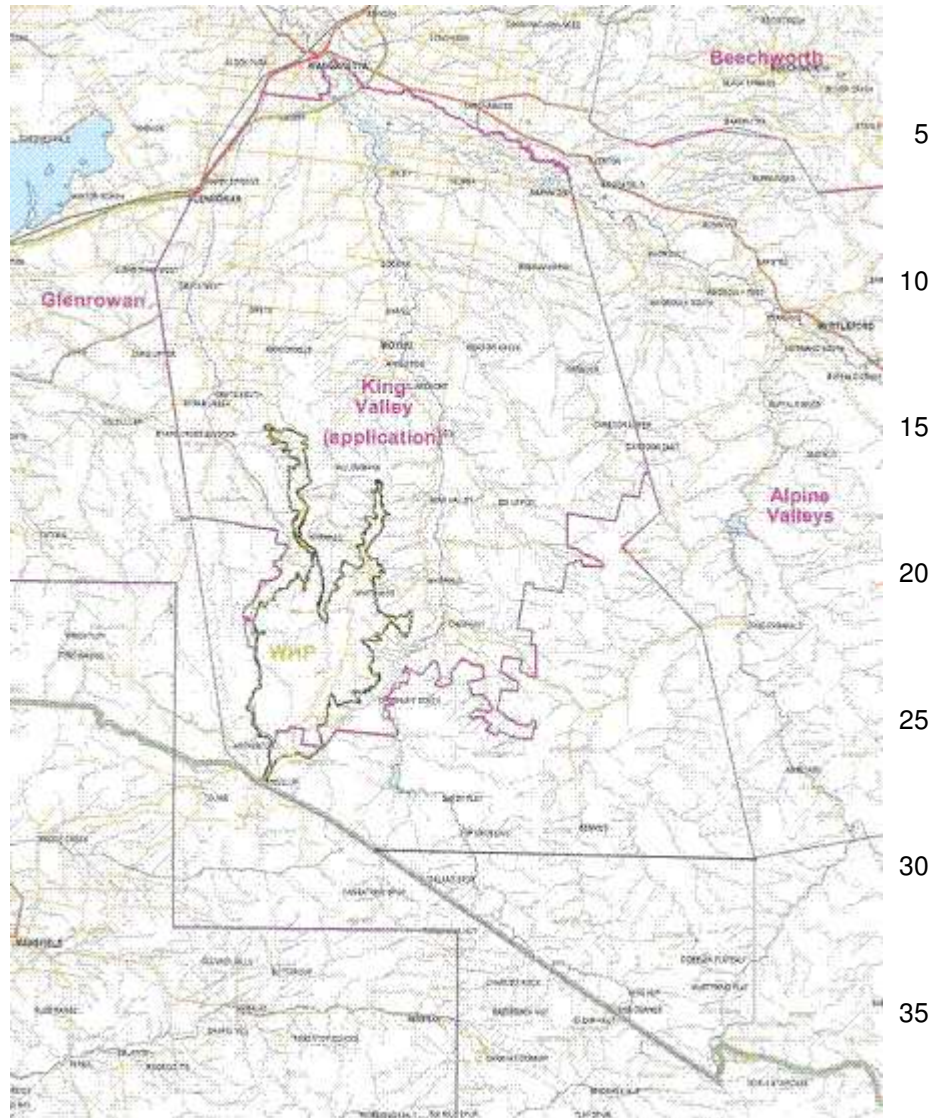
[90] The boundary where the Bald Hill Ridge joins the plateau is at 500 m. It does not fall below 500 m. Accordingly, all the land in the Bald Hill Ridge and included in the proposed region is at 500 m or more.

[91] For the saddle created by the Mount Bellevue Ridge, the 400 m contour line was chosen as the proposed boundary because the ridge drops to about that level. However, it appears that the 400 m contour line dissects an existing vineyard on the Mount Bellevue Ridge or, at least, land contiguous to it and in the same ownership; although not yet planted with grapes. The boundary was transferred by a straight line from the 500 m contour line to the 400 m contour line near the saddle. On the other side of the saddle it was returned by a straight line to the 500 m contour and continued as described above. 45 50

[92] Because the 400 m contour line dissects land associated with an existing vineyard, a number of proposals have been put forward to avoid that. Ultimately, the Whitlands High Plateaux Group sought to utilise the opposite sides of a road to define the boundaries. The road may not be a made road. No doubt a road was selected because it would not dissect private land while, at least arguably, avoiding a region with two parts.

[93] The boundary of the determination made by the Committee generally accepted the King Valley Vignerons proposal. The interim determination wholly accepted that proposal. However, the Committee ultimately considered that the land in the higher parts of the King Valley, where agriculture is never likely to take place, was not appropriately included in the region. The Committee also took into account that much of this land was state forest or national park. The southern boundary of the region, as determined by the Committee, is accordingly a very irregular line made up of straight lines broadly representing boundaries with state forests and national parks. One might say the line is “saw-toothed”. The boundary begins at Archerton and proceeds generally in a north-easterly direction to the western boundary as it was in the interim determination. The Committee also excised land to the south-west of the interim determination on the other side of the south-west boundary of the Whitlands High Plateaux claim. All that land is, accordingly, to the west of the Upper Fifteen Mile Creek. All the excised land remains in the King Valley claim.

[94] The map set out below shows the boundaries of the interim determination and the final determination as well as the land claimed within the two applications. It foreshadows a boundary I will fix later in these reasons. North is at the top of the map.



(f) [O]rdinance survey map grid references in relation to the area; 40

[95] Although the submissions did not make significant reference to these maps, virtually all of the maps for the area were made available to me and, as must be apparent, I have made significant use of them.

(g) [L]ocal government boundary maps in relation to the area; 45

[96] A map of Oxley Shire is in evidence before me. I have also had regard to this map.

(h) [T]he existence in relation to the area of a word or expression to indicate that area, including: 50

(i) any history relating to the word or expression; and

- (ii) whether, and to what extent, the word or expression is known to wine retailers beyond the boundaries of the area; and
- (iii) whether, and to what extent, the word or expression has been traditionally used in the area or elsewhere; and
- (iv) the appropriateness of the word or expression;

[97] “Whitlands” has been used on labels by Brown Brothers. The name has been used in journals. The name “Whitlands High Plateaux” may not have been used in advertising, for promotional purposes or otherwise. If it has been used its use was slight.

[98] The appellation “King Valley” has been used by many wine companies and, significantly, has been used on wines made throughout the King Valley including from the ridges and the plateau.

[99] King Valley is accordingly an established name for the area. Because wine from the area is sold outside the area both domestically and for export overseas, the name must be known to wine retailers throughout the world. There is a wealth of evidence before me by way of journal articles, wine labels and wine brochures which show that the name King Valley has been extensively used to describe the whole area including the area contained within the Whitlands High Plateaux claim. The name King Valley has been used since the 1960s. King Valley also has treaty recognition because of its inclusion in Annex II to the agreement. Whitlands High Plateaux has neither a substantial established reputation nor treaty or statutory recognition. “Whitlands” has some established reputation. Relevant treaty recognition is accorded to “Whitland”. That recognition as a “Sub Region” in Annex II to the Agreement amounts to a recognition of at least part of the plateau as a wine subregion but under a shorter name than Whitlands High Plateaux.

***(i) [T]he degree of discreteness and homogeneity of the proposed geographical indication in respect of the following attributes:***

*(i) [T]he geological formation of the area;*

[100] The geology is dealt with above.

*(ii) [T]he degree to which the climate of the area is uniform, having regard to the temperature, atmospheric pressure, humidity, rainfall, number of hours of sunshine and any other weather conditions experienced in the area throughout the year;*

[101] These matters were subject to much evidence. I have already covered them in some detail.

[102] As one would expect, the climate changes are not great because the area is not particularly large. I exclude from consideration the climate of the highest altitude areas, south of the area determined by the Committee. There was no detailed evidence about the climate of this area. However, as the land is mountainous country as high as 1500 m, it might be different to the lower part of the valley.

[103] The higher land is slightly wetter, slightly cooler during the day (particularly in the summer), and slightly warmer (near the escarpments) during the night, particularly in the winter. However, there remains an element of uniformity in the climate because the whole area is small.

(iii) [W]hether the date on which harvesting a particularly variety of wine grapes is expected to begin in the area is the same as the date on which harvesting grapes of the same variety is expected to begin in neighbouring areas;

[104] The evidence before me did not address in detail any comparison between different parts of the whole area under consideration with other regions such as the Glenrowan Region or the Alpine Valleys Region. Rather, it concentrated on comparison of different parts of the area in question. The evidence shows that, again unsurprisingly, the same varieties of grapes are harvested slightly later in the higher country than on the plain. However, the differences are not great and there are occasions when some picking of certain varieties will not be later in the higher country. 5 10

(iv) [W]hether part or all of the area is within a natural drainage basin;

[105] Plainly, the land within the King Valley proper is all in a natural drainage basin. The Fifteen Mile Creek is also part of the same drainage basin because both the King River and the Fifteen Mile Creek drain to the Ovens River. The concept of a drainage basin is wider than that of a valley. Although the position is somewhat less clear for the Rose River, it also ultimately finds its way into the Ovens River and so I consider it to be part of the same drainage basin. The drainage from all three valleys is generally to the north. 15 20

[T]he availability of water from an irrigation scheme;

[106] There is a dam at Lake William Hovell on the King River. This regulated flow of the King River provides irrigation. Water is drawn by some vineyards from the Boggy Creek. However, these are not conventional irrigation schemes. Nevertheless, I note that some use is made of irrigation, particularly from the waters of the King River. I also note that the vineyards of the plateau and ridges do not have direct access to this water. They generally rely on spring-fed dams. Exceptionally, water is pumped from the Boggy Creek for use on at least the Brown Brothers "Banksdale" vineyard on Mount Bellevue. 25 30

(vi) [T]he elevation of the area;

[107] Elevation has already been dealt with in detail.

(vii) [A]ny plans for development of the area proposed by Commonwealth, State or municipal authorities; 35

[108] It was agreed by all parties that there were no matters for consideration under this heading.

(viii) [A]ny relevant traditional divisions within the area;

[109] The evidence did not expose any traditional divisions within the area other than those associated with geography and topography and which have already been considered. 40

(ix) [T]he history of grape and wine production in the area.

[110] Much of this has already been considered. Viticulture has a long history in the area. It has expanded in recent decades and years. The most recently established vineyards appear to be in the higher country, particularly on the plateau and the ridges. Indeed, the plateau and the ridges can be contrasted on the basis that grape growing only commenced there in the 1980s. Many varieties of grapes are grown in the area. Grapes for both red and white wines are grown throughout the whole area. There is, however, a tendency for grapes for sparkling 45 50

wines to be grown in the higher country. Although red grape varieties can be grown there they are generally only used in sparkling wines. These are matters upon which the Whitlands High Plateaux Group understandably placed great emphasis.

*Note: In determining a geographical indication under subsection 40Q(1) of the Act, the Committee is not prohibited under the Act from having regard to any other relevant matters.*

[111] The parties accepted that soil could be considered under this heading. I am sure it could also be considered under reg 25(a). The soil issues in the case have already been addressed.

**Consideration including criterion 25(a)**

[112] It is now necessary for me to draw the threads together, to identify and evaluate the relative merits and importance of the criteria set out in the regulation and to determine what is the preferable decision pursuant to the statutory scheme. I need to answer the question posed by criterion 25(a).

[113] I am in no doubt that there is a distinction that can be drawn between the valley land and the plateau land. The fact that there may be vineyards close to one another on opposite sides of a boundary does not deter me. Nor does the fact that conditions may be similar for such vineyards. I also conclude that it is more appropriate to link the ridges with the plateau than it is to link them with the valley floor. In assessing this matter I place weight on the existence of in situ basalt soils on both the ridges and the plateau, on the evidence of warmer nights and cooler days there and the contrast of the natural features of a valley floor with those found on ridges and a plateau. I take into account the different underlying geology of the plateau and the ridges but I find these to be factors of lesser importance.

[114] I am not particularly concerned by the problem of linking the ridges and the plateau because of the narrow saddles. I doubt that the selected road is a persuasive solution but I anticipate that a connecting piece of land of sufficient width, which does not dissect an existing vineyard, can be found. It does not seem to me to need to be a road or some land in public ownership. Indeed, it would be preferable for it to be land on which grapes might be grown.

[115] The question for me is whether the differences between the plateau and ridges on the one hand and the rest of the valley on the other are such that they ought to be reflected by a division of the whole into two separate regions. In accordance with the continuing relevance of the definitions in reg 24, I am looking, among other things, at issues of discreteness and homogeneity. I will take into account the contrasting requirements for discreteness and homogeneity contained in para (b) of each of the definitions of “region” and “subregion”.

[116] At this point it is necessary to remember that Annex II to the agreement, which the Act seeks to implement (ss 3 and 40A), identifies the “King Valley” as a region and “Whitland” as a subregion. Some remarks in the judgments of the Full Federal Court in the *Beringer Blass Wine Estates Ltd v Geographical Indications Committee* (2002) 125 FCR 155 at 162; 70 ALD 27; [2002] FCAFC 295 at [20], [57] and [61] might suggest that the provisions of the Annex are conclusive, particularly as to name. I note, however, that there is no Ovens Valley Region, but an Alpine Valleys Region. There is also a Beechworth Region. However, the Annex identifies Ovens Valley as a region, Beechworth as a

subregion and makes no mention of Alpine Valleys. I propose to proceed on the basis that the Annex does not bind me but that I can take into account its contents.

[117] Regulation 24 contemplates degrees of discreteness and homogeneity. For a region it must be measurable. For a subregion it must be substantial. A starting point is to note that the largest of the potential areas under consideration as a region is still a relatively small area. Nevertheless, all the competing areas do satisfy the minimum requirements of reg 24. 5

[118] There are undoubtedly differences in grape growing characteristics within the area but there are high levels of homogeneity within separate parts such as the plains, the valley proper, the ridges and the plateau. 10

[119] Although there are differing grape growing characteristics in the area under consideration they all occur in the same general location in terms of latitude and longitude. The influences are local. The local influences are the climate, soil and geology of a valley system in the foothills of part of Australia's Great Dividing Range. The area does not include any other geographical types, such as desert or wetlands. 15

[120] To my mind there are measurable degrees of homogeneity within the whole of the wider King Valley area as I have described it above, including the area up to the headwaters of the King River. I have no doubt that there is greater homogeneity within the plateau, the ridges, or the plateau and the ridges together, than in the whole valley, but I do not consider that the lesser homogeneity of the whole valley deprives it from qualification as a region under reg 24. In coming to this conclusion I have acted upon my assessment of the area appearing in earlier sections of these reasons as well as upon my assessment of the criteria in reg 25. 20 25

[121] There was little evidence before me concerning the surrounding areas. Nevertheless, there seems to me to be sufficient discreteness in grape growing attributes to qualify the areas under consideration as a region or regions. 30

[122] It is very difficult to explain a reasoning process which refers to a number of criteria which need to be absolutely and relatively evaluated. In the present case there are nine criteria and nine sub-criteria. Many of them are very wide. The first criterion, which requires the identification of areas that qualify for further consideration by falling within the definition of region, itself requires consideration of many factors. 35

[123] Different criteria will call for differing evaluation in different cases. In some cases geology may be an important consideration, in others it may not. The same is true of each of the other criteria.

[124] In the present case I think that natural features (criterion (c)) are important. The King Valley, including the adjacent Fifteen Mile Creek Valley and Rose Valley, seem to me to be drawn together by the natural features which contain them. The history of the area (criterion (b)) and of grape and wine production in the area (criterion (i)(ix)) seem also to extend to the wider valley. This is no doubt explained by another relevant criteria, that the area is part of a natural drainage basin (criterion (i)(iv)). The built environment (criterion (d)) follows on from the natural environment. The use of the name King Valley, which is a name applying to the whole region, including the plateau and the ridges, also follows naturally from the other unifying features (criterion (h)). Each of the other criteria not associated with viticulture or wine making also seem to me to point to the wider King Valley being classified as a region. Ridges and plateaux 40 45 50

may be visually very different to valley floors but together they make up a universally recognised unit called a valley. These are the major factors of homogeneity which I have considered.

[125] I now turn to the criteria that relate to viticultural and wine making considerations or grape growing attributes to see, when they are included with the other factors, whether the preferable decision is that there should be two regions. This requires reference to reg 25(a) and reg 24 and to the relevant criteria in reg 25(i) which I have not referred to in the last paragraph.

[126] The overwhelmingly important criterion for viticultural and wine-making considerations is criterion (a). The fact that it defines qualifying characteristics which must be satisfied does not mean that there is no occasion for returning to the criterion. It is a criterion to which continual reference must be made.

[127] I do not doubt that there are identifiable differences between the plateau and ridges on the one hand and the balance of the area on the other. I accept that there are differences in grapes grown, in growing techniques, in climate and in soils between the two areas. I also accept the qualification that at the margins these distinctions may be difficult to draw.

[128] However, when I give these matters full weight and when I incorporate them with the other factors I have isolated above, I do not come to the conclusion that the King Valley and the Whitlands High Plateaux areas are separate regions. This conclusion is supported by the requirement for relative discreteness and homogeneity in para (b) of the respective definitions of “region” and “subregion”. The two may well be separate subregions. Indeed, were I engaged in the task of identifying subregions, on the material before me at present, I would find that they were. However, that is not the present task. What is relevant, however, is the fact that they might be separate subregions, because a decision as to whether an area should be a region will usually involve considering whether the criteria and the issues of relative discreteness and homogeneity means that the area would be a better subregion than a region.

[129] The preferable decision is, accordingly, that there should be one region for the area which will include the Whitlands Plateau as well as the Bald Hill and Mount Bellevue Ridges. It will be called “King Valley”.

### **Boundaries**

[130] My final task is to determine the boundaries of the region. The region should be larger than the region as finally determined by the Committee but smaller than the interim determination. It will, however, follow the Committee’s determination except for the changes specifically proposed below.

[131] Because the determination of the Committee relates to a wine region and not merely a geographical region, it seems inappropriate to include land on which wine grapes will not be grown. However, it also seems inappropriate to exclude land on which wine grapes might be grown although they are not grown there now. Accordingly, the Rose Valley should be included. If it is not included, it could not practically be part of a wine region because it would be sandwiched between the Alpine Valley Region and the King Valley Region but would be too small to be a region in itself. If wine grapes are never grown there that will not matter. The point is that the land is currently used as agricultural land and is capable of being used for viticulture. It is important to note that there is only a very limited basis under the Act (s 40ZD) for varying a region. It is really



confined to correcting errors. The legislature must be taken, therefore, to have intended that a determination should accommodate possible expansion of viticulture within an area.

[132] Little attention was given by the evidence to the land excised by the Committee from its interim determination which is to the West of the area claimed as the Whitlands High Plateaux region. However, much of that land is below 800 m and none of it appears to be above 900 m. The topographical maps suggest it includes cleared land. To exclude it would create an irregular boundary. Although irregular boundaries are inevitable, the scope, subject-matter and purpose of the Act and Regulations seem to me to be consistent with an attempt to find boundaries that are regular and cohesive. It will be a rare case, in my opinion, in which a boundary should be drawn with such an irregular shape that it will create anomalies or apparent anomalies.

[133] A major reason for the revision by the committee of the southern boundaries of the interim region is that the wider area includes state forests and national parks. However, these are not places where all agricultural and commercial activity is excluded. In addition, the maps suggest that there are pockets of land within the forest and park boundaries which are excised. The actual boundaries are quite irregular. These, no doubt, represent historical circumstances. Where such circumstances lead to irregular boundaries, these should not also determine wine region boundaries unless there is good reason for this. Accordingly, it seems to me that the land excised which is to the west of the area claimed in the Whitlands High Plateaux proposal, should be included.

[134] That brings me to the southern boundary of the region. It should include the Rose Valley. It should not follow the boundaries of state forests or national parks. The anomalies that would be created, should wine growing ever be permitted in any part of what are now state forests or national parks, would be extensive. It does not seem to me to be sensible to adopt as wine boundaries, the boundaries of state forests or national parks, particularly where this leads to an irregular border with anomalies only explained by the forest or park boundary. The fact that viticulture is unlikely in national parks seems to me to be less relevant than the desirability of retaining a boundary which is regular. Of course, the presence of forest and park boundaries may be relevant to the location but not the precise line of a boundary.

[135] A more sensible boundary seems to me to be based on elevation and contours. However, adopting contour lines in the present case would create a very complicated boundary.

[136] A large part of the boundary determined by the Committee is straight lines which relate to an underlying rationale and follow a sensible path where an irregular path would otherwise be required. The east and west boundaries are of this type.

[137] I think that a southern boundary broadly joining the south west corner of the Alpine Valley Region and along the parallel of latitude at that point until it dissects the southern boundary of the North East Victoria Zone would be appropriate. The line will be just above 37° 00' South and below 36° 59' South. This line will exclude the country which is inhospitable to wine but will include the Rose Valley and other cleared land nearby and surrounding it. It will include all of the Rose Valley which is outside the Alpine Valleys Region. The line is shown on the map included above.

[138] The eastern boundary of the King Valley Region will accordingly be the western boundary of the Alpine Valleys Region to the point where the boundary meets the Ovens River.

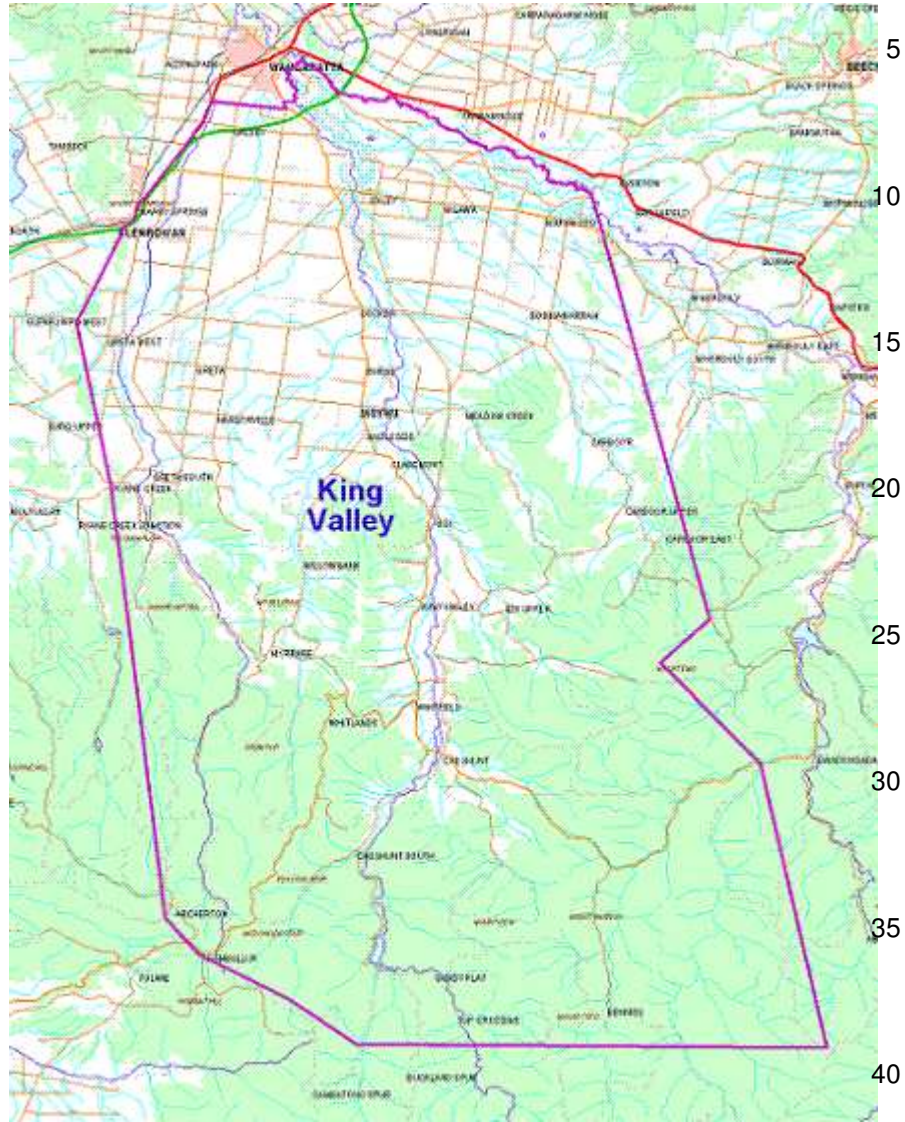
[139] I will make a formal decision in accordance with these reasons. The textual description has been prepared by the Committee. Both applicants, while not necessarily agreeing with these reasons, accept that the textual description accurately reflects them. The effect of the decision is merely to vary one boundary but the most convenient way of achieving this is to set aside the decision under review and substitute a fresh decision.

### Orders

- (1) Set aside the decision under review, namely the final determination of the Geographical Indications Committee for the Geographical Indication “King Valley”.
- (2) In lieu of the decision set aside substitute the following decision:
  - (a) Make a final determination of a geographical indication in accordance with s 40T of the Australian Wine and Brandy Corporation Act 1980 (Cth) with respect to the area under consideration;
  - (b) Identify the boundaries of the area as the boundaries described in the attached document headed Geographical Indication;
  - (c) The definitive statement of the boundaries is the written description but the attached map may be used as a convenient physical representation of the area;
  - (d) Determine that “King Valley” is the expression to be used to indicate the area.

Annexure

GEOGRAPHICAL INDICATION: King Valley



AREA BOUNDARY

The area boundary used to support the textual description of the Geographical Indication for 'King Valley' is presented on the following official maps: 45

WANGARATTA TOPOGRAPHIC MAP

Scale 1:100,000

Series R 652

Sheet 8125

Edition 1

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Produced by the Royal Australian Survey Corps.  
under the direction of the Chief of General Staff  
Printed by the Royal Australian Survey Corps, 1971.

#### ALBURY TOPOGRAPHIC MAP

Scale 1:100,000  
Series R 652  
Sheet 8225  
Edition 2-AAS  
Produced by the Royal Australian Survey Corps.  
under the direction of the Chief of General Staff  
Printed by the Royal Australian Survey Corps, 1987.

#### BUFFALO TOPOGRAPHIC MAP

Scale 1:100,000  
Series R 652  
Sheet 8224  
Edition 2-AAS  
Produced by the Royal Australian Survey Corps.  
under the direction of the Chief of General Staff  
Printed by the Royal Australian Survey Corps, 1986.

#### WHITFIELD TOPOGRAPHIC MAP

Scale 1:100,000  
Series R 652  
Sheet 8124  
Edition 2-AAS  
Produced by the Royal Australian Survey Corps.  
under the direction of the Chief of General Staff  
Printed by the Royal Australian Survey Corps, 1987.

#### TEXTUAL DESCRIPTION

The Geographical Indication “King Valley” is located within the zone “North East Victoria” within the State of Victoria, Australia.

The beginning point of the boundary is located on Map Wangaratta (Sheet 8125), being the junction of an unnamed road and the Hume Highway in Glenrowan at grid reference DV309642, then proceeds generally north easterly along the Hume Highway to its intersection with an unnamed road at grid reference DV357730, then proceeds generally south of easterly in a straight line to the unnamed road at grid reference DV363729, then proceed in the same direction along this unnamed road to its intersection with another unnamed road at grid reference DV399726, then proceeds generally northerly along the other unnamed road to its intersection with the Wangaratta to Moyhu road at grid reference DV400727, then proceeds generally north westerly along the Wangaratta to Moyhu road to its intersection with grid line 730 at grid reference DV398730, then proceeds easterly along grid line 730 to its intersection with the King River at grid reference DV404730, then proceeds generally northerly along the King River to grid reference DV400750, then proceeds north easterly in a straight line to the junction of the Ovens River and the unnamed creek at grid reference DV409762, then proceeds generally south easterly along the Ovens River to the edge of the map at grid reference DV552674; On to Map Albury (Sheet 8225) at grid reference DV552674, then proceeds generally south easterly along the Ovens River to Pioneer Bridge at grid reference DV573666, then proceeds south south easterly in a straight line to the edge of the map at grid

reference DV588605; On to Map Buffalo (Sheet 8224) at grid reference DV588605, then proceeds south south easterly in the same straight line via Kneebones Gap at grid reference DV597558 and continue along the same straight line to the junction of Bread and Butter Gap Road and the Lake Buffalo Caboor Road at Bread and Butter Gap at grid reference DV642367, then proceeds generally south westerly in a straight line to the trig point on Mount Emu at grid reference DV615336, then proceeds generally south easterly in a straight line to the junction of the Dandongadale and Rose Rivers at grid reference DV671266, then proceeds east of southerly in a straight line to the intersection of the Lake Cobbler-Abbeyard Track with the Dandongadale-Buffalo Divide Track at grid reference DV709067, then proceeds westerly along grid line 067 to the edge of map at grid reference DV555067; On to Map Whitfield (Sheet 8124) at grid reference DV555067, then proceeds westerly along grid line 067 to the unnamed vehicular track near Evans Creek at grid reference DV445067, then proceeds north westerly in a straight line to the King River (West Branch) at grid reference DV407099, then proceeds north of westerly in a straight line to the intersection of two unnamed roads near the school at grid reference DV355130, then proceeds in a straight line west of northerly to its intersection with the unnamed road at grid reference DV336155, then proceeds generally northerly in a straight line along the watershed between Ryans Creek and Middle Creek to the intersection of two unnamed roads at grid reference DV303460, then proceeds west of northerly in a straight line to the unnamed road at grid reference DV282574, then proceeds east of northerly in a straight line to the edge of the map at grid reference DV293603; On to Map Wangaratta (Sheet 8125) at grid reference DV293603, then proceeds in the same straight line to the junction of an unnamed road and the Hume Highway in Glenrowan, at grid reference DV309642, the starting point.

LINDA PEARSON  
SOLICITOR

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