FEDERAL COURT OF AUSTRALIA

Baxendale's Vineyard Pty Ltd and Others v Geographical Indications Committee and Another*

[2007] FCAFC 122

Emmett, Dowsett and Siopis JJ

21 May, 10 August 2007

Primary Industry — Wine — Wine regions — Definition of geographical indication — King Valley — Australian Wine and Brandy Corporation Act 1980 (Cth), ss 3(1), 4, 5A, 5B, 6, 40C, 40D, 40N, 40P, 40PA, 40Q, 40T(2), 40U, 40V, 40W, 40Y, 40ZA — Australian Wine and Brandy Corporation Regulations 1981 (Cth), regs 23, 24, 25 — Administrative Appeals Tribunal Act 1975 (Cth), s 44.

Public International Law — Treaties — Commonwealth legislation to give effect to treaty — Definition of geographical indication — Whether definition in treaty to be used in interpreting definition in Commonwealth legislation — Interpretation of definition in treaty — Meaning of appellation of origin — Agreement between Australia and the European Community on Trade in Wine [1994] ATS 6 — Australian Wine and Brandy Corporation Act 1980 (Cth), ss 3(1), 4, 5A, 5B, 6, 40C, 40D, 40N, 40P, 40PA, 40Q, 40T(2), 40U, 40V, 40W, 40Y, 40ZA.

The applicants appealed from a decision of the judge at first instance, upholding a decision of the Geographical Indications Committee (the Committee) that a particular locality in Australia known as King Valley would be deemed a "geographical indication" for the purposes of description and presentation of wine from that locality.

Pursuant to s 40Q of the *Australian Wine and Brandy Corporation Act 1980* (Cth) (the Act), the Committee had the power to determine a geographical indication in relation to a grape-growing area in Australia. This geographical indication could then be used to describe and present wine from that area.

The applicants submitted that the judge at first instance erred in interpreting the meaning of "geographical indication" in the Act. The applicants submitted that the primary purpose of the Act was to give effect to Australia's obligations under the *Agreement between Australia and the European Community on Trade in Wine* (the Agreement) and that the terms of the Agreement were a dominant consideration in interpreting the definition of geographical indication in the Act. The applicants submitted that, in determining a geographical indication, the Committee had to ensure that a particular Australian geographical indication satisfied the definition of geographical indication in the Agreement.

Article 2 of the Agreement defined geographical indication as an indication:

*[EDITOR'S NOTE: See also *Baxendale's Vineyard Pty Ltd v Geographical Indications Committee* (2007) 156 FCR 444.]

> including an "Appellation of Origin", which is recognised 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 geographic origin.

The applicants submitted that the words following "Appellation of Origin" qualified the definition of geographic indication in the Agreement and had to be used to interpret the definition of geographical indication in the Act.

Held: by Dowsett J, Emmett and Siopis JJ agreeing: In determining a geographical indication pursuant to the Act, there is no need to resort to the definition of "geographical indication" in the Agreement. [128]

Beringer Blass Wine Estates Ltd v Geographical Indications Committee (2002) 125 FCR 155, discussed.

Obiter: per Dowsett J: The definition of "geographical indication" in Art 2 of the Agreement should be construed upon the basis that the words following the expression "Appellation of Origin" refer only to that term and do not define or qualify the term "geographical indication". [127]

Appeal against decision of Downes J, (2003) 93 ALD 422, dismissed.

Cases Cited

Beringer Blass Wine Estates Ltd v Geographical Indications Committee (2002) 125 FCR 155.

NBGM v Minister for Immigration and Multicultural Affairs (2006) 81 ALJR 337.

Appeal

A Melick SC and *D Kell*, for the applicants.

G Gretsas, for the first respondent.

T Ginnane SC and *L De Ferrari*, for the second respondent.

Cur adv vult

10 August 2007

Emmett J.

1 I have had the advantage of reading the proposed reasons of Dowsett J in draft form. I agree with his Honour's conclusions for the reasons that his Honour gives. However, I wish to add some observations of my own.

2 The proceeding involves a dispute as to whether there should be a wine region of "Whitlands High Plateaux" for the purposes of the description and presentation of Australian wine. The applicants (the Whitlands Vignerons) say that there should be such a region. The second respondent (the King Valley Vignerons) says that there should not be such a region. The proceeding is brought by way of appeal pursuant to s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (the Tribunal Act). Such an appeal lies only on a question of law. The King Valley Vignerons say that the proceeding does not raise a question of law and that, in any event, the decision of the Administrative Appeals Tribunal (the Tribunal) from which the appeal is brought, involved no error. The Tribunal was constituted by its President. Hence, this appeal has been heard by a Full Court.

Australian Geographic Indications

3 It is convenient to say something about the statutory framework within which the present dispute arises. The primary legislation involved is the *Australian Wine and Brandy Corporation Act 1980* (Cth) (the Act). The objects of the Act include determining the boundaries of the various regions and localities in Australia in which wine is produced, to give identifying names to those regions and localities and to determine the varieties of grapes that may be used in the manufacture of wine in Australia.

4 Section 46(1) of the Act provides that the Governor-General may make regulations prescribing all matters required or permitted by the Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the Act. Pursuant to s 46, the *Australian Wine and Brandy Corporation Regulations 1981* (Cth) (the Regulations) have been made. The issues in the proceeding principally concern the effect and operation of the Regulations.

False and Misleading Description or Presentation of Wine

5 Section 40C of the Act relevantly provides that a person must not, in trade or commerce, intentionally sell or export wine with a *false* description and presentation. Under s 40D(2), the description and presentation of wine is false if, relevantly, it includes a registered *geographical indication* and the wine did not originate in a country, region, or locality in relation to which the geographical indication is registered. Similarly, under s 40E, a person must not, in trade or commerce, intentionally sell or export wine with a *misleading* description and presentation. Under s 40F, the description and presentation of wine is misleading, relevantly, if it includes a registered geographical indication and the indication is used in such a way in the description and presentation as to be likely to mislead as to the country, region or locality in which the wine originated.

6 Section 40F(5A) of the Act provides that the description and presentation of wine is misleading if it is not in accordance with such provisions (if any) relating to the description and presentation of wines, as are prescribed. Regulation 21(1) relevantly provides that, if a wine is made from a blend of grapes that come from different *regions* that have registered geographical indications and the description and presentation of the wine refers to one or more of those indications, the description and presentation of the wine must set out the names of all of the indications in descending order of the proportions of the relevant grapes in the wine. However, under reg 21(2), wine may be described and presented using a particular registered geographical indication if it consists of at least 85% by volume of the variety or varieties of grape that come from a region that has that registered geographical indication.

Determination of Geographical Indications

7 Division 4 of Pt VIB of the Act deals with the determining of geographical indications in relation to a region or locality in Australia. Division 4 consists of ss 40PA to 40Z inclusive. Sections 40Q, 40QA and 40R deal with the powers of the Geographical Indications Committee, which is established under ss 40N and 40P of the Act (the Committee), and with applications for the determination of geographical indications. Sections 40SA to 40Z deal with determinations of geographical indications by the Committee and, on review, by the Tribunal.

8 Under s 40Q of the Act, the Committee may, either on its own initiative or on an application made in accordance with s 40R, determine a geographical

indication in relation to a region or locality in Australia. Under s 40R, any of the following may apply to the Committee for the determination of a geographical indication:

- a declared winemakers organisation;
- a declared wine grape growers organisation;
- an organisation representing winemakers in a State or Territory;
- an organisation representing growers of wine grapes in a State or Territory;
- a winemaker;
- a grower of wine grapes.

9 Under s 40T(3) of the Act, the Committee may do either or both of the following:

- determine an area or areas having boundaries different from those stated in an application under s 40R;
- determine a word or expression to be used to indicate the area or areas constituting the geographical indication that is different from the word or expression proposed in such an application.

Section 40T(2) provides that, if the Regulations prescribe criteria for use by the Committee in determining a geographical indication, the Committee *must* have regard to those criteria. However, in determining a geographical indication, the Committee is not prohibited from having regard to any other relevant matters.

10 Under s 40U, a determination by the Committee is to be an interim determination in the first instance. Under s 40V, a notice stating that an interim determination has been made and setting out its terms must be published inviting persons to make written submissions in relation to the determination. After considering any submissions made to it, the Committee may, under s 40W, make a final determination. Section 40Y provides for application to the Tribunal for review of a *final determination*.

11 Under s 4 of the Act, *geographical indication*, in relation to wine, means:

- 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
- 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 from the country, region or locality indicated by the word or expression.

12 Part 5 of the Regulations, which include regs 23 to 26 inclusive, provides criteria for determining geographical indications. Under reg 23, the Committee must have regard to the criteria set out in Pt 5, for the purposes of making determinations under s 40T of the Act.

13 Regulation 24 defines the terms *zone*, *region* and *subregion*. A zone, a region or a subregion must be an area of land that may reasonably be regarded as a zone, region or subregion respectively. A subregion is a part of a region. A region may comprise one or more subregions. A zone may comprise one or more regions.

14 A *subregion* is an area of land that is a single tract of land that is discrete and homogeneous in its *grape growing attributes* to a degree that is substantial. A *region* is an area of land that is a single tract of land that is discrete and homogeneous in its *grape growing attributes* to a degree that is measurable and

is less substantial than in a subregion. A region or a subregion must also be an area of land that usually produces at least 500 t of wine grapes in a year and comprises at least five wine grape vineyards of at least 5 ha each that do not have any common ownership, whether or not it also comprises one or more vineyards of less than 5 ha.

15 Regulation 25 prescribes the criteria to which the Committee is to have regard for the purposes of s 40T(2) of the Act. The first criterion in reg 25 is whether a relevant area falls within the definition of a subregion, a region or a zone or any other area. That appears to be the only provision in respect to which the definitions of the terms zone, region and subregion have relevance. The intent appears to be that the Committee may make a determination of a geographical indication for a zone, a region or a subregion.

16 Apart from the question of whether an area can reasonably be regarded as a subregion, a region or a zone, the criteria prescribed in reg 25 are concerned either with matters described as "attributes" or with other matters. Regulation 25(b) to (h) specify the following other matters as criteria:

- the history of the founding and development of the area;
- the existence, in relation to the area, of natural features;
- the existence, in relation to the area, of constructed features;
- the boundary of the area suggested in the application to the Committee under s 40R;
- ordinance survey map grid references in relation to the area;
- local government boundary maps in relation to the area;
- the existence, in relation to the area, of a word or expression to indicate that area.

17 Regulation 25(i) then provides for a final criterion consisting of the degree of discreteness and homogeneity of the proposed geographical indication in respect of nine attributes. The nine attributes are as follows:

(i) the geological formation of the area;
(ii) the degree to which the climate of the area is uniform;
(iii) whether the date on which harvesting a particular variety of grapes is expected to begin in the area is the same as the date on which harvesting grapes, the same variety of which 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 governmental authorities;
(viii) any relevant traditional divisions within the area;
(ix) the history of grape and wine production in the area.

Attributes (vii) and (viii) are not specifically related to grape growing. They should probably be understood as referring to development or divisions that have some bearing on grape growing.

The Tribunal's Decision

18 On 8 September 1997, the King Valley Vignerons applied to the Committee for the determination of a region to be known as "King Valley". On

1 October 1997, the Committee published an interim determination in respect of that application. From December 1997 to April 1998, the Committee received submissions in relation to its interim determination.

19 In June 1998, the Whitlands Vignerons made a separate application for the determination of a different region to be known as "Whitlands High Plateaux". The area of the proposed Whitlands region is wholly within the area of the proposed King Valley region.

20 From December 1998 to March 2004, the Committee received further submissions in relation to the King Valley application. On 23 November 2004, the Committee published a final determination of a region to be known as King Valley. At that stage, no interim determination had been made in respect of the proposed Whitlands region.

21 Both the Whitlands Vignerons and the King Valley Vignerons lodged applications to the Tribunal for review of the Committee's decision of 23 November 2004. It is significant that both review applications relate to the same decision by the Committee, namely, the final determination made by the Committee on 23 November 2004.

22 In its reasons, the Tribunal characterised the issue before it as being whether there should be one region or whether there should be two regions. The Tribunal observed that there was no dispute that there should be a region called King Valley. The issue was whether there should be a separate region called "Whitlands High Plateaux". The Tribunal also identified another broad issue, namely, whether any such separate region should include two ridges to the north of the main plateau. However, having regard to the decision made by the Tribunal, that issue does not presently arise.

23 The Tribunal appears to have approached its task on the basis that there were two reviews before the Tribunal, one in respect of the Whitlands application to the Committee and the other in respect of the King Valley application to the Committee. However, since s 40Y of the Act only authorises an application for review of a final determination and no final determination has been made in respect of the application by the Whitlands Vignerons, both applications before the Tribunal must be regarded as relating to the final determination made by the Committee concerning the King Valley region. Both the Whitlands Vignerons and the King Valley Vignerons sought review of the final determination in relation to the King Valley region, but for different reasons.

24 In their review application to the Tribunal, the King Valley Vignerons complained about the area that was the subject of the determination by the Committee, in that it sought to have a larger area included in the region than the area that was the subject of the Committee's final determination. The complaint of the Whitlands Vignerons in their review application, on the other hand, was that the area that was the subject of the Committee's final determination was too extensive, in so far as it included the area that the Whitlands Vignerons claimed should be a separate region. No question appears to have been raised that the Whitlands area should have been determined to be a subregion of the King Valley region.

25 The Tribunal, in one sense, mischaracterised the stance of the parties before it, insofar as it said that the Whitlands Vignerons propound two regions, while the King Valley Vignerons proposed only one region. The only question before the Tribunal was whether the King Valley region should be determined as

including the area that was the subject of the application by the Whitlands Vignerons. It was not open to the Tribunal to conclude that there should be a second region.

26 The Tribunal considered each of the criteria set out in reg 25(a) to (h). It made findings in relation to each of the first eight criteria and then proceeded to consider the nine attributes referred to in the ninth criterion in reg 25(i). The Tribunal made findings in relation to each of those attributes.

27 After considering each of the criteria in reg 25, the Tribunal returned to a more detailed consideration of the criterion in reg 25(a). In dealing with the criterion in reg 25(a), whether the area falls within the definition of a subregion, a region, a zone or any other area, the Tribunal referred to the definitions in reg 24. It considered that the definitions required attention to be given to the potential identification of an area that is discrete and homogeneous in its grape growing attributes. The Tribunal saw no basis for concluding that the ordinary meaning of the phrase "grape growing attributes" should be ignored. Rather, the scope, subject matter and purpose of the Act appeared to the Tribunal to support a construction that accords with the ordinary meaning of the words.

28 The Tribunal considered the criterion in reg 25(a) to be the overwhelmingly important criterion for viticultural and wine making considerations. It considered that that criterion was one to which continual reference must be made. Against that context the Tribunal concluded that the preferable decision was that there should be one region to be called King Valley.

29 The Tribunal was in no doubt that a distinction can be drawn between the valley land and the plateau land. It formulated the question before it as whether the differences between the plateau land, on the one hand, and the valley land, on the other, are such that they ought to be reflected by division into two separate regions. The Tribunal found that, while there are undoubtedly differences in grape growing characteristics within the whole area, there are high levels of homogeneity within separate parts, such as the plains, the valley proper and the ridges and the plateaux. The Tribunal found that, although there are differing grape growing characteristics in the areas under consideration, they all occur in the same general location in terms of latitude and longitude. The Tribunal considered that the local influences were the climate, soil and geology of a valley system in the foothills of a part of the Great Dividing Range and that the area did not include any other geographical types, such as desert or wetlands.

30 The Tribunal found that there are measurable degrees of homogeneity within the whole of the wider King Valley area, including the area up to the headwaters of the King River. The Tribunal found that there is greater homogeneity within the Plateau, the ridges or the Plateau and the ridges together, than in the whole valley. However, the Tribunal did not consider that the lesser homogeneity of the whole valley deprived it from qualification as a region under reg 24. The Tribunal said that, in reaching that conclusion, it acted upon its assessment of the area and upon its assessment of the criteria set out in reg 25.

31 The Tribunal accepted that there are identifiable differences between the Plateau and ridges, on the one hand, and the balance of the area, on the other, and that there are differences in grapes grown, in growing techniques, in climate and in soils between the two areas although, at the margins, such distinctions

may be difficult to draw. Nevertheless, having given those matters full weight, the Tribunal did not consider that the King Valley and the Whitlands areas were separate regions.

32 The Tribunal observed that there may well be separate subregions and that, were the Tribunal engaged in the task of identifying subregions, it would find that there were separate subregions on the material before it. The Tribunal observed that it was relevant that there might be separate subregions because a decision as to whether an area should be a region usually involved considering whether the criteria and the issues of relative discreteness and homogeneity mean that the area would be better classified as a subregion rather than a region.

33 The Tribunal concluded that there should be one region for the area, which should include the area of the proposed Whitlands region and the other areas as claimed by the King Valley Vignerons. The result was that the region would be larger than that area that was the subject of the final determination made by the Committee, although it would be smaller than the area that was the subject of the interim determination made by the Committee.

The Appeal

34 The notice of appeal is long and verbose in its attempts to identify a question of law and grounds of appeal. In the course of the hearing, the Whitlands Vignerons sought leave to amend the notice of appeal by the inclusion of a further question of law and a further ground. The written submissions filed on behalf of the Whitlands Vignerons do not appear to support all of the grounds set out in the notice of appeal. In the circumstances, it is appropriate to deal only with those purported grounds that were supported in the submissions, either written or oral.

The Tribunal Raised the Wrong Question

35 The Whitlands Vignerons contended that the Tribunal raised the wrong question, in saying that the question for determination was whether there should be one region for the whole valley or whether there should be two. They said that they were entitled to have their application determined on its own merits and the relevant question was whether their application satisfied the requirements of the Act. They say that at no time did the Tribunal consider the application of reg 25 and the definition of region in reg 24 directly to the Whitlands area. They complain that the Tribunal gave no consideration to whether the Whitlands area comprised a single tract of land that is discrete and homogeneous in its grape growing attributes to a degree that is less substantial than a region. They say that the failure to undertake such a comparative analysis constituted an error of law because the Tribunal asked itself the wrong statutory question.

36 The short answer to this contention is contained in the observations already made above. That is to say, the only matter that was before the Tribunal was the review of the final determination made by the Committee that there should be a region to be known as King Valley. There has been no final determination by the Committee of the application made to it by the Whitlands Vignerons. It was not open to the Tribunal to entertain any review in respect of any determination made by the Committee in relation to that application, assuming one has been made.

Error in the Interpretation of regs 24 and 25

37 The notice of appeal purports to raise a question of law consisting of the

proper interpretation of s 40 of the Act and the proper meaning of regs 24 and 25. The first ground in the notice of appeal is that the Tribunal erred in failing to apply, or in misapplying, the decision of the Full Court in *Beringer Blass Wine Estates Ltd v Geographical Indications Committee* (2002) 125 FCR 155 (the *Coonawarra* case).

38 The Whitlands Vignerons say that the Tribunal erred in affording primacy to the criterion in reg 25(a). However, a fair reading of the Tribunal's reasons does not suggest that it treated that criterion as being determinative. The weight and significance to be given to particular criteria was a matter for the Tribunal. The Tribunal's reasons do not exhibit a wrong approach to the construction of reg 25(a) such as would constitute an error of law.

39 The Whitlands Vignerons say that the Tribunal erred by taking into account, when determining the boundaries of the proposed region, considerations that are permitted to be taken into account only when determining the name of a geographical determination. They say that the Tribunal erred in having regard to the history of the area and the use of the name King Valley in determining the boundaries of the proposed region. The answer, once again, is that the weight to be given to particular criteria was a matter for the Tribunal.

40 The Whitlands Vignerons also say that the Tribunal erred by approaching the attributes in reg 25(i) as permitting application in respect of such attributes to the extent that they have nothing to do with grape growing attributes. Specifically, they say that the criterion in reg 25(i) should be read as though it says:

> The degree of discreteness and homogeneity *in its grape growing attributes* of the proposed geographical indication in respect of the following attributes.

(See the *Coonawarra* case 125 FCR 155 at [66].)

In its reasons, the Tribunal referred to a submission that the phrase "grape growing attributes" does not mean what those words ordinarily mean. It referred to a submission that the phrase was intended to mean exclusively the list of loosely related subcriteria contained in reg 25(i), some of which have nothing to do with grape growing attributes. The Tribunal rejected the submission and considered that giving the words their ordinary language meaning was the preferred approach. The Tribunal rejected the submission that the phrase "grape growing attributes" related only to the attributes referred to in reg 25(i). The Whitlands Vignerons say that that approach involved an error of law.

41 Whether or not it is correct, as the *Coonawarra* case 125 FCR 155 suggests, that the criterion in reg 25(i) should be understood as referring to the degree of discreteness and homogeneity in grape growing attributes, the question does not bear on the conclusion reached by the Tribunal. Even if the Tribunal's approach involved an error of construction in relation to the criterion in reg 25(i), the Whitlands Vignerons' contentions really lead nowhere. Rather, their submissions were directed to supporting the proposition that, having correctly found a series of facts, the Tribunal erred in failing to find that the area proposed by the Whitlands Vignerons as a region should be defined as such and in arriving, instead, at the conclusion that there were not two separate regions.

42 Related to that proposition was the further proposition that the Tribunal erred in failing to find that the principal factors relevant to the grape growing attributes of land were the factors of climate, topography and soil and that, as such, all of those factors supported the determination of the Whitlands area as a region and those factors could not support a finding that the area as a whole

could be regarded as a region. The Whitlands Vignerons made a detailed analysis of the findings made by the Tribunal in relation to each of the criteria in reg 25. They contended that their analysis demonstrated that the findings made by the Tribunal either supported the conclusion that there should be a separate region for the Whitlands area or were neutral to that conclusion. They say that none of the findings supported the ultimate conclusion reached by the Tribunal that there should be a single King Valley region. That appears to be a veiled invitation to the Full Court to require the Tribunal to reconsider its conclusions, notwithstanding the absence of any error of law.

Conclusion Not Reasonably Open to the Tribunal

43 The Whitlands Vignerons also contend that, even if the Tribunal correctly stated the law, the conclusion that it reached on the basis of the facts found was not reasonably open to it. They say that the primary facts found by the Tribunal were such as would fairly compel the conclusion that there should be separate regions. That also appears to be a veiled invitation to the Full Court to require the Tribunal to reconsider its conclusions, notwithstanding the absence of any error of law. The conclusions of the Tribunal were open to it on the basis of the findings that it made.

Obligation to Give Reasons

44 The amendment to the notice of appeal that the Whitlands Vignerons sought to make during the hearing was to include an additional question of law and ground that the Tribunal failed to give adequate reasons for its decision and failed adequately to disclose the process of reasoning that led to its conclusion that there should be a single region. The proposed ground appears to be an alternative to the ground dealt with above, that the Tribunal misconstrued reg 25.

45 In essence, the Whitlands Vignerons say that, in the light of the analysis referred to above, it is not apparent from the Tribunal's reasons how it reached the conclusion that there should be a single region, in circumstances where it found that the criteria in reg 25 either supported a conclusion that there should be separate regions or were neutral as to whether there should be separate regions. They say that, in those circumstances, the Tribunal did not expose its reasoning in sufficient detail to enable them to understand why they were unsuccessful before the Tribunal.

46 There has been no request to the Tribunal for further reasons. Indeed, after the Tribunal published its reasons, there were several communications between the parties and the Tribunal concerning the need for a further directions hearing. Specifically, at one stage, the Whitlands Vignerons indicated that they wished to make further submissions concerning "anomalies which [they] consider to be fundamental". Despite requests for particulars of those "anomalies" nothing was provided. At the further directions hearing conducted by the Tribunal after it had published its reasons, no complaint was made concerning the inadequacy of reasons on the part of the Tribunal. The ground is in effect a veiled invitation to the Full Court to invite the Tribunal to reconsider its ultimate conclusions, based on the primary findings made by the Tribunal, without identifying an error of law.

Irrelevant Consideration

47 The Whitlands Vignerons also say that the Tribunal erred by taking into account, as a disqualifying factor against the conclusion that there should be

separate regions, the fact that the proposed Whitlands region was geographically small. They say that the only relevant consideration as to whether the area satisfied the requirement for a region is that the area comprise at least five wine grape vineyards of at least 5 ha each that do not have any common ownership. The area of the proposed Whitlands region satisfied that requirement.

48 They complain that, notwithstanding that the proposed Whitlands region satisfied that prerequisite, the Tribunal referred to “the relatively small area” and dismissed different grape growing characteristics “in the area under consideration”, as all occurring in the same general location in terms of latitude and longitude. They say that the Tribunal focussed impermissibly upon the relatively small size of the proposed Whitlands region. However, the criteria specified in reg 25 are not exhaustive. Even if the prerequisite that an area comprised at least five wine grape vineyards of the relevant size, it would still be open to the Committee or the Tribunal to conclude that the area was not a region because of its size.

49 The Whitlands Vignerons complained specifically about a reference made by the Tribunal to an area being “too small to be a region in itself”. However, that reference was made in the context of determining the boundaries of the King Valley region. The Tribunal considered that it was inappropriate to include land in a region on which wine grapes will not be grown. However, the Tribunal also considered that it was inappropriate to exclude land on which wine grapes might be grown although they are not presently being grown. Those observations were made in the context of determining whether an area known as the Rose Valley should be included in the King Valley region. The Tribunal considered that, if that area were not included in the King Valley region, it could not practically be part of a wine region because it would be sandwiched between two other regions and would be too small to be a region in itself. That observation does not indicate an erroneous approach on the part of the Tribunal in relation to its conclusion that there should be only one region and not two separate regions as the Whitlands Vignerons contended.

Conclusion

50 The Whitlands Vignerons have not established any error on a question of law on the part of the Tribunal. It follows that the appeal should be dismissed with costs.

Dowsett J.

The Appeal

51 This is an appeal from a decision of the President of the Administrative Appeals Tribunal (the “Tribunal”). The decision was made pursuant to the *Australian Wine and Brandy Corporation Act 1980* (Cth) (the “AWB Act”). The appeal is pursuant to s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (the “AAT Act”). Such an appeal must be “on a question of law”. It is by no means clear that the applicants have raised such a question.

Background

52 The case concerns use of the words “King Valley” in the description and presentation of Australian wine. The case also concerns use of the words “Whitlands High Plateaux” in that context. The King River and the King Valley are in north-eastern Victoria. Whitlands is an elevated area to the west of the

King River. Opinions may differ as to whether it lies within the river valley. The King Valley and the Whitlands area are grape-growing areas, the grapes being suitable for wine-making.

53 The AWB Act regulates the use of words in the description and presentation of wines. The relevant provisions were enacted in circumstances which are set out in the Tribunal's reasons. A purpose of such enactment was to provide a legal framework for the operation of an *Agreement between Australia and the European Community on Trade in Wine* (the "EC agreement").

The AWB Act

54 Much of the applicants' argument depends upon the proposition that the primary purpose of the AWB Act is to give effect to Australia's obligations pursuant to the EC agreement, and that the terms of that agreement are therefore a relevant, indeed a dominant, consideration in the construction of the AWB Act and the *Australian Wine and Brandy Corporation Regulations 1981* (Cth) (the "Regulations"). However that approach may not be consistent with the approach adopted by the majority of the High Court in *NBGM v Minister for Immigration and Multicultural Affairs* (2006) 81 ALJR 337; 231 ALR 380, concerning "the steps which an Australian court should take in situations in which international instruments have been referred to in, or adopted wholly or in part by, enactments". In that case the Court was considering the operation of the *Migration Act 1958* (Cth) and the *Convention Relating to the Status of Refugees 1951*, done at Geneva on 28 July 1951 and the *Protocol Relating to the Status of Refugees 1967*, done at New York on 31 January 1967. However their Honours' remarks constitute an authoritative guide for present purposes.

55 At [61] the majority observed:

> The first step is to ascertain, with precision, what the Australian law is; that is to say, what and how much of an international instrument Australian law requires to be implemented, a process which will involve the ascertainment of the extent to which Australian law by constitutionally valid enactment adopts, qualifies or modifies the instrument. The subsequent step is the construction of so much only of the instrument, and any qualifications or modifications of it, as Australian law requires. The first step is not, … to derive an understanding of the proper interpretation and operation of the convention.

56 At [69] their Honours continued:

> The convention does not provide any of the framework for the operation of the Act. The contrary is the case. That does not mean that the convention in and to the extent of its application to Australia should be narrowly construed. It simply means that Australian law is determinative, and it is that which should be clearly ascertained before attention is turned to the convention.

57 Notwithstanding the applicants' contrary submissions, the AWB Act, itself, seems to do much more than simply give effect to Australia's obligations under the EC agreement. Section 3(1) provides:

> The object of this Act are:
>
> (a) to promote and control the export of grape products from Australia; and
>
> (b) to promote and control the sale and distribution, after export, of Australian grape products; and
>
> (c) to promote trade and commerce in grape products among the States, between States and Territories and within the Territories; and

(d) to improve the production of grape products, and encourage the consumption of grape products, in the Territories; and
(e) to enable Australia to fulfil its obligations under prescribed wine-trading agreements; and
(f) for the purpose of achieving any of the objects set out in the preceding paragraphs:
(i) to determine the boundaries of the various regions and localities in Australia in which wine is produced; and
(ii) to give identifying names to those regions and localities; and
(iii) to determine the varieties of grapes that may be used in the manufacture of wine in Australia;
and this Act shall be construed and administered accordingly.

58 The term "prescribed wine trading agreement" is defined in s 4 to mean:

(a) an agreement relating to trade in wine that is in force between the European Economic Community and Australia; or
(b) an agreement relating to trade in wine that is in force between a foreign country (other than an EC country) and Australia and is declared by the regulations to be a prescribed wine-trading agreement.

59 This and other provisions clearly indicate an expectation that there will be agreements with other countries ("agreement countries") in connection with which the AWB Act will operate. Further, the stated purposes go well beyond the facilitation of one agreement. Finally, the EC agreement assumes the existence of domestic Australian law protecting names used in the description and presentation of Australian wine and, to some extent, applies that law to the description and presentation of wine within the European Community. There would be an element of circuity in a process which involved the construction of domestic law by reference to the agreement. These factors suggest that care should be taken in assuming that Parliament intended that the terms of the EC agreement be the dominant factor in construing the AWB Act.

60 The AWB Act establishes the Australian Wine and Brandy Corporation (the "Corporation"). Section 7 provides:

The functions of the Corporation are:
(a) to promote and control the export of grape products from Australia;
(b) to encourage and promote the consumption and sale of grape products both in Australia and overseas;
(c) to improve the production of grape products in Australia;
(d) to conduct, arrange for, and assist in, research relating to the marketing of grape products; and
(e) such other functions in connection with grape products as are conferred on the Corporation by this Act or the regulations.

61 Section 8 identifies various powers of the Corporation which include:

- doing anything for the purpose of giving effect to a prescribed wine-trading agreement;
- determining conditions applicable to registered geographical indications in relation to wines manufactured in Australia or in an agreement country; and
- determining geographical indications to be registered in relation to foreign countries which are not agreement countries and the conditions applicable to such indications.

62 For present purposes the term "geographical indication" is of considerable importance. Section 4 of the AWB Act provides that:

> (*geographical indication*), in relation to wine, means:
>
> (a) a word or expression used in the description or 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.

63 Section 40ZA provides for the establishment of a "Register of Protected Names" (the "Register"). The Register is to contain, among other things, Australian and other geographical indications and any conditions concerning their use. In the case of Australian wines, the geographical indications to be entered in the Register are those determined by the first respondent (the Geographical Indications Committee (the "Committee")) pursuant to Div 4 of Pt VIB of the AWB Act. In relation to an agreement country, geographical indications are those identified as such in the relevant agreement. Geographical indications used in the description and presentation of wines from other countries may also be registered.

64 Division 2 of Pt VIB of the AWB Act regulates the sale, export and import of wines. Section 40C proscribes the sale, export or import of wine with a false description and presentation. Pursuant to s 40D the description and presentation of a wine is false if:

- it includes the name of a country or any other indication that the wine originated in a particular country and the wine did not so originate; or
- it includes a registered geographical indication and the wine did not originate in a country, region or locality in relation to which the geographical indication is registered.

65 Section 40E prohibits the sale, export or import of a wine with a misleading (as opposed to false) description and presentation. Section 40F provides that a description and presentation will be misleading in circumstances which are broadly similar to those prescribed by s 40D.

66 In Div 3 of Pt VIB, s 40N establishes the Committee. Section 40P prescribes its functions as follows:

> (1) The functions of the Committee are:
>
> (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 the Part; and
>
> (c) to make determinations for the omission of Australian GIs in accordance with this Part; and
>
> (d) any other function conferred on the Committee under this Part.
>
> (2) The Committee has power to do all things that are necessary or convenient to be done by, or in connection with, the performance of its functions.

67 Division 4 of Pt VIB prescribes the process for determining geographical indications in relation to regions and localities in Australia. Section 40Q provides that the Committee may, either on its own initiative or pursuant to an

application, "determine a geographical indication in relation to a region or locality in Australia". Section 40R identifies the persons who may apply for a determination. They are:

- a declared winemakers' organisation;
- a declared wine grape growers' organisation;
- an organisation representing winemakers in a State or Territory;
- an organisation representing growers of wine grapes in a State or Territory;
- a winemaker; and
- a grower of wine grapes.

68 The presiding member of the Committee must give notice of any proposed determination. Section 40RB contemplates objection by the owner of a registered trade mark which is identical to, or likely to be confused with, a proposed geographical indication. Subdivision E deals with determinations by the Committee. Section 40S requires the Committee, in determining a geographical indication, to consult with any declared winemakers' organisation or declared wine grape growers' organisation. These terms are defined in s 4 and in ss 5A and 5B. It may also consult with other organisations or persons.

69 Section 40T is of particular importance. It provides:

> (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.
>
> (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 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.
>
> (4) In determining a geographical indication, the Committee must not consider any submission to the extent that the submission asserts a trade mark right in respect of the proposed geographical indication.

70 Section 40Y provides for review of the Committee's decisions by the Tribunal.

71 The constitution of the Committee is dealt with in a Schedule to the AWB Act entitled "Administrative Provisions Relating to the Geographical Indications Committee". The Committee is to consist of three persons, namely:

- a presiding member appointed by the chairperson of the AWB Corporation;
- a member appointed by the chairperson on the nomination of a declared winemakers' organisation; and
- a member appointed by the chairperson on the nomination of a declared wine grape growers' organisation.

The Regulations

72 Section 40T(2) contemplates that there be regulations prescribing the criteria for determining geographical indications. Section 46 authorises the making of regulations, "not inconsistent with this Act, prescribing all matters required or permitted by this Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to this Act …". The Regulations were accordingly made. Part 5 of the Regulations is entitled "Criteria for determining geographical indications". Regulations 23, 24 and 25 are as follows:

> 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.
>
> 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
>
> (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
>
> (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
>
> (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.
>
> *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.
>
> *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:
>
> (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;

(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.

73 I will later refer to regs 24 and 25 in some detail. In so doing I will refer to the matters identified in reg 25(a) to (i) as criteria. In the case of reg 25(i) the individual matters identified in subparas (i) to (ix) will be referred to as "factors".

The EC Agreement

74 One of the objects of the AWB Act is to enable Australia to fulfil its obligations under prescribed wine-trading agreements. The EC agreement (which is such an agreement) entered into force on 1 March 1994. Article 1 provides:

> The Contracting Parties agree, on the basis of non-discrimination and reciprocity, to facilitate and promote trade in wine originating in the Community and in Australia on the conditions provided for in this Agreement.

75 The agreement has two major aspects. The first appears from Art 4. It provides that the European Community and Australia are to authorise the importation and marketing of each other's wine, subject to certain conditions. The second aspect appears from Art 6 which provides in part:

> 1 The Contracting Parties shall take all measures necessary, in accordance with this Agreement, for the reciprocal protection of the names referred to in Article 7 which are used for the description and presentation of wines originating in the territory of the Contracting Parties. Each Contracting Party shall provide the legal means for interested parties to prevent use of a traditional expression or a geographical indication identifying wines for wines not originating in the place indicated by the geographical indication in question.
>
> 2 The protection provided for in paragraph 1 also applies to names even where the true origin of the wine is indicated or the geographical indication or traditional expression is used in translation or accompanied by expressions such as "kind", "type", "style", "imitation", "method" or the like.

76 Article 7, para 1 provides that certain "names" are protected. Paragraph 1(a) deals with wines originating in EC countries. Paragraph 1(b) deals with wines originating in Australia. In each subparagraph item I deals with national names (ie of member states of the European Community and of Australia). Items II and III in para 1(a) deal with specific terms used in European Community regulations. Item IV in para 1(a) (dealing with European Community wines) and item II in para 1(b) (dealing with Australian wines) refer to "geographical indications" and "traditional expressions" referred to in Annex II. All of these "names" are protected pursuant to para 1 of Art 7 and other articles of the EC agreement.

77 The term "geographical indication" is defined in Art 2, para 2 to mean:

> … an indication as specified in Annex II, including an "Appellation of Origin", which is recognised 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 … .

78 I note the apparent similarity in language between the words following the term "Appellation of Origin" in this definition and para (b) of the definition of "geographic indication" in the AWB Act. I will return to that matter.

79 The term "traditional expression" is defined in the EC agreement to mean:

> … a traditionally used name as specified in Annex II, referring in particular to the method of production or to the quality, colour or type of a wine, 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.

80 The combined effect of Art 6, para 1 and Art 7, paras 1 and 3 is that the Australian geographical indications which appear in Annex II are protected in the European Community and can be used only in accordance with the conditions prescribed by Australian law.

81 Annex II sets out the wines "covered by this Agreement". Part A sets out a list of wines originating in the European Community, country by country. Wines originating in Australia are identified in Pt B which commences:

> 1. Geographical Indications
>
> Wines bearing the ascription South-Eastern Australia or one of the following names of States/Territories, zones, regions or sub-regions of wine-producing areas: … .

82 A list follows. It is divided into parts, one for each state and one for the Northern Territory. A typical entry is the first entry under the heading "New South Wales". There is a subheading "Zone", beneath which appears the word "Riverina". Beneath that is the word "Regions", under which appear eleven geographical names. I infer that they are regions of the Riverina zone. Other zones are then listed, also broken up into regions. Some regions contain subregions. For Victoria, one zone is "North-East Victoria", of which "King Valley" is shown as a region having the following subregions:

Cheshunt,
Edi,
Hurdle Creek,
Markwood,
Meadow Creek,
Milawa,
Myrrhee,
Oxley,
Whitfield, and
Whitland

The Applications — "King Valley" and "Whitlands High Plateaux"

83 On 8 September 1997 the King Valley Grape Growers' Association made application for determination of a geographical indication for a region to be known as "King Valley" (the "King Valley application"). The second respondent (King Valley Vignerons Inc (the "KVVI")) is the successor to that organisation. On or about 28 June 1998 the applicants (or some of them) applied for determination of a geographical indication for a region to be known as "Whitlands High Plateaux" (the "Whitlands High Plateaux application"). The land included in that application lies within the boundaries of that included in the King Valley application. The Committee decided that it should make a final determination recognising King Valley as a geographical indication describing a region which includes the Whitlands High Plateaux area. It declined to make an interim determination in connection with the Whitlands High Plateaux application. Pursuant to ss 40U, 40V and 40W, making an interim determination is a preliminary step in making a determination pursuant to s 40T.

Proceedings in the Tribunal

84 Both the applicants and KVVI applied to the Tribunal for review of the Committee's decision. The applicants effectively sought exclusion of the Whitlands High Plateaux area from the King Valley region. They submitted that there should be a separate region having the geographical indication "Whitlands High Plateaux". If this Court were minded to accede to that submission, it would presumably be necessary to remit the matter to the Committee so that the

requirements of ss 40U and 40V might be met prior to any determination. KVVI sought review by the Tribunal of the boundaries fixed by the Committee for the King Valley region.

85 Proceedings in the Tribunal occupied eleven days in April and May 2006, including an extensive view, conducted over two days, during which evidence was also taken. The Tribunal published reasons on 6 September 2006. At [139] of its reasons the Tribunal said:

> 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.

86 Formal orders were made on 18 October 2006, apparently after the parties had been given the opportunity to confer. Those orders were as follows:

> 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 section 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.

87 In its reasons at [4] the Tribunal identified two "broad issues" for its consideration, namely:

- whether there should be one region for the whole valley or whether there should be two regions including a separate region called the Whitlands High Plateaux; and
- whether any separate plateau region should include two ridges to the north of the main plateau.

Geography

88 The King River rises in the Great Dividing Range, east of Mt Buller and flows, more or less, from south to north. It joins the Ovens River in the vicinity of the city of Wangaratta. That city is close to, but beyond, the northern boundary of the area included in the King Valley region as determined by the Tribunal. The town of Moyhu lies about 25 km south of Wangaratta, slightly west of the King River. The area between those centres is relatively flat. As one approaches Moyhu from the north the foothills of the Victoria Alps lie to the east. To the west are two ridges running roughly north/south. They are of some importance in this case. One of the ridges is called Bald Hill and the other, Mt Bellevue. To the south they join a plateau known as Whitlands Plateau which is part of a larger area known as Tolmie Plateau. Whitlands Plateau is bisected by Boggy Creek which also runs between the two ridges. Vineyards have been

established on Whitlands Plateau and on the two ridges. Mt Bellevue is 622 m high and Bald Hill, 660 m. Whitlands Plateau is, at various places, between 600 and 1,000 m in height. The saddles between each ridge and the plateau are somewhat lower than the ridges. The ridges, saddles and Whitlands Plateau comprise the area to which the proposed geographical indication "Whitlands High Plateaux" would apply. The plural "plateaux" presumably describes Whitlands Plateau and the tops of the two ridges.

89 As one travels south from Moyhu past these ridges the ground commences to rise more steeply. At an area known as South Cheshunt the King River is at an altitude of about 350 m, having fallen to that level from the weir at Lake William Hovell which is at 400 m. There is no practical prospect of vineyards being established any further south. To the east of the King River is an area drained by the Rose River which flows into Lake Buffalo. The Committee had excluded the Rose River area from the King Valley region. The Tribunal included it. That area may be suitable for viticulture, but no vineyards are presently established there. To the west of Mt Bellevue and Whitlands Plateau lies an area drained by Fifteen Mile Creek which eventually flows into the Ovens River north of Wangaratta. Much of that drainage area is included in the King Valley region. The area included in the King Valley region by the Tribunal is substantially greater than that included by the Committee. KVVI's original application was for an even larger area, but it does not appeal against the Tribunal's decision. The applicants appeal against the Tribunal's refusal to exclude the Whitlands High Plateaux area from the King Valley region.

The Tribunal's Reasons

90 At [115] of the Tribunal's reasons it identified the primary question for its consideration as follows:

> 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, amongst other things, at issues of discreteness and homogeneity. I will take into account the contrasting requirements for discreteness and homogeneity contained in paragraph (b) of each of the definitions of "region" and "sub region".

91 References in the Tribunal's reasons to "Whitlands Plateau" or the "Plateau" appear to relate to the northern part of the Tolmie Plateau, adjoining the two ridges, but excluding them. It is not clear whether the Tribunal treated the saddles as included in the ridges or in Whitlands Plateau.

92 In Annex II to the EC agreement "King Valley" is shown as a region. "Whitland" is shown as a subregion of that region. The Tribunal considered that the decision of the Full Federal Court in *Beringer Blass Wine Estates Ltd v Geographical Indications Committee* (2002) 125 FCR 155 (the "*Coonawarra* case") might suggest that such classification is binding in that the geographical indication "King Valley" may only be used for a region, and the geographical indication "Whitland" may only be used for a subregion. The Tribunal did not accept that proposition, treating Annex II as simply a matter to be taken into account for the purposes of the decision.

93 At [118]-[121] the Tribunal observed:

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.
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.
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.
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.

94 At [124]-[129] the Tribunal continued:

124. In the present case I think that natural features … are important. The King Valley, including the adjacent Fifteen Mile Creek Valley and Rose Valley, seem to be to be drawn together by the natural features which contain them. The history of the area … and of grape and wine production in the area … seem also to extend to the wider valley. This is no doubt explained by another relevant criteria [sic], that the area is part of a natural drainage basin … The built environment … follows on from the natural environment. The use of the name King Valley, which is the name applying to the whole region, including the Plateau and the ridges, also follows naturally from the other unifying features … 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 may be visually very different to valley floors but together they make up a universally recognized 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 winemaking 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 Mt Bellevue Ridges. It will be called "King Valley".

The Appeal

95 The notice of appeal is extensive, asserting numerous (apparently factual) errors in the Tribunal's decision. At the commencement of the hearing the applicants sought to amend the notice of appeal to add a further "question of law", namely:

> Whether the learned President failed to give adequate reasons for the decision at which he arrived in finding … that the Whitlands High Plateaux and the King Valley are not separate regions.

96 The "grounds" for this further question of law are said to be that:

> The learned President failed to give adequate reasons for the decision at which he arrived in finding … that the Whitlands High Plateaux and the King Valley are not separate regions and failed adequately to disclose the process of reasoning and what were "the other factors" alluded to in [128] and how such other factors, once identified, could have led to the conclusion reached having regard to the learned President's acceptance of significant factors favourable to the [applicants] with the consequence that the decision should be set aside and the matter remitted to the AAT for rehearing.

The Court has not yet granted leave to make this amendment.

97 As I have previously observed, excluding the proposed additional "question of law", the notice of appeal does not clearly identify any alleged error of law. However, in the course of argument, counsel for the applicants identified the following "grounds" as those upon which they rely:

- that the Tribunal erred in law by failing to consider both the King Valley application and the Whitlands High Plateaux application;
- that no reasonable Tribunal could have come to the conclusion that the Whitlands High Plateaux area should be included in the King Valley region; and
- that the Tribunal failed to give sufficient weight to the criteria identified in reg 25(i) as required by law.

98 It may be that I have not identified the points in precisely the language used by counsel for the applicants, but I understand the above outline accurately to describe the points which were made.

99 In my view many of the criticisms which the applicants make of the Tribunal's reasons are the result of their undue reliance upon the decision in the

Coonawarra case 125 FCR 155. Many of the "propositions" which they seek to draw from that case may be really observations relevant to its facts, having regard to the way in which it was conducted. This approach led the applicants to advance certain arguments by reference to that decision and without reference to the AWB Act, the Regulations or the EC agreement. Before addressing the applicants' submissions I should make some observations concerning certain provisions of each of those instruments.

Geographical Indications

100 The applicants' arguments depend very much upon para (b) of the definition of "geographical indication" in the AWB Act or, perhaps, the definition of that term in the EC agreement, to the exclusion of para (a) of the definition in the AWB Act. The two paragraphs are alternatives. Pursuant to para (a) a word or expression will be a geographical indication if it is used in the description and presentation of a wine to indicate the country, region or locality in which it originated, that is, in which the grapes were grown. Pursuant to para (b) a word or expression so used will also be a geographical indication if it suggests 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. To my mind there is a clear distinction between, on the one hand, a word or expression which identifies geographical origin and, on the other, a word or expression which suggests a quality, reputation or characteristic attributable to such origin.

101 The expressions "King Valley" and "Whitlands High Plateaux", *prima facie*, say nothing about quality, reputation or characteristics of the wine produced in those areas. Of course, a particular geographical description might acquire such significance. The Tribunal's reasons do not suggest that the case was conducted on that basis. In the course of argument, counsel for the applicants suggested that wine from the Whitlands High Plateaux area was of a higher quality than wine from other parts of the King Valley region and had a reputation to that effect. They submitted that there was much evidence supporting those assertions, and that the Tribunal had simply ignored it. Little, if anything, concerning the topic appears in the reasons. However the parties did not seek any further findings from the Tribunal. Curiously, none of the numerous alleged errors identified in the notice of appeal addresses wine quality or reputation. These matters are also not addressed in the applicants' written submissions or written submissions in reply to KVVI's submissions. The applicants have not asked this Court to make any such findings. Nor have they identified the evidence upon which it might act in order to do so. In those circumstances, I consider that the Court simply cannot address the question of whether the Whitlands High Plateaux area produces wine of a particular quality, or whether the term "Whitlands High Plateaux" indicates that any quality, reputation or characteristic of such wine is attributable to the fact that it originates in that area.

102 I turn to Div 4 of Pt VIB of the AWB Act. Sections 40PA and 40Q contemplate a geographical indication being determined for a region or locality. Section 40T speaks of areas within a region or locality to which a determination relates, suggesting that a geographical indication may describe more than one discrete area within a region or locality. The Tribunal seems to have concluded that regs 24 and 25 require that a region or subregion comprise one discrete parcel of land, not two or more. I will return to that matter, although it is

probably of little importance for present purposes. Finally, s 40T(2) provides that if regulations prescribe criteria for use in determining a geographical indication, the Committee is to have regard to them.

103 Part 5 of the Regulations is of primary importance for present purposes. Regulation 23 provides that for the purposes of making determinations pursuant to s 40T the Committee is to have regard to the criteria set out in that Part. Regulation 24 is, in effect, a definition provision. Regulation 25 is the primary operative provision. It provides that for the purposes of s 40T(2) of the AWB Act (that is with respect to making determinations as to geographical indications) the Committee is to have regard to certain identified criteria. None of the criteria is said to be of more or less significance than any other. The Tribunal considered that reg 25(a) requires that a geographical indication only be determined as being for a zone, region or subregion if the area in question satisfies the relevant definition in reg 24. That may be so. However a geographical indication may be determined for an area which is not a zone, region or subregion. It is difficult to know whether classification as a zone, region or subregion would be of any ongoing importance. The applicants apparently consider that their interests will be better served by being classified as a region rather than a subregion of the King Valley region. Annex II to the EC agreement classifies the protected Australian geographical indications on that basis.

104 The words "region", "subregion", "zone" and "area" are incapable of precise meaning. No doubt each word is intended to describe an area of land which is more or less capable of discrete identification. However each of those terms may be used to describe a very large or a very small area. Size gives no clear indication as to whether a particular tract of land should be described as a zone, a region, a subregion or simply as an area. There must be some other consideration or considerations leading to the conclusion that a particular area should be so described. Annex II to the EC agreement suggests a system of gradation, with a zone as the largest area and a subregion as the smallest. However the reference in the AWB Act to localities and areas somewhat disrupts that taxonomy. I should add that the applicants criticise the Tribunal's decision on the basis that it wrongly treated as relevant to its consideration of their application the fact that the area to which the proposed geographical indication was to apply was relatively small. However the Tribunal found (at [117]) that the Whitlands High Plateaux area satisfied the definition of "region" in reg 24. Thus it must only have treated size as a discretionary consideration. The applicants conceded in argument that size of the area was a relevant consideration in determining whether a geographical indication should be for a region or a subregion. See the transcript on appeal at p 47, ll 10-15. I see no basis for this criticism.

105 In the *Coonawarra* case 125 FCR 155 the Court distinguished between the criteria identified in reg 25 upon the basis that some were relevant to identification of the boundaries of an area to be the subject of a proposed geographical indication and others were relevant to the naming of the geographical indication. Whilst some of the criteria may be, generally or in a particular case, more appropriate to one purpose rather than the other, I doubt whether that distinction is universally valid.

106 The words "discreteness" and "homogeneity" in reg 25(i) seem to reflect the words "discrete and homogeneous" in the definitions of "region" and "subregion" in reg 24. This might suggest that the various factors identified in

reg 25(i) are the grape growing attributes referred to in reg 24, or at least some of them. The Tribunal considered that the grape growing attributes referred to in reg 24 were not limited to the factors identified in reg 25(i). It also considered that some of those factors "have nothing to do with grape growing attributes".

107 In my view regs 24 and 25 prescribe criteria which might commonly be considered in seeking to identify and describe a discrete geographical area, particularly for purposes associated with wine grape growing. The criteria identified in reg 25(a) to (h) are common features which might indicate that a particular area has been, or should be, treated as a discrete entity, that it has sufficient commonality to justify its being so treated. For the purposes of reg 25(a), reg 24 offers a general physical description of a subregion, a region and a zone. It establishes a system of gradation which reflects that in the EC agreement, but with the addition of "other" areas. Geographical indications may be determined for areas which are not subregions, regions or zones. Nonetheless, it may be that where a geographical indication has been classified in Annex II to the EC agreement as relating to a zone, a region or a subregion, the Committee should give effect to such classification. Although there seems to be no express statutory requirement to do so, it would be a reasonable inference that as much was intended. For present purposes it is not necessary to decide that question. The geographical indication "King Valley" is classified in the EC agreement as a region, and the Committee has so determined. The proposed geographical indication "Whitlands High Plateaux" does not appear in Annex I, although the geographical indication "Whitland" is shown as a subregion of the King Valley region. The name "Whitlands" appears on the maps which have been provided to the Court. It appears to indicate the area referred to by the Tribunal as Whitlands Plateau. It does not include the two ridges. Annex II says nothing about the proposed geographical indication "Whitlands High Plateaux" which includes a substantially greater area than that described as "Whitlands" or, as I infer, "Whitland".

108 The Tribunal concluded that some of the factors identified in reg 25(i) are not grape growing attributes. I disagree. The factors identified in reg 25(i)(i) to (vi) are directly related to cultivation and, in that sense, are grape growing attributes. That identified in reg 25(i)(vii) may affect availability of land for grape growing by making it more or less likely that it will continue to be available for that purpose. Traditional divisions in the area (reg 25(i)(viii)) may also militate in favour of, or against, grape growing or the growing of a particular type of grape. The history of grape growing and wine production (reg 25(i)(ix)) may involve available outlets for grapes, human resources and infrastructure. All these factors may accurately be described as grape growing attributes.

109 Regulations 24 and 25 offer little difficulty if they are read together. The task is to identify an area to which a particular geographical indication may be attached, whether it be a zone, a region, a subregion or other area. Regulations 24 and 25 are simply a non-exhaustive guide to that task. I see no justification for giving pre-eminence to any of the criteria or factors there identified. The weight to be given to each of them may vary from case to case.

110 There are at least two distinct situations in which the Committee will have to apply s 40T and regs 24 and 25 in determining an Australian geographical indication. The first is a task of the kind recognised by the Court in the *Coonawarra* case 125 FCR 155. The Committee will be determining the boundaries of the area to be included in a geographical indication identified in

Annex II to the EC agreement. In other words it will be seeking to identify the appropriate boundaries of an area already recognised as a wine producing area. History and geography will be especially relevant to that task. Relevant history may include common attitudes and opinions concerning the land in question. In particular it may be relevant that people have treated, and continue to treat, a particular area as an entity. In other circumstances, the Committee may be considering whether an area has the characteristics necessary to its having a geographical indication. The criteria in regs 24 and 25 may be identified and evaluated differently, depending upon which of these tasks is being undertaken. In each case the exercise is, in all respects, an holistic one, requiring the global assessment of a large number of considerations, some quite specific and others, quite imprecise.

111 To some extent, the conduct of this appeal has been confused by the applicants' concentration on para (b) of the definition of "geographical indication" in the AWB Act and the definition of that term in the EC agreement. The applicants' case seems to assume that the AWB Act should be read as reflecting the definition in the EC agreement. Some support for such a proposition may possibly be derived from the *Coonawarra* case 125 FCR 155 at [58], [59] as follows:

> 58. For present purposes, the central requirement to enable Australia to fulfil its obligations under the A-EC Agreement is to determine a geographical indication within the meaning of Art 2 of the A-EC Agreement. Such a geographical indication is one recognized in the law of Australia for the purpose of the description and presentation of wine originating in a region "where a given quality, reputation or other characteristic of the wine is essentially attributable to its geographical origin". That definition intends that the geographical indication will indicate a wine, the characteristics of which are essentially attributable to the region where the grapes, from which it is made, are grown.
>
> 59. The characteristics of wine essentially attributable to the region where the grapes are grown will not be influenced by the location within that region of local government or land survey boundaries administratively fixed for reasons unrelated to soil, climate or other conditions which bear on grapevine horticulture. While boundaries of this kind may have a role to play in the selection of an appropriate name, word or expression to describe a region, to use them to identify the region is likely to introduce a wholly irrelevant consideration.

112 At [58], the Court appears to have been discussing the definition of "geographical indication" which appears in the EC agreement rather than that which appears in the AWB Act. The reference to "legal recognition" suggests as much. At [59] the Court was referring to the effect of the definition in the EC agreement upon the approach to the criteria identified in reg 25. However, at [57], the Court referred to the definition of "geographical indication" in the AWB Act as:

> a word or expression used in the description and presentation of wine to indicate the country, region or locality in which the wine originated.

113 As I have previously observed, the definition of "geographical indication" in the AWB Act identifies two different types of geographical indication. The first type reflects the geographical origin of the grapes used to make the wine. The

second suggests that a particular quality, reputation or characteristic of the wine is attributable to such geographical origin. Whether or not a particular geographical indication has that effect is a question of fact.

114 It may be implicit in [58] and [59] of the *Coonawarra* case 125 FCR 155 that in performing its function pursuant to s 40T of the AWB Act, the Committee is obliged to ensure that a particular Australian geographical indication satisfies the definition in the EC agreement. However it may also be that those paragraphs simply reflect the way in which the case was presented. Some passages in the reasons suggest that it was conducted on the basis that Coonawarra wines had a particular quality, a particular reputation or particular characteristics. At [29] it was said that:

> The area has a reputation for consistent production of high quality grapes which has led to premium wine production.

115 At [38] there is reference to areas which have produced, or may produce, premium grapes. At [44] the Court refers to [124] of the Tribunal's decision in that case. The Tribunal there apparently referred to a "Coonawarra-style" wine.

116 If argument focussed on para (b) of the definition in the AWB Act, that may have led to a tacit acceptance that the definition in the EC agreement was to be given effect. However, with all due respect, I doubt the correctness of that approach. Whatever may have been the basis upon which the *Coonawarra* case 125 FCR 155 was conducted, it could not displace the clear definition of the term "geographical indication" in the AWB Act. In particular it offers no basis for ignoring the two alternatives contained in that definition or for conflating them. Paragraph (a) says nothing about any relationship between quality, reputation or other characteristics of the wine and its geographical origin. Paragraph (b) deals expressly with such relationships.

117 The EC agreement offers "reciprocal" protection to names used in connection with wines, reflecting the protection available in the country of origin of the wine in question. See Art 7, para 3. In order that an Australian name be protected in the European Community, it must be protected by the law of Australia. Article 6, paras 1 and 7 make this quite clear. The applicants impliedly suggest that such protection extends only to Australian geographical indications which involve a recognised link between quality, reputation or other characteristics of the wine and its geographical origin. Article 12 suggests to the contrary. It contemplates the use of more than one geographical indication in connection with the same wine. Where a single geographical indication is used, at least 85% of the wine must be obtained from grapes harvested in the relevant geographical area. Where up to three geographical indications are used, at least 95% of the wines must be obtained from grapes harvested in those areas with a minimum of 5% from each of them. The Article also contemplates the use of more than three geographical indications with no such restrictions. It is somewhat difficult to imagine a wine derived from three or more different geographical regions having a quality, reputation or other characteristic "essentially attributable to its geographical origin". Various aspects of Art 6 also seem to focus on geographical origin.

118 The only support for the applicants' position appears to be the definition of the term "geographical indication" in Art 2. Inherent in the applicants' submission is the proposition that the words "which is recognized … attributable to its geographical origin" qualify the words "geographical indication". An alternative view is that those words qualify the words

"Appellation of Origin". This raises the question of the meaning of those words. This matter was the subject of evidence in the Tribunal. I will return to that evidence at a later stage. Before doing so it is appropriate to look at Annex II to the EC agreement with a view to seeing how the various terms are there used.

119 I have previously observed that the wines of the various member countries of the European Community are dealt with separately, apparently reflecting the history of the industry in each country. For Germany, the wines are divided into three categories namely:

- quality wines produced in specified regions;
- table wines bearing a geographical indication; and
- additional traditional expressions.

120 Geographical indications are used in connection with both "quality wines" and "table wines". In the case of French wines a different approach is taken. Part (A) comprises "quality wines produced in specified regions". In this list there are frequent references to "appellation d'origine contrôlée", "appellation contrôlée" and "appellation d'origine" — "vin délimité de qualité supérieure". Although various geographical names are used, the expression "geographical indication" is not used in connection with such wines. However, in Pt (B) ("Table wines bearing a geographical indication") the names of production areas are specified, apparently as geographical indications. In the case of Spanish wines, quality wines produced in specified regions are described in words which may well denote the Spanish equivalent of "appellation of origin", together with geographical indications. It is not necessary to examine the matter any further. It is sufficient to say that there is some evidence in Annex II suggesting that for the purposes of the EC agreement, although, appellations of origin are included within the term "geographical indication", the terms are not synonymous. I suspect that reference to a relevant wine dictionary or book would clarify the meaning of the expression "appellation of origin", but it is unnecessary that I take that approach. There was evidence on the subject.

121 Ira John Pendrigh is a person with considerable experience in the wine industry. He was engaged in the negotiation of the EC agreement and, in particular, with the development of the geographical indication system. He said that the negotiation of the EC agreement was conducted against the background of an agreement amongst the Australian industry representatives that Australia should not adopt:

> … the kind of controlled "appellation" system which is used in Europe. In France, for example, the appellation system involves many controls and restrictions on viticultural practices.

122 He continued:

> The view expressed by representatives [of the industry] was that Australia should not adopt such a restrictive regime. Rather, the views that were expressed and which guided me in my approach to negotiations with the European representatives, were that;
>
> (i) The Australian Wine Industry had been successful largely because of its ability to produce wine of good quality and with distinctive characteristics, free from outdated controls or restriction which existed under the controlled appellation systems in Europe.
>
> (ii) It was not in the best interests of the Australian wine industry to replicate a restrictive appellation system.
>
> …

123 Mr Pendrigh said that:

> The other differences between the Australian GI system and the EU appellation system … were:
>
> (i) There was to be no limit on the volume of wine produced from grapes grown in a particular GI;
> (ii) There was to be no restriction on the blending of wine from different GI's, subject to blending rules and the correct labelling of the relevant GI;
> (iii) There was to be no restriction on the varieties of wine grapes … which may be grown or used for wines from any Australian GI;
> (iv) There was to be no concept or requirement for any particular quality of wine originating from any Australian GI;
> (v) There were to be no requirements for restraints or controls on viticultural practices on any Australian GI;
> (vi) There were to be no requirements for or restrictions in styles of wine or wine making practices in any Australian GI.

124 Attached to Mr Pendrigh's statement is a draft paper "which noted the differences between European and Australian wine …". That document is in two parts. The first is headed "EC Country Wine Laws". The second is headed "Laws Governing the Production and Marketing of Wine in Australia". In the first part the document states:

> 1. INTRODUCTION
>
> In all EC countries every aspect of the production and labelling of wine is governed by each individual country's wine law. These wine laws have also been synchronized on broadly comparable quality/origin criteria. They were developed during the 1920's and 30's.
>
> In France the laws are called Appellation Controllee laws, in Germany the German Wine Law, in Italy DOC laws, etc.
>
> The basis of all of these laws is the presumption that the individuality and quality of a wine is primarily attributable to its place of origin.
>
> The principle that a wine's pedigree is taken from its origin is increasingly untrue as it ignores such basic problems such as over-cropping, disease or generally poor viticultural practices are not taken into account.
>
> In presenting Australian laws governing the production and marketing of wine most favourably it may well be advantageous to point up as many shortcomings of the EC country laws as possible.
>
> 2. OVERVIEW
>
> The laws of the EC countries covering the production and marketing of wine can be divided into three broad categories:—
>
> (a) Laws controlling the cultivation of wine grapes. These laws regulate such matters as:
> - Regions where grapes can be grown.
> - Grape varieties which can be grown in particular regions.
> - The permissible number of vines per hectare.
> - The maximum yield per hectare for each approved variety.
> - Pruning methods for each approved variety in each region.
>
> (b) Laws controlling the manufacture of wine each country has a full spectrum of laws which apply to the manufacture of wine. Subject to various differences (some notable) the laws are similar to our own food laws in that they regulate.
> (c) Laws controlling the description of wines.

- Varietal names can be used provided the variety is an approved variety for the district and provided that minimum percentages are adhered to. Query whether varietal names can be used on vin d'table.
- Vintage.
- Alcohol by volume statement.
- Volume statement.
- Producer or packer.
- Region of origin/grape variety.

3. COMPARISON TO AUSTRALIAN LAWS

At the heart of the EC wine laws is the principle of Appellation Controllee (AC). If the AC related regulations are removed from the EC laws then what is left is quite similar to the Australian laws with the same common thread i.e., to provide consumers with a guarantee that only approved practices are employed in the production of the wine and that standardized information regarding the nature and origin of the wine is as shown in the label.

The fundamental difference between Australian laws and EC country laws is not that Australian laws do not guarantee origin. Rather, the difference is that the Australian laws make no attempt to create a nexus between origin and quality.

125 In the part headed "Laws Governing the Production and Marketing of Wine in Australia" there is reference to the various legislative provisions contained in our "food laws". Those provisions concern information on labels. They also prohibit misdescription or misrepresentation. It is not necessary to address these laws in detail. There is nothing similar to the "appellation contrôllée" system which was discussed in the earlier part of the document.

126 The *New Shorter Oxford English Dictionary* defines "appellation contrôllée" as follows:

(A guarantee of) the description of a bottle of French wine (or other item of food) in conformity with statutory regulations as to its origin. Also appellation d'origine contrôlée.

127 I infer that the expression "appellation of origin" in the EC agreement definition describes names used in the systems in force in France and other countries which are of the prescriptive kind identified in the evidence to which I have referred. The reference to "quality, reputation or other characteristics of the wine" is consistent with the evidence concerning those systems. The evidence also suggests that the expression "appellation of origin" has no place in the Australian wine industry. The definition in the EC agreement should be construed upon the basis that the words following the expression "Appellation of Origin" refer only to that term and do not define the term "geographical indication" which includes the geographical indications identified in Annex II and such appellations of origin.

128 The only possible difficulty with such an approach is that it removes from the definition of "geographical indication" any requirement that it be recognised by the laws and regulations of its country of origin. However as much is required by Art 6. As I have observed, the concept of reciprocal protection necessarily assumes the existence of lawful protection in such country. The protection offered by Art 7, para 2 is limited to that offered by the laws and regulations of Australia. Article 6, para 7 has the effect of removing protection where a name ceases to be protected in its country of origin. Given these specific provisions, it was unnecessary to include such a requirement in the definition of the term

"geographical indication". The qualifying words rather identify a significant aspect of the "appellation contrôllée" system. In any event I see no reason for resorting to the definition in the EC agreement in performing the function prescribed by s 40T of the AWB Act.

Failure to Consider the Whitlands High Plateaux Application — Posing the Wrong Question

129 In order to deal with this alleged error of law it is necessary to identify with some precision the nature of the proceedings before the Tribunal. In the course of interlocutory proceedings on 30 March 2005 the Tribunal considered the way in which proceedings should be conducted. At [1] and [2] of the Tribunal's reasons for orders made on that date, it said:

> 1. There are before me a number of applications for review of decisions of the Geographical Indications Committee relating to the appellation King Valley. One group of applicants has commenced proceedings in the Victorian registry of the Tribunal. Another group has commenced proceedings in the South Australian registry of the Tribunal. These matters have been brought before me this morning for directions generally, and in particular for directions as to the identity of the registry in which the matter should proceed, and as to the question whether the hearing should ultimately take place in Victoria or South Australia.
> 2. It is agreed by the parties that the matter should be consolidated, or at least heard together, because there is one decision to be reviewed, and accordingly the Tribunal must ultimately make one decision itself. It is also accepted that the issues that arise in the proceedings are such that it is convenient for the matters to be heard together.

130 In its written submissions on appeal KVVI identified three relevant applications, namely:

- an application by KVVI's predecessor for determination of the regional geographical indication, "King Valley";
- an application by the present second and third applicants for determination of the regional geographical indication, "Whitlands High Plateaux"; and
- an application for determination of a subregional geographical indication, "Whitlands" covering Whitlands Plateau within the area of the King Valley region, and for determination of a separate subregional geographical indication "Myrrhee" covering the area of the ridges.

131 The two regional applications are presently relevant. The Tribunal's task was to review the Committee's decision. The Committee determined that the regional geographical indication "King Valley" should include the Whitlands High Plateaux area. As a result, at p 55 of its reasons, the Committee observed:

> It therefore follows that the GIC has decided not to make an interim determination of a separate region of "Whitlands High Plateaux".

132 As I have previously pointed out, it is a necessary aspect of the process leading to a determination pursuant to s 40T of the AWB Act that the Committee make an interim determination pursuant to s 40U, and then publicise such interim determination, inviting written submissions in accordance with s 40V. As I understand the AWB Act, the Committee could not have made a final determination concerning the Whitlands High Plateaux application, there having been no interim determination or notification pursuant to ss 40U and 40V. If so, then any "consolidation" could only have been of the application for

a final determination concerning King Valley and the application for an interim determination concerning Whitlands High Plateaux. However, as between the present applicants and KVVI, the question ventilated in the Committee and the Tribunal was whether there should be one geographical indication for the King Valley region which included the area which was the subject of the Whitlands High Plateaux application, or two regional geographical indications, King Valley and Whitlands High Plateaux, for two discrete regions. The applicants submit that this approach led the Tribunal to consider only one question — whether there should be a geographical indication for the whole region with the name "King Valley". They submit that it did not consider whether there should be a separate region with the separate geographical indication "Whitlands High Plateaux".

133 Much of the applicants' argument in support of this alleged ground of appeal effectively invited the Court to reconsider the merits of the case. To the extent that such a consideration may, in any sense, be relevant to an appeal of this kind, it will be better considered elsewhere in these reasons. For present purposes I limit my consideration to the question of whether or not the Tribunal misunderstood its task. I stress that the applicants' concern is that the area of the Whitlands High Plateaux application should be a region in its own right and not merely a subregion of the King Valley region. The primary basis for the applicants' criticism is the assertion that the Tribunal either failed to apply reg 25 to the Whitlands High Plateaux application or applied it only by way of comparison with the operation of the regulation with respect to the King Valley application. They also submit that the Tribunal erroneously indicated that the applicants had proposed that there be two regions in the area. The applicants say that their position was simply that Whitlands High Plateaux be a separate region, whether or not there was a King Valley region. Nothing seems to turn upon any such misunderstanding of the applicants' position.

134 The Tribunal's approach to the application of reg 25 appears to have been careful and exhaustive. I do not entirely agree with every proposition advanced by the Tribunal. Some observations may have involved misunderstanding of the *Coonawarra* case 125 FCR 155 or perhaps, a too literal view of that decision. I have mentioned some observations with which I disagree and will mention others at a later stage. Nonetheless, the Tribunal identified with precision the areas to which the applications related and factors of similarity and distinction between them. In particular the Tribunal identified the extent of homogeneity of the Whitlands High Plateaux area and the extent of the similarities and differences between that area and the balance of the King Valley region. The applicants submit that the Tribunal failed to apply reg 25(a) to the Whitlands High Plateaux application. However, at [88]-[92], the Tribunal said that it had identified a serious weakness in the applicants' case, having regard to the definition of "region" in reg 24. In other words the Tribunal was applying reg 25(a) to the Whitlands High Plateaux application. The applicants' criticism has no merit.

135 The applicants also submit that the Tribunal gave little consideration to the Whitlands High Plateaux application in its consideration of the history of the area. However it seems that little historical evidence was offered. That is my understanding of the Tribunal's observations at [71]. The applicants do not submit that any relevant aspect of the history of the Whitlands High Plateaux area was omitted from consideration, or that the evidence demonstrated

historical differences between the two areas. There is nothing in this point. The applicants also complain of the observation at [120] in the Tribunal's reasons concerning the degree of homogeneity of the King Valley, asserting that "No separate and independent consideration was given at this stage of the analysis, as it ought to have been, to the [applicants'] Whitlands High Plateaux area". That submission ignores the Tribunal's reasons at [120] where it recognised the "greater homogeneity within the Plateau, the ridges, or the Plateau and the ridges together, than in the whole valley …". At [120] the Tribunal summarised its conclusions as follows:

> 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.

136 In other words it recognised the greater homogeneity of the Whitlands High Plateaux area within the King Valley but concluded that the former area was, nonetheless, part of the latter. I see no basis for the assertion that the Tribunal failed to understand that the applicants' case was that there should be a region identified as "Whitlands High Plateaux". It considered the evidence for the purpose of determining whether or not there should be such a determination. This ground of appeal must fail.

An Unreasonable Decision

137 The applicants submit that no reasonable Tribunal could have come to the conclusion that the Whitlands High Plateaux area should be included in the King Valley region. Such an assertion tacitly invites the Court to form its own view as to the appropriate outcome, in other words to undertake merits review. The test of unreasonableness is more appropriate to the demonstration of jurisdictional error. When, on appeal, it is asserted that the evidence at first instance did not support a finding, the ground of appeal usually says precisely that. It is then relatively simple to demonstrate whether there was or was not evidence upon which the impugned finding was made. I do not understand the applicants to suggest that any finding lacked evidentiary support. Rather, it is said that the overall outcome was not open to the Tribunal, on all of the evidence.

138 In their submissions the applicants addressed many aspects of the evidence, but no single factor was identified as leading inevitably to the conclusion that the Whitlands High Plateaux area was not part of the King Valley region. The Tribunal's reasons demonstrate that it understood its task and the factors relevant to the performance of it. It understood that the process involved the evaluation of various factors. I do not accept that a mere allegation of unreasonableness of outcome dictates that an appellate court examine the evidence afresh with a view to determining whether or not a particular inference was available. It is for the applicants to demonstrate that the inference was not available. They have made no serious attempt to undertake that task. They have contented themselves with pointing to areas in which more or less weight might have been given to particular factors. They have demonstrated no error in the Tribunal's approach or the outcome.

139 It is, in effect, submitted that the outcome bespeaks an error on the part of the Tribunal in its interpretation of reg 25. It is suggested that the Tribunal failed to apply the observations made in the *Coonawarra* case 125 FCR 155 to the effect

that some of the criteria identified in reg 25 may be taken into account in determining the boundaries of the relevant area and others, in choosing the name. I have previously indicated that I doubt whether it is possible to identify in advance how those criteria will apply in a particular case. I also doubt whether the Court meant to do so in the *Coonawarra* case 125 FCR 155. It may be that I favour a somewhat wider interpretation of those criteria than was suggested in that decision. In any event I am unable to identify any failure by the Tribunal properly to understand and apply those criteria, subject only to certain specific matters to which I have already referred or will refer later in these reasons.

140 I see no basis for the assertion that the decision was one to which no reasonable Tribunal could come.

Failure to Give Sufficient Weight to Criteria Identified in reg 25(i)

141 The submission in this regard appears at para 17 of the written submissions as follows:

> Furthermore, the AAT appears to have approached the factors in reg 25(i) as permitting application in respect of such factors to the extent that they "have nothing to do with grape growing attributes" (see Reasons at [64]). This approach involved error of law on the part of the AAT. The approach is contrary to the approach of the Full Court in *Coonawarra* above at 174 [66], which requires that reg 25(i) be read effectively as incorporating the words "in its grape growing attributes" after the words "degree of discreteness and homogeneity". The AAT further erred by failing to give effect to the criteria specified in the regulations.

142 In the course of argument this submission changed to some extent. It was rather submitted that inadequate weight was attributed to the factors set out in reg 25(i) relative to the other criteria specified in reg 25. I will address both versions of the submission.

143 At [64] the Tribunal said:

> 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 its 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.

144 Reference to [63] suggests that this observation was made in connection with the requirements in the definitions of "region" and "subregion" in reg 24 that each comprise a single tract of land which is discrete and homogeneous in its grape growing attributes. Regulation 25(i) requires the Committee to consider "the degree of discreteness and homogeneity of the proposed geographical indication in respect of the following attributes". I note that while reg 24 speaks of discreteness and homogeneity of a tract of land, reg 25(i) refers to discreteness and homogeneity of the proposed geographical indication. However it is difficult to see how a geographical indication could have such qualities other than by virtue of their attaching to the area of land to which the indication relates.

145 In reg 25(i) a list of considerations follows. I have called them "factors". The applicants say that the *Coonawarra* case 125 FCR 155 establishes that those factors are also the grape growing attributes referred to in the definitions of "region" and "subregion" in reg 24, and therefore to be considered pursuant to

reg 25(a). It may well be that the Full Court took such a view in the *Coonawarra* case 125 FCR 155. For reasons which I have given, I am inclined to agree. In other words the factors are grape growing attributes. The Tribunal, at [64], appears to have considered that it was adopting a different approach from that suggested in the *Coonawarra* case 125 FCR 155. In particular, it seems to have concluded that some of the factors identified in reg 25(i) are not grape growing attributes. Those identified in reg 25(i)(i) to (vi) may clearly be so described. I have previously demonstrated that the factors identified in reg 25(i)(vii), (viii) and (ix), when properly understood, may also be so described. In any event the Tribunal clearly evaluated the various criteria and factors identified in regs 24 and 25 to the extent that they were relevant to this case. Even if the Tribunal misconstrued any of the references to "grape growing attributes" or "attributes" in regs 24 and 25, there has been no suggestion that this led to a failure to consider relevant matters or a consideration of irrelevant matters. I am satisfied that any such error had no effect upon the Tribunal's decision.

146 That leaves for consideration the relative weight to be given to the various criteria and factors in regs 24 and 25. The applicants submit that the factors identified in reg 25(i) should be given greater weight than the other criteria identified in reg 25. I see no basis for a general "rule" of that kind. However I accept that in a particular case, one criterion or factor may attract greater weight than others. I detect no error in the Tribunal's failure to treat the factors identified in reg 25(i) as having particular weight.

147 However it might be thought that the Tribunal attached particular importance to reg 25(a). It seems to have considered that its effect was that compliance with the definition of "region" was a condition precedent to the determination of a regional geographical indication. That may be correct, but I need not decide the matter. The Tribunal concluded that the King Valley area satisfied the definition of "region". It also accepted that the Whitlands High Plateaux application satisfied that requirement. At [117] it indicated that "all the competing areas do satisfy the minimum requirements of reg 24".

148 Apart from treating reg 25(a) as prescribing such a condition precedent, the Tribunal suggested (at [126]) that regs 24 and 25(a) constitute an "overwhelmingly important criterion for viticultural wine making considerations". If this meant that reg 25(a) is, on the proper construction of the Regulations, to be given greater weight than the other criteria identified in reg 25, then I disagree. However I do not understand that to be the Tribunal's meaning. I consider that it meant simply that there is an inevitable interrelationship between reg 25(a) and (i), given that the area identified pursuant to reg 25(a) is to be assessed having regard to the factors identified in reg 25(i).

Proposed Ground of Appeal — Inadequate Reasons

149 In the course of argument it was suggested to counsel that the complaint of inadequate reasons was not so much a ground of appeal as a basis of discretionary relief in the nature of mandamus. The applicants chose not to seek such relief and persevered in seeking the proposed amendment. I consider that the proposed ground of appeal lacks substance. The Tribunal gave quite detailed reasons. Whilst reasons which appear to be detailed may, in fact, fail to explain the decision, these reasons cannot be so described. The Tribunal identified the various relevant factors, balancing differences and similarities across the whole

King Valley region and also within the Whitlands High Plateaux area. It concluded that the better view was that there was one region of which the Whitlands High Plateaux area was part.

150 That decision was inevitably one of judgment, of weighing different considerations and drawing appropriate inferences. It is not easy to describe such an exercise. There will always be a point at which a subjective assessment is made but not explained as a discrete step. It is rather the ultimate inference from all that has preceded it. As is sometimes said in the criminal courts, a circumstantial case is not composed of links in a chain, one following the other. It is more like the strands of a rope, each supporting the others. The Tribunal's ultimate decision was not the final link in a deductive chain of reasoning. It was rather the inductive outcome of a consideration of all relevant matters, including those identified in [24] and [25]. I am unable to accept that the Tribunal failed to explain the process by which it reached its ultimate decision. In those circumstances no point would be served by allowing the proposed amendment.

New Arguments in Reply

151 In the course of their written submissions in reply the applicants raise two other matters. Firstly they submit that there was no evidence to support the finding that the King Valley was "… discrete and homogeneous in its grape growing attributes to a measurable degree in comparison with the area or areas outside that asserted region". It is said that in the absence of evidence as to conditions in the surrounding areas "the Tribunal could not properly find that the King Valley area qualified as a region". At [121] the Tribunal observed that there was little evidence concerning the surrounding areas. The applicants assert that there was none, and that this was a weakness in KVVI's case. However, as far as I can see, the issue was not raised before the Tribunal. Whilst proceedings in the Tribunal may not be adversarial in the usual sense, it is difficult to see why, in the absence of evidence or submissions to that effect, the Tribunal should have dismissed the King Valley application on the basis that it was only part of a larger region.

152 Regulations 24 and 25 do not, in terms, require that assessment of the extent of discreteness and homogeneity of grape growing attributes be conducted as a comparison between the area proposed for inclusion in a geographical indication and surrounding areas. However discreteness may not be capable of consideration other than by reference to other areas. Nonetheless, whilst it may be appropriate to take into account the fact that relevant characteristics are shared with a wider area, that circumstance would not necessarily lead to rejection of the proposed geographical indication. Other relevant factors might still dictate a favourable determination. I see no merit in this criticism of the Tribunal's decision.

153 Secondly, the applicants assert that the Tribunal found that the Whitlands High Plateaux area and the balance of the King Valley region both enjoy sufficient discreteness in grape growing attributes to qualify "as a region or regions". The applicants refer to [121] in this regard. I also refer to the reasons at [117]. The applicants submit that this finding ought to have led to the conclusion that the Whitlands High Plateaux area should be a separate region. Once again the argument fails to take account of the fact that "discreteness" was not the only factor to be taken into account. There is nothing in this argument.

Orders

154 In the circumstances, I conclude that no operative error of law has been demonstrated. I would refuse the application to amend the notice of appeal and dismiss the appeal. As to costs, I propose that:

- the applicants pay the second respondent's costs of the appeal;
- should the first respondent wish to apply for any order as to its costs it may file and serve relevant submissions within seven days of the publication of these reasons; and
- in the event of submissions being so filed, the applicant file and serve any submissions in reply within a further three days.

Siopis J.

155 I agree with the reasons given by Emmett and Dowsett JJ and the orders proposed.

Orders accordingly

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