- The granting of, or refusal to grant, a CPA, or refusal to grant an increase in the number of hectares included in a CPA by a CPB;

- The variation of, or the refusal to vary, the description of land included in a grower's CPA by a CPB;

- The variation of, or the refusal to vary, the conditions on which a grower holds a CPA by a CPB;

- The cancellation of, or the refusal to cancel, a grower's CPA, or part of the number of hectares included in a CPA by a CPB;

- A condition imposed on the growing of cane;

- A condition imposed on the harvesting of cane;

- A condition imposed on the delivery of cane;

- A requirement about the use of a particular person for the delivery and transport of cane; and

- A prohibition or limitation on the transfer of a CPA within a certain time from the day the CPA is granted.

Expansion:

- The making of a decision by a negotiating team about expansion.

Individual supply agreements:

- The making of an individual agreement by one or more growers and a mill owner;

- The variation of an individual agreement by the parties;

- The harvesting of cane by a grower under an individual agreement, including the use of a particular person for the harvesting;

- The use of a particular person for the delivery and transport of cane; and

- The acceptance and crushing of cane by a mill at a time fixed under an individual agreement.

Collective agreements:

- The making of a collective agreement by a negotiating team;

- The variation of a collective agreement by a negotiating team;

- The harvesting of cane by a grower under a collective agreement, including the use of a particular person for the harvesting;

- The use of a particular person for the delivery and transport of cane; and

- The acceptance and crushing of cane by a mill at a time fixed by under the collective agreement.

Supply agreements — payments:

- The entry into a supply agreement (both individual or collective) to the extent that the agreement provides for the terms upon which payments are to be made by a mill owner for cane to be supplied to a mill by a grower under the supply agreement;

- The payment of a price for cane by a mill owner to a grower under a supply agreement;

- The receipt of a price for cane by a grower from a mill owner under a supply agreement; and

- A financial incentive scheme of premiums, discounts and allowances in relation to cane and sugar quality or to anything that may affect cane and sugar quality having regard to best practice under a supply agreement.

Cane quality programs:

- The making of a cane quality program by a negotiating team for a mill, to the extent that the program provides for a scheme of premiums and discounts for cane quality.

7.5 CSR and a number of interested parties submit that the agreements the subject of the application fall within the terms of statutory authorisation created by Chapter 6 of the SIA. A number of interested parties — Bohle Grazing, Bugeja Cane Farms and Queensland Canegrowers Organisation — claim the arrangements for which this application relates are covered by the operation of regulatory exemption provided under the SIA. However, CSR did not provide detail in its supporting submission to the application as to why it considers authorisation under section 88(1) of the Act necessary.

7.6 The Commission sought further clarification on this point. In response, CSR submits that in so far as there is uncertainty that aspects of the Agreements are not covered by Chapter 6 of the SIA, because of the language of that Chapter and the lack of any judicial consideration of its meaning, it elected to adopt a more cautious approach and seek authorisation under the Act.

7.7 Specifically, in terms of the Invicta Supply Agreement for example, CSR submits it is strongly arguable that sections 211(2) and (3)(a) of the SIA are wide enough to cover and therefore authorise the differential payment scheme. However, the absence of a judicial interpretation to this effect meant that it was not possible to say with certainty that statutory authorisation in relation to cane prices paid to a grower by a mill owner would protect a scheme that may otherwise be seen as restricting competition. Similarly, CSR advises that the Invicta Supply Agreement for example, also places conditions on the installation of additional crushing capacity which are linked to the differential payment scheme. CSR submits that it did not wish to be

placed under an obligation to increase capacity without a corresponding increase in crushing season length.

7.8 In regard to the Invicta Expansion Agreement for example, in so far as it has the potential to restrict competition from restricting existing and new entrants to the grower market, CSR submits it is arguable that section 208(1)(d) applies to authorise those provisions of the Expansion Agreement that relate to the granting of new production areas. However, because the Expansion Agreement places constraints on the manner in which new CPA is to be granted, and the constraints are not expressly referred to in the statutory authorisation provisions, there remains the question as to whether or not the language of the SIA is wide enough to cover the nature of these constraints.

Role of the Commission

7.9 It is not necessary for the Commission to express a view as to whether an application for authorisation is necessary. Where an applicant believes that his or her conduct may breach the Act if not authorised and therefore applies for authorisation, the Commission has a duty to consider the application in terms of the public benefit test contained in section 90 of the Act.

7.10 As outlined in section 4 of this decision, section 90 of the Act provides that the Commission shall grant authorisation only if it is satisfied in all the circumstances that the provision of a contract, arrangement or understanding has resulted or is likely to result in a benefit to the public and that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

7.11 Public benefit is not defined by the Act. However, in *Re 7-Eleven Stores Pty Ltd (1994)* the Australian Competition Tribunal (the Tribunal) suggested that the term should be given its widest possible meaning:

> ...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.

7.12 The question of whether certain conduct will result in a public benefit is a question of fact to be determined in the context of each application.

7.13 In order for a benefit to be a public benefit it must benefit the community generally although this does not mean that private benefits are necessarily irrelevant. As outlined in the Commission's Guide to Authorisations and Notifications, any conduct which produces direct or indirect benefit to the Australian public constitutes public benefit and can include private benefits that accrue to the applicant or some other limited group.

7.14 In addition, it is not always possible, or necessary to quantify in precise terms the level of public benefit arising from an arrangement for which authorisation is sought.

7.15 Ray Hoey and Co submits that the phrase 'in all the circumstances' places a very high onus on the Commission to ascertain the effect of the conduct or the

proposed conduct in a range of situations, and where there is ambiguity in the terms of the proposal, then, effectively, the Commission cannot be appropriately satisfied that a public benefit arises from the Agreements in all the circumstances.

7.16 The Commission considers that this does not accurately reflect the extent of the obligation. The Commission considers the use of the words 'in all the circumstances' merely indicates that the Commission has to engage in a process of weighing various factors, and that factors other than those going to public benefit or anti-competitive effect may be relevant to the authorisation procedure. The question of what additional factors may be relevant to a particular application will depend on the circumstances of the particular case.

7.17 In the context of the Commission's assessment of the current applications, a number of interested parties have made submissions claiming that there is a more beneficial, less restrictive or better way of constructing the agreements and the individual terms within the agreements. For example, AC Ivory submits that there is no technical basis to the cane payment formulae contained in the Agreements and a better alternative formula is suggested. Similarly, Ray Hoey & Company submits that the public benefits in the Commission's draft determination could be achieved by alternative methods, such as increasing competition in the milling sector and allowing new mills the opportunity to compete for increased production from existing and new growers.

7.18 The phrase 'not otherwise available' previously formed part of the public benefit test,[11] however, it is no longer an absolute requirement. The fact that the benefit may be available otherwise (that is, other than by the restrictive conduct sought to be authorised) is something to be taken into account in the general weighing process, but it is not an absolute prohibition to authorisation as it was previously.

7.19 Therefore in applying the statutory test at section 90 of the Act, the Commission is required to consider the public benefit resulting from the conduct and any anti-competitive effects of the conduct and weigh the two. The fact that the outcome sought by the authorisation application could be achieved more efficiently/effectively by some alternative arrangement will not necessarily preclude a finding of net public benefit. This is supported by the Tribunal's determination in *Re Media Council of Australia (No.3)(1989)* ATPR 40-933 at 50,123 where it observed that:

> ... the Tribunal's function is not to require the design of an ideal system of code administration within the advertising industry, but to determine whether the proposed Codes within the Media Council system fulfil the statutory tests prescribed by section 90 of the Trade Practices Act.

7.20 In order to identify and measure the public benefits and the detriments constituted by any lessening of competition, it is useful to apply the "future with-and-without test", that was first established by the Tribunal. This requires a comparison of the public benefits and detriments resulting from the position which would, or would be

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[11] Amendments to the Act operating from 1 July 1977 removed this requirement from the public benefit test.

likely to exist in the future if the authorisation were granted, with the position if the authorisation were not granted.

7.21 In this regard, the current application raises some complex issues, particularly given the existence of industry regulation in the form of the SIA. As already outlined, the SIA provides for collective negotiations; the making of individual supply agreements; regulates the granting, variation and cancellation of CPA's; vests sugar in a single desk arrangement; and authorises for competition legislation, amongst other matters, individual and collective supply agreements, which will occur in the industry with or without Commission authorisation. As previously discussed, CSR identified two aspects to the collective agreements that arguably may not be covered by the statutory exemption. In particular, the differential payment scheme, and the constraints on the manner in which new CPA is to be granted. These are integral to the purpose of the Agreements. It therefore could be argued that without authorisation, the agreements may not contain the same provisions dealing with, or setting up a differential payment scheme, including the expansion of the crushing season, and the granting of CPA. Having said this, the position is not entirely clear. CSR claims that these provisions fall within the spirit of the authorisation created by the SIA. Similarly, the Queensland Canegrowers Organisation submits not only does the SIA authorise the making of collective supply agreements, but section 207(4) of the SIA also authorises the imposition on growers of obligations to make payments to mill owners for contributions to infrastructure costs.

7.22 In the current application, the Commission considers it is necessary to conduct its assessment of the Agreements for which authorisation is sought in the context of the regulatory environment in which it exists. Where necessary, the Commission distinguishes whether the public benefit or effect on competition flows from the Agreements or the operation of the SIA. The Commission's view is that the SIA constrains the type of collective agreement that can be negotiated and the decisions the negotiating team can make.

7.23 In addition, the Commission notes that a number of provisions in the SIA have a significant effect on competition. For example, the SIA provides that the ability to supply cane is restricted to growers with CPA; supply is restricted to a limited number of hectares; and mill owners have the guarantee that cane grown on assigned land to their mill cannot be disposed of to another mill. Similarly, under section 18 of the SIA, mill owners have the ability to veto cane supply switching arrangements.

7.24 Furthermore, the legislated CPA arrangements and the lack of full grower transferability under the SIA potentially restricts the ability of new and existing millers from accessing enough CPA to maintain viable operations or expand production. Similarly, potential and existing growers' ability to enter the industry or expand production may also be limited.

7.25 As outlined in section 5 of this determination, Ray Hoey and Company submits that the Commission does not have the ability to grant authorisation in respect of the agreements by virtue of section 88(12) of the Act. In particular, section 88(12) provides that:

> The Commission does not have the power to grant an authorisation to a corporation to make a contract or arrangement, to arrive at an understanding or to require the giving of, or to give a covenant if the contract or arrangement has been made, understanding has been arrived at or the covenant has been given before the Commission makes a determination in respect of the application.

7.26 The Commission does, however, have the ability to grant authorisation to the 'giving effect to' conduct already made. The Trade Practices Tribunal in *Re John Dee (Export) Pty Ltd & Ors (1989)* 87ALR321 stated in relation to section 88(12) that:

> Sub-section (12) does not therefore prevent authorisation being given to a corporation's future conduct which takes place pursuant to a contract or arrangement or understanding, the making of which may itself be outside the jurisdiction of the Commission to authorise.

7.27 Therefore, consistent with the decision by the Tribunal in *Re John Dee*, the Commission considers that it may consider the applications and if it so decides, grant authorisation for the future operation of the Invicta Sugar Mill Agreements and the Pioneer Mill Agreement.

Industry features

7.28 A wide range of activities within the Queensland raw sugar industry remain regulated under the SIA.

7.29 In regard to the growing sector, the Commission notes that:

- there are a large number of Invicta growers (275) and Pioneer growers (149), and only one miller (CSR) operating in the Burdekin growing region where the Invicta and Pioneer Mills are located;
- sugar cane farming is regulated under the SIA by allocating CPA to growers with the linked obligation to supply cane to a particular mill. The effect of which is to "lock" growers into a particular mill;
- the SIA provides that growers may switch supply between mills subject to gaining consent of both mills;
- sugar cane is a perishable product, which must be transported to a mill within one day of harvesting otherwise its CCS will be adversely affected. Most cane is transported via tramway network, most of which are not designed to allow for transfer of cane between mills. Thus the ability for growers to transfer supply may be limited;
- there is strong interdependency between cane growers and millers; and

- CSR advises that the approximate expenditure required to establish a 100 hectare sugar farm, capable of producing around 100 000 tonnes of sugar per annum, would be $1.5 million.

7.30 In regard to the milling sector, the Commission notes that:

- there is no mill competition in the Burdekin region as CSR owns all four mills (see Figure 1), which means that growers can only sell their cane to CSR. In this context, the Commission is of the view that growers are "locked into" cane supply arrangements with CSR;

- in any event, in the short term, the legislated CPA arrangements restrict the ability of mills to compete for cane grown on land assigned to other mills;

- the ability of new mills to enter the industry may be constrained under the SIA due to the need for them to access existing CPA in order to be viable;

- raw sugar is vested in a single desk seller — Queensland Sugar. Neither a grower nor miller can contract to sell sugar to any other party. Queensland Sugar sells sugar both domestically and internationally depending on the market and grade of sugar;

- approximately 85 % of Queensland raw sugar is exported. Accordingly, the industry is export dependent and is subject to demand and supply pressures and price outcomes of the world market;

- Queensland Sugar distributes raw sugar proceeds to mills net of costs. Mills receive proceeds in proportion to the tonnage of sugar supplied that year. In turn, mills make payments to growers for their cane based on the provisions negotiated in collective or individual supply agreements;

- the balance of raw sugar is sold to the domestic market. Queensland Sugar determines the domestic price under a ministerial directive, based on export parity pricing; and

- raw sugar is not imported in significant levels.

7.31 In regard to the refining sector the Commission notes that:

- there are four refineries in Australia, two of which are owned by Sugar Australia Pty Limited, which is a joint venture between the applicant (50%), Mackay Sugar Co-operative Association Limited (25%) and ED & F Man Australia Limited (25%).

- the major domestic customers of refined sugar are food and beverage manufactures and retail sectors;

- refined sugar imports are not significant; and

- the Commission is advised that market forces set refined sugar prices.

8. Commission evaluation

8.1 Authorisation is sought in relation to the Invicta Supply Agreement, the Invicta Expansion Agreement and the Pioneer Collective Supply Agreement. The Commission's evaluation of the application is in accordance with the statutory tests outlined in section 4 of this decision. As required by the tests, it is necessary for the Commission to assess the likely benefit and detriment, including the effects on competition, resulting from the Agreements.

8.2 Essentially, the thrust of the three Agreements is to provide for a gradual extension of the sugar cane crushing season to a maximum of 24.5 dry weeks, in conjunction with expansion of mill crushing capacity. The applicant submits that the capital expenditure required to achieve the increased crushing rates and season expansion are conditional upon granting of new CPAs.

8.3 One issue for the Commission's consideration is the nature of the Agreements and their potential effects on competition. In this context, the Commission will also consider the effects on competition of growers coming together, through the negotiating team, to discuss the terms and conditions of supply.

8.4 In its draft determination the Commission was satisfied that a net public benefit resulted from the Agreements, and proposed to grant authorisation to the Agreements.

8.5 Following release of the draft determination and the pre-determination conference, interested parties' submissions primarily focused on the effects of the Pioneer Agreement, namely the manner in which the Pioneer Agreement was developed, and the technical aspects of the cane payment formulae. Accordingly, the Commission's assessment of the effects of the Pioneer Supply Agreement follows.

Commission assessment of public detriments constituted by any lessening of competition arising from the Pioneer Supply Agreement

8.6 As outlined in Section 3 above, the Pioneer Supply Agreement provides for the collective negotiation of terms and conditions of supply of sugar cane to the Pioneer Mill, including cane payment formulae, terms of payment, cane quality conditions and a minimum supply amount.

8.7 In addition, the Pioneer Supply Agreement also outlines a mandatory system of applying for CPA in the Pioneer Mill area. Essentially, this is the basis upon which the Pioneer Negotiating Team determines the allocation, if any, of land for new or increased CPA.

Collective negotiation

8.8 Agreements which fix, control or maintain prices are deemed by the Act to substantially lessen competition. By its very nature, a collective supply agreement

which sets out uniform conditions for all rates of payment to independent growers covered by the agreement involves a lessening of competition (at least relative to a situation where each of the growers negotiates their own rates of payment). In this regard, the issue that needs to be considered for the current application is the extent of anti-competitive detriment that is likely to result in the context of a situation where the application of the SIA (which exempts much of the conduct for which authorisation is sought) must be considered.

Cane payment formulae

8.9 The Commission understands that the cane price formulae set out in both the Pioneer and Invicta Agreements are similar to the award payments that were applicable under the previous SIA 1991.

8.10 Application of the cane price formulae under the Pioneer Supply Agreement results in different prices paid to growers based on the CCS. Essentially, the Pioneer Supply Agreement provides that growers are compensated on the basis of their performance (in terms of the CCS content) relative to the seasonal average CCS of all cane supplied to the mill. The price for both existing and new individual grower's cane is calculated on a daily system of relative payment that incorporates the individual grower's CCS. At the end of the season, growers receive an adjusted payment to account for the difference between the value of a grower's cane at the base price adjusted for the grower's seasonal average CCS and the sum already paid for that cane.

8.11 In its draft determination the Commission indicated its general view that the anti-competitive effects of collective price agreements may be lessened where participants are compensated on the basis of their performance relative to an average level of performance. This is because a relative payment system can provide an incentive to increase the efficiency of production and quality of output relative to others in the collective.

8.12 At the conference and in subsequent submissions, Ray Hoey and Co and AC Ivory submitted that CCS is not a measure of efficiency, rather it is an empirical approximation of the amount of commercial sugar in a standard unit of cane. The same variety of cane grown in the very same manner on the same land in two consecutive years will give very different CCS levels depending on the weather. Ray Hoey and Co questioned the validity of the relative payment system, and suggested it is devised to entice growers to supply cane over a longer period so that the miller's average costs could be reduced.

8.13 CSR submits that the relative payment system has a history of long acceptance in the industry and is provided for in section 54(2)(f) of the SIA. It is designed to make growers indifferent as to the time of year their cane is harvested. CSR claims it makes no difference to the total amount paid to growers as a body. CSR further suggests that the relative system was requested by growers in the interests of equity between growers. CSR claims it is unaffected by the operation of the relative payment scheme, except for the administrative complexities it creates.

8.14 The Pioneer Canegrowers submits that under the Agreements growers will continue to strive for improved farm efficiencies and sustainability. Pioneer Canegrowers submits that growers will work out efficiencies, strategies and budgets

within the parameters of the Pioneer Supply Agreement to minimise the negative impacts and maximise returns on their individual farm equity. Rationalisation of farm enterprises will still be an ongoing consideration. At the same time, rather than work against new or expanding growers, Pioneer Canegrowers submits that the Pioneer Supply Agreement facilitates expansion in a realistic framework.

8.15 The Commission accepts that CCS may not be a measure of a grower's efficiency. The Commission also recognises that there are opposing views concerning the use of CCS in the cane payment formulae, and whether the formula in the Pioneer Supply Agreement is the most appropriate one for the industry.

8.16 Section 211 of the SIA specifically authorises payments under supply agreements, including collective supply and individual supply agreements, and therefore exempts such conduct from the Act. In particular, section 211(3) states:

> The following things are specifically authorised for the competition legislation–
>
> a) the payment of a price for cane by a mill owner to a grower under a supply agreement mentioned in this section;
>
> b) the receipt of a price for cane by a grower from a mill owner under a supply agreement mentioned in this section;
>
> c) a financial incentive scheme of premiums, discounts, allowances relating to cane and sugar quality or to anything that may affect cane and sugar quality having regard to best practice under a supply agreement mentioned in this section.

8.17 The Commission considers that any anti-competitive detriment of the cane payment formulae emanates from the SIA, not the Pioneer Supply Agreement.

Ability to 'opt out' of collective negotiations

8.18 As indicated in its draft determination, the Commission considers the ability of growers to 'opt out' of the collective arrangements appears limited due to the operation of the SIA.

8.19 In general terms the Commission considers that individual negotiation allows growers to negotiate contract terms and conditions according to individual circumstances, and that the ability to 'opt-out' of collective arrangements can often lessen the anti-competitive effects of a collective proposal.

8.20 At the pre-determination conference and in subsequent submissions, there was much discussion in relation to the requirements for individual negotiations under the SIA.

8.21 The Pioneer Supply Agreement, which is a collective agreement, does not make any reference to the making of individual agreements. The SIA sets out the process for entering into individual supply agreements. Briefly, section 47 provides that a grower must give the Mill Suppliers' Committee (representing the growers supplying cane to the Pioneer Mill) at least 14 days notice before the start of negotiations for the collective agreement that that grower intends to enter into an individual agreement with the mill owner. The mill owner must provide the Suppliers' Committee notice of every

individual agreement it has entered into. The notice must include enough details of the individual agreement to allow its effect on the collective agreement to be decided in terms of section 48 of the SIA.

8.22 A mill owner is not compelled under the SIA to enter into an individual agreement with a grower upon request from that grower. In particular, section 45(2) of the SIA provides that:

> A grower **may** enter an individual agreement with the owner of the mill, or a collective agreement made for the mill, to which the grower's cane production area relates.

8.23 Section 48 of the SIA imposes a regime whereby any individual agreement is subject to mediation and possible cancellation at the instigation of the Mill Suppliers' Committee. In such a mediation, the only grounds to be considered is whether the provisions of the individual agreement will have a significant adverse effect on growers supplying cane under the collective agreement. The section contains an example of an adverse impact being 'provisions that may result in a cane grower who supplies cane to the mill under the collective agreement being excluded during peak CCS levels.' Under section 48 the parties to mediation are the individual grower and the Mill Suppliers' Committee. If the parties are still in dispute at the end of mediation, the SIA provides that the Suppliers Committee may, within 21 days, apply to a Magistrate's Court for an order stopping the making of, or cancelling, the agreement.

8.24 CSR submits that it has no discretion in applying section 48(6) of the SIA. CSR advises it is prepared to negotiate an individual agreement providing there is some 'differentiating feature' of a grower's cane supply and there is no adverse effect on others supplying under the collective agreement, although they generally question the efficiency of individual negotiations. For example, if it wished to enter into an individual agreement with a grower to supply cane in a high CCS period of the year, this would have an adverse effect on the collective, and would be vetoed. Conversely, if a grower wished to supply cane in a certain period of the year (that is, before the start of the traditional season), then an individual agreement might be able to be negotiated which would give that grower different payment arrangements to take into account the supply of cane in a period when the CCS was low. Other examples of when CSR advises it would negotiate an individual supply agreement would be when a grower had a large quantity of land that he/she wished to bring into production, or when a grower wanted to harvest cane over 24 hours per day rather than the approximate 12 hour periods as currently occurs. CSR advises that if the grower wished to have the same supply arrangements as other growers under the collective agreement, it does not see how it could offer different payment options to what was contained in the collective agreement.

8.25 Ray Hoey and Co submits that CSR appears to place high importance on the concept of 'some differentiating feature', to the point that it appears to apply it as a 'threshold' for, or means of, determining when they will enter into an individual agreement. Ray Hoey and Co argues that there is no provision within the SIA to support CSR's interpretation concerning individual arrangements. Ray Hoey and Co submits that CSR's approach to individual negotiations is a restriction emanating from CSR (not the SIA), which is being actively applied to Pioneer growers by CSR.

8.26 The Commission believes there is potential for different interpretations by CSR and growers in relation to the requirements under the SIA, and as argued by Ray Hoey and Co, the 'differentiating feature' test proposed by CSR may amount to a greater restriction than that contemplated by the SIA.

8.27 However, the SIA does not require CSR to enter into individual negotiations with a grower if it does not wish to do so. The industry legislation also creates potential impediments to the negotiation of an individual agreement which has a 'significant adverse impact on the collective agreement.' This does not mean however, that such agreements could not be entered into and survive the mediation process, albeit in limited circumstances.

8.28 While the Commission considers the limitations in relation to individual agreements under the SIA are restrictive, they are a requirement of the SIA and it is not within the Commission's power to alter the provisions of the SIA. The present legislative arrangements already restrict the ability of individual growers, like Ray Hoey and Co, to negotiate individual agreements with CSR. However, the Commission considers that there should be maximum scope to allow individual negotiations and contracts within the scope of the legislation. The authorisation does not extend to cover situations where CSR imposes a more restrictive requirement on individual agreements than what is legislated. The Commission would expect CSR to comply with the requirements of the SIA in relation to this issue, and imposes a condition of authorisation that the Pioneer Supply Agreement specifically refers to the possibility for growers to enter into individual negotiations with CSR in line with the provisions of the SIA.

Condition

The Pioneer Supply Agreement is to be amended to include reference to the possibility for growers to enter into individual negotiations with CSR in line with the provisions of the SIA.

Barriers to entry

8.29 Mr Rossiter submits that the nature and effect of the Agreements make it almost impossible for another company or group of growers to build another mill in the area.

8.30 The Commission considers the capacity for new entrants to compete with either CSR in the milling of cane, or growers in terms of the supply of cane is limited.

8.31 Difficulties faced by new entrants (both millers and growers) include the capital investment needed to establish a viable mill or farm, other market features such as the current level of competition (for example, CSR owns all four mills in the Burdekin region), and the current (low) price of sugar on the world market.

8.32 Collective negotiation by growers and CSR resulting in agreed cane payment formulae, the $1 levy, and entry into a long term Agreement (five years for Parts I, II and III) may further reduce the likelihood of entry into both the cane growing and milling markets by potential competitors.

8.33 There are also significant legislated barriers faced by potential new entrants. For example:

- the ability to supply cane is restricted to growers with CPA (section 2 of the SIA);
- the allocation of CPA to growers with the linked obligation to supply cane to a particular mill (section 2 of the SIA);
- mill owners have the guarantee that cane grown on land assigned to their mill cannot be disposed of to another mill (section 2 of the SIA); and
- mill owners have the ability to veto cane switching arrangements until 2007 (section 18 of the SIA).

8.34 Consequently the Commission considers that while collective negotiation between growers and CSR as provided under the Pioneer Supply Agreement may increase barriers to new participants entering the industry, such barriers already exist independent of the Agreement, and it is not considered that the barriers are increased to such an extent as a result of the Agreement to materially impact on new entry to the market.

Minimum supply quota

8.35 In general terms, the Pioneer Agreement provides that a grower must supply cane to the Pioneer Mill for a five year period. Further, Clause 2.1 (Part III) stipulates a minimum supply amount to Pioneer growers. It states:

> If a Grower grows cane on less than 70% of that Grower's CPA in each of three consecutive crushing seasons, then a party to this agreement may ask the CPB to consider whether it is appropriate for that Grower to forfeit that percentage of CPA which has not grown cane.

8.36 In this regard, CSR submits it is necessary to specify a minimum cane supply percentage in order to secure cane supply, due to the significant capital investment required in sugar milling.

8.37 In its draft determination, the Commission indicated it would be concerned if the minimum supply quota contained in the Agreements had the effect of constraining growers as to where they may sell their cane, or constraining potential competitors where they may source cane. The Commission also considered that a quota may operate to prevent growers switching to an alternative land use.

8.38 Subsequent to the Commission's draft determination, CSR advised in relation to cane swapping arrangements between its own mills, that cane has been, and will continue to be, swapped between its Pioneer and Invicta Mills to equalise the season length. For example, transferring some cane from one mill to the other can mitigate the effect of mill breakdowns at a particular mill. CSR reports this happened in the 2000 crushing season, where the effect of extensive lost time at Pioneer was mitigated for growers by transferring some of the cane to the Invicta Mill. Further, CSR submitted that growers can relinquish their CPA and switch to another crop if they so desire with no further liability under the Agreements.

8.39 In relation to grower cane supply arrangements, CSR advised there are two natural barriers that limit the ability of a grower to switch mills. These are:

- the requirement that cane must be crushed within a short period of harvest sets a natural geographic limitation on which mill a grower can supply; and
- the use of rail to transport cane from the farm to the mill means proximity to a rail siding is a requirement for efficient harvesting and transport.

8.40 CSR also cited other practical limitations in switching mills including the different size and style of cane bins between mills, Pioneer Mill has a 3'6" gauge rail system whereas the other Burdekin CSR-owned mills have a 2' gauge rail system, the fact that there is no connecting rail bridge to the Inkerman mills, and harvesting is organised in geographical groups and efficient transport scheduling would preclude a single grower from accessing any mill rail siding he desired.

8.41 Additionally, there is a legislative barrier (in force until 2007) to growers transferring cane supply arrangements between mills, which requires the consent of both mills be obtained. This could constrain potential millers from entering the industry. However, as CSR is currently the sole miller in the Burdekin, this clause has no practical application for growers in this region.

8.42 In relation to CPA, section 207 of the SIA, among other things, specifically exempts from competition legislation:

- the grating of, or refusal to grant, a cane production area (section 207(1)(a));
- the cancellation of, or the refusal to cancel, a grower's cane production area, or part of the number of hectares included in a cane production area, by a cane production board (section 207(1)(d)); and
- a condition imposed on the growing of cane (section 207(4)(a)).

8.43 Consequently the Commission considers that while the minimum supply quota as provided under the Pioneer Supply Agreement may have the effect of constraining growers and mill owners as to where they may sell or source their cane, and may impact on growers switching to an alternative land use, such restrictions already exist independent of the Pioneer Supply Agreement. Long term supply agreements may be a further restriction to entry into the industry, especially as concentration at the miller level is high. However, the Commission does not consider that the restrictions are increased to such an extent as a result of the Pioneer Supply Agreement to materially impact on the constraints on growers and mill owners that already exist.

8.44 Decisions of the CPB to cancel a grower's CPA are appealable to the local Magistrate's Court where the decision has adversely affected the interests of the grower (section 204 of the SIA).

Exit clause

8.45 The Commission notes the Pioneer Supply Agreement does not contain provisions in relation to exiting the industry. At the conference and in a later submission, CSR advised that an exit clause was not incorporated into the Pioneer Supply Agreement because it is covered by section 46 of the SIA.

8.46 Section 46 relates to collective agreements made for a particular mill for more than a four year period, and provides that:

> Before the collective agreement is made, a grower may give notice to the negotiating team of a proposed cancellation of the grower's cane production area, or of a number of hectares included in it, to take effect from a day after the end of the four year period.

8.47 The explanatory memorandum of section 46 of the SIA states that the provision represents a balance between the competing interests of the grower and the mill owner, and 'the purpose of this provision is to enable growers to plan their exit from the industry, while at the same time providing certainty and information to the mill owner.'

8.48 CSR advises that regardless of the requirements under the SIA, they would allow a grower to exit the industry by making an individual agreement with the miller. CSR advises it is 'quite willing to accommodate individual growers wishing to leave the industry, providing that they do not all wish to leave at once, and provided reasonable (ie 2 years) notice is given so that their cane be replaced in a timely matter, and the mill does not suffer a loss of throughput in the meantime.'

8.49 Ray Hoey and Co expressed concern over the lack of a discernible exit clause and penalties for not fulfilling contract requirements within the Pioneer Supply Agreement. Ray Hoey and Co submit that such a clause has urgent significance, given current world sugar prices and the escalating price of inputs such as fuel and water.

8.50 While acknowledging the intention behind section 46 of the SIA, the Commission generally does not favour exit arrangements which are too restrictive. As outlined above, CSR's approach appears to be less restrictive than what is required under the SIA.

8.51 However, as the restrictions on a grower from exiting the industry result from the SIA, it is beyond the Commission's power to amend this. Therefore, as the exit arrangements are a legislated requirement the Commission considers the restriction flows from the SIA, not the Pioneer Supply Agreement.

The SIA and the Pioneer Supply Agreement

8.52 The Commission considers the adverse effect on competition arising from the cane payment formulae; the limited ability of growers to 'opt out' of the collective arrangements; the difficulties faced by new market entrants (both millers and growers); the restrictions on a grower exiting the industry; and constraints on growers and potential mill owners from minimum supply obligations, largely exist independent of the Pioneer Supply Agreement. The Commission considers the market outcome would be the same in relation to these factors with or without authorisation.

8.53 As previously discussed, CSR advised that the elements of the Agreements which arguably may not be covered by the statutory exemption provisions of the SIA are the differential payment scheme, including the expansion of the crushing season, and the constraints on which new CPA is to be granted.

Differential payment/expansion of the crushing season

8.54 CSR advises it is uncertain as to whether the differential payment scheme is specifically authorised by sections 211(2) and (3) of the SIA.

8.55 Essentially, the cane price formulae under the Pioneer Supply Agreement establishes a differential payment scheme for existing growers and new or expanding growers. The effect of this arrangement is that the price payable for cane supplied from

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new CPA (whether they be existing growers on new land or new growers entering into the market) is less than the price payable to growers supplying from existing CPA.

8.56 CSR submits the grounds for differential payment are linked to the objectives of the Pioneer Supply Agreement. That is, it helps to ensure a gradual extension of the crushing season in conjunction with expansion of mill crushing capacity. CSR submits in order for existing growers to demonstrate a level of commitment to the scheme, and to provide an incentive for an extended crushing season, there is a compensatory dollar amount included in the cane payment formula in recognition of the fact that an extended season will reduce the average sugar content upon which part of the price formula is based. This compensation amount increases as the season length increases. New growers however, receive a flat compensation rate.

8.57 Growers supplying from new CPA are also liable to pay a levy of $1 per tonne of cane supplied for the term of the Pioneer Supply Agreement. CSR submits the levy is required to offset some of the capital expenditure required under the scheme, including plant and equipment, and train-line infrastructure between new CPAs and existing train-line.

8.58 The Commission notes there are conflicting views in respect of whether the differential payment system and imposition of a levy create a disincentive to new growers entering the industry.

8.59 Prior to the draft determination being issued, a number of new growers submitted that the expansion arrangements provide the only practical solution for a new grower to enter the industry. The growers indicated that they were prepared to pay the levy and stated that it was acceptable because:

- new growers can enter the industry on a basis that is economically acceptable and certain. That is, with the right to supply cane for a ten year period;
- the $1 per tonne levy is paid out of revenue and not out of capital and is paid only on the tonnage that goes to the mill; and
- the $1 per tonne is a known cost that can be budgeted for.

8.60 In particular, Ms Owens has prepared cash flows and a business plan, which have been presented to and assessed by her financier, which she submits satisfy her as to her viability as a new grower.

8.61 The Invicta Canegrowers and Bugeja Cane Farms submit that the imposition of a levy in the sugar industry is not unprecedented. In the past, Invicta growers have been required to pay a levy for tramline infrastructure during earlier expansion periods. In addition, prior to the 1999 season, new growers were required to make a contribution to enter the industry by virtue of the Number 1 and 2 Pools. Invicta Canegrowers submit the differential between Number 1 and 2 Pools was substantially higher than the levy of $1 which expanding growers are required to pay as part of the Agreements.

8.62 The Commission also notes the comments by JJ McDonald and Sons that the issue of the levy and differential payment scheme was made aware to all concerned

during negotiations for a Cane Supply Agreement. To their knowledge, no grower took petition for change to the Negotiating Team.

8.63 The ASMC submits that providing for a differential rate of payment for growers with existing cane production areas and those growers with new cane production areas, reflects the legislative intention to devolve decision making back to local areas. Similarly, in relation to the levy, the ASMC submits that the SIA leaves it up to local negotiating teams to decide all matters about cane pricing.

8.64 Mr Ivory, an existing grower in the Pioneer area opposes the differential payment scheme. Mr Ivory submits that the implementation of the Pioneer Supply Agreement will create a barrier to entry for new CPA growers. He outlines that a new CPA grower may receive up to $2.00 less per tonne of sugar cane than an existing CPA grower may. Growers that supply cane from new CPA do not obtain any incentives or allowances for the lowering of the average CCS content of cane caused by the extended season. Specifically, they will only be paid an additional 0.578 dollars per tonne, while existing CPA growers will be paid incentives up to $1.65 per tonne.

8.65 In relation to the levy, Mr Ivory submits that it will be applied for ten years. However, after this period, new CPA growers will not receive any allowances or incentives. Mr Ivory also argues that CSR's claim that a levy is required for the construction of a new tramway is not correct. He explains that if old sugar lands, or lands previously used in other horticultural pursuits, are brought into production as sugar cane growing lands, and subsequently allotted new CPA, then in terms of the Agreement a levy must be paid, despite the fact that the lands may be immediately adjacent to an existing tramway network. The Commission notes that CSR submits that capital expenditure includes expenditure on plant and equipment as well as expenditure on train-line infrastructure between new CPAs and existing train lines.

8.66 In a subsequent submission, CSR outlined that having access to crushing capacity at a sugar mill is an extremely valuable right of a grower. CSR submits that the regulation of the industry artificially controlled the level of cane land expansion allowed in the industry. As a result, the crushing capacity of mills generally exceeded the ability of growers to grow cane. It submits that the Pioneer Supply Agreement clearly sets out the conditions under which it is prepared to increase mill throughput. A possible entrant can make a decision whether to enter the industry under these circumstances.

8.67 Ray Hoey and Co submits that the Pioneer Supply Agreement, by way of differential payment, in principle seeks to re-introduce the Number 1 and Number 2 pool price arrangement. It submits that the SIRWP criticised the pool arrangement for restricting entry of growers. Ray Hoey and Co submits that the SIRWP could find no public benefit for the two-price scheme which previously operated. There is now a single price arrangement operating in Queensland.

8.68 The Commission notes CSR considers there is a level of uncertainty surrounding the issue of whether the differential payment scheme is authorised by the SIA. In any event, the Commission can see that the differential payment scheme means that growers receive less for their cane and this could be a disincentive for new growers wishing to enter the industry, or existing growers wishing to expand. However, the

Commission also notes the submissions received from growers that claim it is financially viable for them to enter or expand under these arrangements. The Commission therefore considers there may be some lessening of competition as a result.

Granting of new CPA

8.69 Part II of the Pioneer Supply Agreement deals with expansion. It governs the circumstances in which the need for new CPA will be determined.

8.70 CSR submits that the Agreements place constraints on the manner in which new CPA is to be granted. This potentially restricts competition for cane supply from existing and new growers. While these constraints are not expressly referred to under the SIA, CSR advises it is uncertain whether section 208(1)(d) of the SIA is wide enough to authorise the nature of the constraints.

8.71 As previously outlined, the Pioneer Negotiating Team calculates the nominal annual capacity for crushing at the mill in order to determine the CPA needed to produce the tonnage of cane to utilise that capacity. In other words, the allocation of new CPA is the amount of land in hectares after deducting the current level of CPA from the level of CPA needed to match the mill's capacity. Therefore, new or increased CPA may only be granted if there is potentially unused mill capacity.

8.72 The Pioneer CPB is responsible for implementing the Pioneer Negotiating Team's decision in respect of new CPA. While the Pioneer Supply Agreement places a condition on the grant of new CPA (that a grower accepts the terms and conditions of a collective agreement or individual agreement), they do not outline the criteria used in the CPB's assessment of an application for new or increased CPA. The Commission subsequently sought clarification on this point.

8.73 The Commission was advised that each application is assessed on an individual basis after a closing date for applications. In deciding each application for new or increased allocation, the CPB takes into consideration:

- the suitability of the land for growing cane;
- whether there is a sustainable water supply for the amount of CPA applied for; and
- whether cane harvested from that CPA could be transported to the mill.

8.74 The Pioneer Supply Agreement lists one of its objectives as being to provide confidence in and security of cane supply and processing. In this context, the Commission notes the above-mentioned criteria acknowledge the environmental credentials of the potential new growers to the extent that they may impede the reliability of cane supplies to the mill.

8.75 With further regard to this issue, the Commission understands that during the SIRWP deliberations, the Australian Milling Council suggested that 'environmental compliance should be the responsibility of the individual' (SIRWP 1996). In response, a voluntary Code of Practice for Sustainable Cane Growing was introduced. Essentially, the Code requires individual members to commit to a general level of

compliance with the guidelines in existing legislation for land clearing, soil conservation, environmental protection and waste management.

8.76 In its draft determination, the Commission indicated its view that the Agreements for expansion have a potential constraining influence on both existing and new growers.

8.77 The Commission did not receive subsequent submissions on this point. Therefore the Commission concludes that the arrangements for CPA allocation have the potential to constrain existing growers wishing to expand their production by putting additional land under production. Similarly, the expansion procedures outlined under the Pioneer Supply Agreement have the potential to inhibit entry for new growers. This is coupled with lower terms of payment and the imposition of a levy under the Agreement as previously discussed.

8.78 While the Commission considers there is some small anti-competitive detriment flowing from the differential payment scheme and expansion arrangements under the Pioneer Supply Agreement, it considers the overall detriment is somewhat limited by the regional nature of the arrangements.

Localisation of arrangements

8.79 Although the SIA operates across the State of Queensland, it provides for collective negotiations on a regional and mill specific basis through local negotiating teams. The Pioneer Supply Agreement reflects the localisation of sugar supply terms and conditions and is the result of collective negotiations by the negotiating team comprising CSR and Pioneer growers.

8.80 In its draft determination, the Commission concluded that the detriment to competition of a collective negotiation process that is regional in nature will not be as significant as an industry-wide agreement, which leads to standard rates and conditions across an entire industry with more significant anti-competitive implications.

8.81 In a subsequent submission, Ray Hoey and Co submitted that under the previous legislation even though the responsibility of issuing assignment lay with the QSC, it delegated responsibility locally to each Mill area which determined crucial issues for that Mill area only. Ray Hoey and Co submits that, therefore, in a practical sense, decisions to do with expansion were previously made at the local level. Ray Hoey and Co also submitted that the SIA, and the SIA 1991, provide for the making of local supply agreements, rather than being a result of the Pioneer Supply Agreement.

8.82 Irrespective of how cane prices and new cane entitlements were regulated under previous legislation and whether they were localised, the Commission is being asked to authorise provisions of collective agreements. To the extent that the Pioneer Supply Agreement is regional and mill specific, the Commission considers that the detrimental effect on competition is limited.

Dispute resolution

8.83 Following the pre-determination conference, Ray Hoey and Co submitted that in certain circumstances there are inadequate appeal mechanisms under the Pioneer Supply Agreement. In particular, Ray Hoey and Co submitted that there is no appeal

mechanism with respect to the CPB's determination of whether a CPA is defined as existing CPA or new CPA. Ray Hoey and Co submitted that such a decision by the CPB can adversely affect a grower's financial viability, yet there is no appeal mechanism in the Pioneer Supply Agreement (the dispute resolution procedures contained in the Pioneer Supply Agreement are discussed in Section 3 of this determination).

8.84 Clause 1.3.2 of the Pioneer Supply Agreement states:

> The determination by the CPB as to whether CPA is Existing CPA or New CPA is final and binding.

8.85 The Pioneer Supply Agreement defines new CPA as CPA granted on or after 1 March 2000, or existing CPA varied by a CPB application after 1 March 2000. The Pioneer Supply Agreement outlines specific guidelines to be used by the CPB in determining whether a variation of existing CPA should be classified as existing CPA rather than new CPA.

8.86 The SIA provides for an appeal process for a grower whose application for grant, variation, or cancellation of CPA has been refused by a CPB, or granted on a condition which the grower is dissatisfied with (section 204).

8.87 The Commission understands that the CPB's classification of CPA as new or existing has significant consequences for growers in terms of their cane payments. It therefore seems appropriate that the Pioneer Supply Agreement provides growers with the ability to appeal such a decision (consistent with that provided under the SIA). As a result, the Commission considers a condition of authorisation is necessary to amend the Pioneer Supply Agreement to provide a right of appeal in relation to a decision by the CPB in relation to whether CPA is existing CPA or new CPA, consistent with the SIA.

Condition

8.88 The final sentence in Clause 1.3.2 of the Pioneer Supply Agreement is deleted, which currently reads:

> **The determination by the CPB as to whether CPA is existing CPA or new CPA is final and binding.**

8.89 An independent process of appeal which is consistent with section 204 of the SIA is to be inserted into the Pioneer Supply Agreement for situations where a CPB's decision is not consistent with the CPA variation guidelines under Clause 1.4 of the Pioneer Supply Agreement.

8.90 Ray Hoey and Co also considers there is no appeal mechanisms in regard to the annual review process under the Pioneer Supply Agreement. In particular, the final paragraph of Clause 3.4 (Part I) of the Agreement states:

> ...It is not the intention of either party that in this annual review process, any of the matters be referred to a dispute resolution process.

8.91 As previously outlined, the Pioneer Agreement provides that its terms and effects will be subject to annual review by the Negotiating Team, which may agree to

vary the Agreement. Clause 3.4 (Part I) of the Pioneer Supply Agreement also provides that the Negotiating Team may agree in writing to roll over Parts I, II and III of the Agreement for one year.

8.92 CSR advises that the purpose of an annual review is to take into account any anomalies that may arise in relation to the operation of the Pioneer Supply Agreement. CSR submits it allows the Negotiating Team to incorporate changes to the Pioneer Supply Agreement to give effect to the original spirit and intent of the negotiations.

8.93 In addition, CSR advises that where there is no mutual agreement regarding the variation of the Agreement, the existing arrangements under the Agreement will continue.

8.94 The Commission considers that the annual review procedure is designed to address anomalies in the operation of the Agreement, rather than to completely re-negotiate the terms and conditions of the Pioneer Supply Agreement. As such, the Commission is satisfied that where there is no agreement for change arising from the annual review, the existing agreement remains, and can be collectively re-negotiated at the end of its term. The Commission considers that the lack of an appeal process in relation to issues arising from the annual review is offset by Clause 3.5 (Part I) that allows for variation of the Agreement if, at any time, as a result of changed circumstances, one party has been seriously disadvantaged to the benefit of another party, and provides for dispute resolution if there is disagreement in respect to whether there has been a significant change in circumstances, or whether such change has caused serious disadvantage to the one party.

8.95 The Commission considers that subject to the condition discussed above, the dispute resolution procedures under the Pioneer Supply Agreement are adequate.

Assessment of the likely benefit to the public arising from the Pioneer Supply Agreement

Increased bargaining power

8.96 CSR claims that by negotiating collectively growers have an enhanced bargaining position with CSR. The Commission has considered a number of previous applications which involve primary producers' collectively negotiating terms and conditions of supply with their processor.

8.97 Arguments based on increasing bargaining or countervailing power essentially relate to a change in the power relativities of the parties to a proposed agreement. An increase in countervailing power, raised in the authorisation context, typically involves one party attempting to improve its bargaining position relative to another, for example through a collective arrangement. The Commission does not accept that a mere change in the amount of countervailing power is necessarily, in itself, a public benefit. Rather, the Commission will focus on the likely outcomes resulting from the change in bargaining position flowing from the arrangement for which authorisation is sought. It is these likely outcomes which are essential to the net public benefit test. Generally, the Commission would accept an argument about increasing countervailing power as a public benefit where it is satisfied that enhancing the bargaining power of the applicant

would benefit the broader community, for example in terms of lower prices for consumers.

8.98 The Commission has previously stated that the balance of negotiating power – and possible public benefits from addressing any imbalance – will depend on the circumstances involved. In this case the Commission is of the view that there is an imbalance between the growers and CSR. This imbalance is exacerbated by the fact that CSR owns the only four mills in the region, sugar cane farming is regulated under the SIA by allocating CPA to growers with the linked obligation to supply cane to a particular mill, and sugar cane is a perishable product and must be transported to a mill within one day of harvesting.

8.99 In its draft determination, the Commission concluded that the Agreements for which authorisation is sought did not appear to have the purpose of redressing the imbalance, although CSR claimed that an effect of the Agreements is to enhance the bargaining power of the growers. The Commission considered the arrangements helped to redress some of the imbalance, although only to a limited extent.

8.100 Following the draft determination Ray Hoey and Co submitted that given collective bargaining is mandated by the SIA, it does not result from the Pioneer Agreement, and therefore cannot be claimed as a benefit of the Agreement.

8.101 The Commission agrees that collective negotiation is provided for in, and specifically authorised by, the SIA and as such considers that any public benefits from enhanced bargaining power which results from the ability to collectively negotiate cannot be attributed to the Agreements for which authorisation is sought (as with the competition effects).

8.102 However, consistent with the Commission's analysis of the competition effects, public benefits may result from the nature and elements within the collective Agreements as negotiated.

8.103 Certain public benefits are derived from the provisions within the Pioneer Supply Agreement. In particular, and as discussed in more detail below, increased mill throughput and farm output, associated new investment, and efficiency gains from improved use of infrastructure. There is also likely to be a growth in exports and an associated increase in the international competitiveness of the sector as a result of efficiencies and seasonal exports of sugar. There are also likely to be some public benefits, as a result of associated economic gains to the Burdekin community and a better informed market.

Increased production and improved use of infrastructure

8.104 The essential thrust of the Agreements is to provide for a gradual extension of the crushing season, in conjunction with expansion of mill crushing capacity. CSR claims that the additional tonnage harvested under an extended season, and additional mill capacity will provide an opportunity for more efficient utilisation of resources used in harvesting and milling of cane.

8.105 In its draft determination, the Commission accepted that as a consequence of increasing mill throughput at the Invicta and Pioneer Mills, utilisation of infrastructure

would be improved, including Bulk Sugar Terminals, and harvesting and transport plant.

8.106 At the pre-determination conference, and in a later submission, Ray Hoey and Co claimed that the extent of increased crushing capacity and increased throughput at the Pioneer Mill is undefined. In light of the longer crushing season, Ray Hoey and Co argue that there are no benefits for Pioneer growers if there is no increase in CPA in the Pioneer area.

8.107 CSR submits that the major public benefit of the Agreements relates to the increase in throughput that will occur in the district.

8.108 With regard to annual throughput, CSR submits that under the Agreements annual throughput in the district will increase by approximately 1 million tonnes of cane. This will be achieved through a combination of mill expansion and extending the crushing season length (from 21.4 dry weeks to 24.5 dry weeks) at both the Invicta and Pioneer Mills. The annual increase in throughput at the Pioneer Mill under the proposal is expected to be approximately 300 000 tonnes of cane.

8.109 CSR also advises that capital expenditure at the Pioneer Mill is likely to occur over the term of the Pioneer Supply Agreement. However, it will not invest to expand production at the Pioneer Mill without receiving adequate returns on its capital investment, which can only be achieved under the new payment arrangements under the Agreement (including the differential payment system). The level of capital expenditure is dependent, in part, on the extent of CPA applicable to the Pioneer Mill. CSR advises there are applications for 1288 hectares of new CPA in the Pioneer area currently under consideration. In addition, CSR advises that the majority of the cane land expansion in the district is coming from new areas of land outside the traditional Pioneer or Invicta areas. Any grower within or outside the district may invest in these expanding areas.

8.110 In addition, CSR argues that it is incorrect to address public benefit by reference to growers in a particular area. CSR submits that cane is moved between the Invicta and Pioneer Mills, and growers generally view equalising the season length between the two mills as desirable (which is provided for by the Agreements). CSR submits that growers should be indifferent as to where mill expansion takes place, as the ability to swap cane between the Invicta and Pioneer Mills means that an increase in capacity at one mill effectively benefits growers supplying both mills. As sugar milling is a capital intensive industry, CSR claims it cannot justify capital expenditure on mill expansion without changing the current cane payment arrangements and extending the crushing season. CSR submits that in terms of the growers as a collective body, a longer season will mean more cane land will be able to be brought into production.

8.111 The Commission considers that in the absence of an agreement or agreements between growers and mill owners, it is unlikely that industry expansion can take place. This is because cane growers and mill owners face different financial incentives with respect to the optimal season length. For example, mill owners support expansion in land area under cane because it lowers costs through increased throughput and better utilisation of its existing milling investment.

8.112 On the other hand, existing growers, and more particularly growers not wanting to expand, are reluctant to support an expansion in land under cane unless it is matched with sufficient increased milling investment to maintain or reduce existing crushing season lengths. This is because growers are paid for the sugar content in their cane and that content generally increases as the crushing season is shortened.

8.113 In regard to the competing demands on growers and millers in the industry, it is not the role the Commission to reach a conclusion on what is the optimal season length. The Commission recognises that the Pioneer Supply Agreement is the result of a negotiated outcome, albeit subject to some grower opposition, and it incorporates an allocation of allowances to existing growers in recognition of the detrimental impact of an extended season.

8.114 The Commission accepts that the Pioneer Supply Agreement provides for an increase in mill throughput (by around 300 000 tonnes) in the following ways;

- the differential payment scheme for growers tied to the length of the season provides an incentive for a longer season;

- the levy provides for a means to fund capital investment in land, plant and equipment, including train-line; and

- the Pioneer Negotiating Team will meet to consider whether there should be an allocation of new or increased CPA to the Pioneer Mill based on the nominal annual capacity and the CPA necessary to fully utilise that capacity.

8.115 The Commission considers that as a result of increasing mill throughput at the Pioneer Mill, the utilisation of milling infrastructure will be improved. The Commission accepts the resulting efficiencies as a public benefit. In addition, the Commission considers that an effect of increasing throughput and therefore output is likely to operate as an incentive for further investment by CSR, with flow on benefits to growers in terms of certainty/continuance of supply.

8.116 The Commission considers there are several features of the sugar industry that should prevent growers and CSR simply internalising the benefits flowing from gained efficiencies, namely:

- the vast majority of raw sugar is exported and is therefore subject to the forces of international competition;

- domestic raw sugar prices are set at export parity;

- the competition provided by other mill owners in Queensland (CSR owns 7, Bundaberg Sugar owns 7, Mackay Sugar Co-operative Association owns 4, and 8 are owned by other mills; and

- competitive pressures generated by retailers, and food and beverage manufacturers.

Better informed market

8.117 The Commission generally accepts that markets work more efficiently when participants are well informed, and as there is a cost in the collection and analysis of market information, there may be efficiency gains from having this function performed on a collective basis.

8.118 The Commission understands that the Pioneer Supply Agreement provides for the negotiation of cane supply terms of supply by the Pioneer Negotiating Team on behalf of the growers. The Commission also notes the process of annual review of the terms and effects of the Agreements will be carried out by the Negotiating Team, with the aim of jointly exploring ways to enhance the efficient operation of the industry. Also, the Commission notes that the Pioneer Collective Supply Agreement expressly provides for specific industry statistics, including tonnes of green cane crushed, tonnes of burnt cane crushed, total hectares of plant cane, total hectares of ratoon cane, an area details report and a productivity report to be provided to the Committee representing the growers at the end of every season.

8.119 The Pioneer Supply Agreement also reflects provisions of the SIA that provide that each mill must have a cane analysis program in order to obtain information about the cane delivered to the mill, which ultimately determines the price paid to growers for their cane. The SIA also provides that a negotiating team must develop a cane quality program.

8.120 In its draft determination, the Commission concluded that to the extent that the proposed Agreements go beyond what is legislated under the provisions of the SIA, the collection and analysis of market information on a collective basis is likely to improve the efficient operation of the industry, resulting in a public benefit.

8.121 Following the pre-determination conference, Ray Hoey and Co submitted that the level of information mandated in the Pioneer Supply Agreement is less than the level of information required to be supplied under the Local Board Award of the SIA 1991. Furthermore, Ray Hoey and Co claimed the level of information supplied as a consequence of the Pioneer Supply Agreement is less than the information flows in other current collective agreements in the Burdekin. No further detail in regard to these issues was received. The Commission notes the SIA 1991 has been repealed.

8.122 As indicated in its draft determination, it appears that the Pioneer Agreement goes further than the SIA in that CSR must provide certain information to the Supplier's Committee, including weekly crushing figures and group equity information, and an end of season Area Details Report and Productivity Report. To that extent, the Commission considers there is likely to be some public benefit resulting from the collection and analysis of market information on a collective basis.

Transaction costs savings

8.123 Savings on transaction costs are another outcome generally associated with collective negotiations. Collective arrangements may reduce the number and cost of agreements that need to be negotiated. However, as the current application relates to a collective selling arrangement, it is possible that the main beneficiary will be CSR who has only one process of negotiation under the Pioneer Supply Agreements, as opposed

to negotiating with its growers individually. Notwithstanding this, the Commission is of the view that if savings are aggregated in competitive markets, CSR should be forced to pass on those savings.

8.124 The Commission did not receive a submission on this issue following its draft determination.

8.125 As outlined at paragraph 8.116, the Commission considers any cost reductions are most likely to be passed through given the features of other sectors of the industry. However, the public benefit from transaction cost savings may occur independent of this authorisation, as the SIA already provides for collective arrangements. To the extent that transaction cost savings result from the Pioneer Supply Agreements rather than the conduct permitted under the SIA, the Commission considers these savings are likely to constitute a public benefit for the purposes of this authorisation. However, collective negotiation is permitted under the SIA. Accordingly, the Commission does not give much weight to any benefits resulting from transaction cost savings.

Growth in exports

8.126 Increased production arising from the Pioneer Supply Agreement, whether this production is for domestic or export consumption, is considered to be a public benefit. If production is exported however, there may be some additional economy wide benefits. For example, in terms of strengthening exchange rates. The Act specifically directs the Commission's attention to the increased public benefits of increased exports and international competitiveness in relation to mergers and acquisitions

8.127 The Commission is advised that all raw sugar produced in the Burdekin is exported, which suggests that sugar produced as a result of the proposed expansion will be fully sold onto the export market. The Commission notes the production efficiencies, as discussed above, are likely to increase exports.

8.128 In its draft determination, the Commission accepted that as nearly all Queensland sugar is exported, efficiencies resulting from the Agreements may make Australian sugar more internationally competitive. The Commission notes this is in line with the primary objective of the SIA to:

> ...facilitate an internationally competitive, export orientated sugar industry based on sustainable production that benefits those involved in the industry and the wider community.

8.129 In a subsequent submission, CSR provided further information in relation to the combined value of increased exports flowing from the Agreements, and the ability to produce seasonal exports of raw sugar. CSR submits there is a combined increase in throughput in the district of approximately 1 million tonnes. At an average sugar content (CCS) of 14.5%, the additional sugar production would be approximately 150 000 tonnes per annum. At a world market sugar price equal to A$350 per tonne (the forecast price for the 2001 season), the value of this additional sugar would be A$52.5 million.

8.130 In addition, CSR claims a benefit of extending the crushing season under the Pioneer Supply Agreement is the ability to produce earlier seasonal exports of sugar, which is currently in demand from customers.

8.131 Ray Hoey and Co submits that any increase in exports from the Burdekin will require a new bulk sugar terminal in Townsville. Ray Hoey and Co claims that Townsville residents view a new terminal as detrimental to their welfare.

8.132 In response, CSR advised that the proposal to build additional storage capacity at Townsville is being driven by the marketing strategies of Queensland Sugar, and not by any pressure from increased production levels.

8.133 Queensland Sugar wants to be able to supply preferred customers over a longer period of time, avoiding the need for the customer to seek alternate supply sources during the non-Queensland crushing season. This requires holding back in store as much sugar at the end of the season as possible.

8.134 The Commission did not receive any information following the draft determination that would cause it to change its view on this issue and therefore accepts that there is some public benefit in the efficiencies resulting from the Agreements and seasonal exports of sugar which may make Australian sugar more internationally competitive.

Regional benefits to the Burdekin community

8.135 The Commission understands that the communities and economies of many Queensland towns such as Giru, its surrounding area, and Townsville, are substantially maintained and or effected by the raw sugar industry and its associated service areas. CSR claims there is public benefit associated with the increased operating and capital expenditure flowing from the programs under the Agreements in the form of direct financial benefits to the workforce and economy of the Burdekin area. An example of the flow-on effects argued by CSR include:

- employment in the field sector in the areas of growing, harvesting and transporting cane may increase by over 200 persons; and

- expenditure in growing, harvesting, transporting and processing additional cane (estimated at $24 million) will remain in the local community in the form of wages and purchases of local materials;

8.136 A number of interested parties also submit there are significant flow on effects from the economic state of the sugar industry to the local community. These being:

- direct employment of mill staff, cane growers, field testers, haulage contractors and sugar port staff;

- greater commercial activity; and

- greater use of service industries.

8.137 In its draft determination, the Commission accepted that there may be positive economic flow-on effects to the Burdekin community associated with the efficiency gains flowing from the Agreements. The Commission accepts that increased production and incomes generated in regional areas can be regarded as a public benefit in some contexts. Particularly where resources lack mobility.

8.138 CSR claims the Agreements will increase the annual capacity of the Pioneer and Invicta Mills, which generates economic benefits to Pioneer growers and millers. As previously outlined, following the conference, CSR submitted that the combined approximate value of additional cane crushed under the Agreements is A$52.5 million. Of this, CSR submits approximately $35.5 million would go to growers for payment of cane. In turn, growers would pay local harvesting contractors $5.5 million. The balance of the growers payments represents their labour, water, materials and profit component, most of which would be expected to spent locally.

8.139 Similarly, CSR claims the approximate $17 million it retains goes to employees as wages, as well as materials and services from local suppliers and contractors, capital servicing and profit. Apart from the capital servicing, CSR claims most of this money would be expected to remain locally. CSR did not provide a breakdown of these values between the Invicta and Pioneer growing regions.

8.140 As discussed earlier, the Commission considers that an effect of increasing throughput and therefore output is likely to operate as an incentive for further investment by CSR, with flow on benefits to growers in terms of certainty/continuance of supply.

8.141 The Commission acknowledges the role that large business plays in local communities. In light of subsequent submissions, the Commission affirms its view that there are likely to be some public benefits, as a result of associated economic gains to the Burdekin community, to the extent that these benefits are not obtained at the expense of other communities (and they do not appear to be).

Summary of public detriment and public benefit arising from the Pioneer Supply Agreement

8.142 The Commission considers it is necessary to consider the Pioneer Supply Agreement in the context of the regulatory environment in which it exists (which exempts much of the conduct for which authorisation is sought).

8.143 The Commission considers the adverse effect on competition arising from the cane payment formulae; the limited ability of growers to 'opt out' of the collective arrangements; the difficulties faced by new market entrants (both millers and growers); the restrictions on a grower exiting the industry; and constraints on growers and potential mill owners from minimum supply obligations, largely exist independent of the Pioneer Supply Agreement.

8.144 To the extent that the differential payment scheme and the expansion arrangements under the Pioneer Supply Agreement are not covered by the terms of statutory authorisation provided by the SIA, the Commission considers there is some limited public detriment resulting from the Agreement. However, the Commission considers the extent of this detriment is minimal, and is be limited by the localisation of arrangements.

8.145 The Commission considers, subject to a condition discussed at paragraphs 8.88 – 8.89, the Pioneer Supply Agreement contains adequate dispute resolution procedures.

8.146 In relation to the public benefit flowing from the Pioneer Supply Agreement, the Commission considers there is benefit to the public as result of efficiency gains from the better utilisation of infrastructure. In addition, the Commission considers that an effect of increasing throughput and therefore output is likely to operate as an incentive for further investment by CSR, with flow on benefits to growers in terms of certainty/continuance of supply. There is also likely to be a growth in exports and an associated increase in the international competitiveness of the sector as a result of the efficiencies and seasonal exports of sugar achieved as a result of the Agreements. There are also likely to be some public benefits, as a result of associated economic gains to the Burdekin community and a better informed market.

8.147 The Commission's assessment of the public benefits and detriments flowing from the Pioneer Supply Agreement is based on the expectation that CSR is obliged to comply with the requirements of the SIA, and particularly those relating to individual negotiations. Therefore the Commission has imposed a condition of authorisation that the Pioneer Supply Agreement be amended to include reference to the possibility for growers to enter into individual negotiations with CSR in line with the provisions of the SIA.

Assessment of public detriments constituted by any lessening of competition arising from the Invicta Supply Agreement and the Invicta Expansion Agreement

8.148 The Commission notes submissions received following the pre-determination conference focused on the effects of the Pioneer Supply Agreement, rather than the Invicta Agreements.

Collective negotiation

8.149 As outlined in section 3 above, the Invicta Supply Agreement provides for the collective negotiation of terms and conditions of supply of sugar cane to the Invicta Mill, including cane payment formulae, terms of payment, cane quality conditions and a minimum supply amount.

8.150 As outlined in relation to the Pioneer Supply Agreement, agreements which fix, control or maintain prices are deemed by the Act to substantially lessen competition.

8.151 As with the Pioneer Supply Agreement, the issue that needs to be considered for the Invicta Supply Agreement, is the extent of anti-competitive detriment that is likely to result in the context of a situation where the application of the SIA (which exempts much of the conduct for which authorisation is sought) must be considered.

Cane payment formulae

8.152 The Invicta Supply Agreement results in different prices being paid to growers based on the CCS of their cane. As described above in relation to the Pioneer Supply Agreement, growers are compensated based on a relative payment scheme.

8.153 In its draft determination, the Commission indicated that it generally considers the anti-competitive effects of collective price agreements may be lessened where

participants are compensated on the basis of their performance, relative to an average level of performance.

8.154 Subsequent submissions in relation to the cane payment formulae are outlined above in relation to the Pioneer Supply Agreement. No additional points were raised in relation to the operation and effect of the cane payment formulae under the Invicta Supply Agreement.

8.155 As previously discussed, the SIA specifically authorises payments under both individual and collective supply agreements, and therefore exempts such conduct from the operation of the Act. The Commission's assessment and conclusion in this regard is the same as that discussed at paragraphs 8.9 – 8.17 of this determination in relation to the Pioneer Supply Agreement. In particular, the Commission considers that any anti-competitive detriment of the cane payment formulae, result from the SIA and not the Invicta Supply Agreement.

Ability to 'opt-out' of collective negotiations

8.156 Like the Pioneer Supply Agreement, the Invicta Supply Agreement does not make any reference to the making of individual agreements. A discussion of this issue is contained at paragraphs 8.18 – 8.28 of this determination in respect of the Pioneer Supply Agreement.

8.157 While the Commission considers the limitations on individual agreements under the SIA are restrictive, this is a result of the SIA and not the Invicta Supply Agreement. The present legislative arrangements restrict the ability of individual growers to negotiate individual agreements with CSR. The Commission considers that there should be maximum scope to allow individual negotiations and contracts within the scope of the legislation. The authorisation does not extend to cover situations where CSR imposes a more restrictive requirement on individual agreements than what is legislated. The Commission would expect CSR to comply with the requirements of the SIA in relation to this issue, and imposes a condition of authorisation that the Invicta Supply Agreement specifically refers to the possibility for growers to enter into individual negotiations with CSR in line with the provisions of the SIA.

Condition

The Invicta Supply Agreement is to be amended to include reference to the possibility for growers to enter into individual negotiations with CSR in line with the provisions of the SIA.

Barriers to entry

8.158 It is submitted that the Agreements for which authorisation is sought make it difficult for other growers or competing company to build another mill in the Burdekin region. The Commission considers that while collective negotiation by growers and CSR under the Invicta Agreements may increase barriers to new participants entering the industry, such barriers are already high and it is not considered that the barriers are increased to such an extent as a result of the Invicta Agreements to materially impact on new entry to the market. The Commission's view in relation to the Invicta Supply Agreement is the same as that outlined in relation to the Pioneer Supply Agreement at paragraphs 8.29 – 8.34.

Minimum supply quota

8.159 In general terms, the Invicta Supply Agreement provides that a grower must supply cane to the Invicta Mill for a ten year period. Further, Clause 5.1 (Part I) stipulates a minimum supply amount to growers. It states:

> If a grower supplies less than 70% of that grower's CPA in each of three consecutive crushing seasons, and the total area of cane available for rushing is below 85% of the total CPA for the Invicta Mill, then a party to this agreement may ask the CPB to consider whether it is appropriate for the grower to forfeit that percentage of CPA which has not been supplied.

8.160 In its draft determination, the Commission indicated it would be concerned if the minimum supply quota had the effect of restricting growers as to where they may sell their produce, or restricting CSR's potential competitors as to where they may source product. The Commission also considered that a quota may operate to prevent growers switching to an alternative land use.

8.161 As previously discussed (at paragraphs 8.39 – 8.42 of this determination), there are a number of natural and legislative restrictions which limit supply and potential new millers entering the market.

8.162 As indicted by the Commission in relation to the Pioneer Supply Agreement (at paragraph 8.43 of this determination) the Commission considers minimum supply obligations under the Invicta Supply Agreement may have constraining effects on growers and potential millers, however, such restrictions already exist.

8.163 Long term supply agreements may be a further restriction to entry into the industry especially as concentration at the miller level is high. The anti-competitive detriment from the Invicta Supply Agreement would be lessened if the Agreement was for five years, as with the Pioneer Supply Agreement, rather than ten years. Further, the Commission is not convinced that a ten year agreement as opposed to a five year agreement is necessary to achieve the public benefits discussed later.

Exit clause

8.164 The Commission notes that both the Invicta Supply Agreement and Invicta Expansion Agreement do not contain provisions in relation to exiting the industry, as it is covered by section 46 of the SIA. While the Commission considers the exit provisions in the SIA are restrictive, as discussed at paragraphs 8.45 – 8.51 of this determination, it is beyond the Commission's power to amend the SIA.

The SIA and the Invicta Agreements

8.165 As similarly concluded in relation to the Pioneer Supply Agreement, the Commission considers the adverse effect on competition arising from the cane payment formulae; the limited ability of growers to 'opt out' of the collective arrangements; the difficulties faced by new market entrants (both millers and growers); the restrictions on a grower exiting the industry; and constraints on growers and potential mill owners from minimum supply obligations (apart from the ten year period of the Invicta Supply Agreement), largely exist independent of the of the Invicta Agreements. The Commission considers the market outcome would be the same in relation to these factors with or without authorisation of the Invicta Agreements.