2 November 2016

Submission to the Australian Competition and Consumer Commission

In relation to the application for authorisation lodged by Queensland Canegrowers

on behalf of Wilmar Sugar

Level 22 Waterfront Place 1 Eagle Street
Brisbane Qld 4000 Australia DX 102 Brisbane
T +61 7 3119 6000 F +61 7 3119 1000
minterellison.com

MinterEllison

Submission to the ACCC

In relation to the application for authorisation lodged by Queensland Canegrowers

Submission

1. Executive Summary

Wilmar submits that this application for authorisation should not be granted. This is because:

(a) there is no benefit to the public resulting from the authorisation; and

(b) the authorisation would be likely to result in detriment to the public, chiefly by having a detrimental impact on competition in relation to:

(i) the supply and acquisition of sugar cane;

(ii) the supply of raw sugar by mill owners to sugar marketers; and

(iii) the supply of forward pricing, pooling and marketing services to growers.

The Queensland Parliament, when enacting the 2015 amendments to the *Sugar Industry Act 1997* (Qld) (**SIA**), widened the scope of the statutory authorisation enacted for the purpose of section 51 of the *Competition and Consumer Act 2010* (**CCA**).

While neither the Queensland or Australian Productivity Commission or the Queensland Government supported these amendments, these changes reflected the judgment of the Queensland Parliament as to where the public benefit lies in balancing the interests of growers with the protection of competition. There is no public benefit (and considerable risks to competition) in widening this authorisation beyond the statutory protection conferred under the SIA as amended.

Wilmar is particularly concerned about the possibility that the authorisation, if granted, would jeopardise competition in the market in which sugar marketing entities compete for the right to market the 'Grower Economic Interest' (or **GEI**) sugar attributable to individual cane growers. One of the explicit objectives of the 2015 amendments to the SIA was to foster competition for the right to market GEI sugar by giving individual growers 'choice' in GEI sugar marketing.

This authorisation, if granted, would permit growers to exercise that choice collectively, and threaten to hinder competition in this market before it has been allowed to take root. The Queensland Parliament, when amending the SIA in 2015, did not see fit to enact an authorisation for collective bargaining by growers in relation to choice of marketer. If the Parliament had intended such an outcome it would have provided for it in the amendments to the SIA. There is no case for the ACCC to grant such an authorisation now. The requested authorisation should not be used as a vehicle to usurp the Queensland Parliament.

Wilmar considers that the Applicant has failed to set out a basis upon which the ACCC could be satisfied that the application should be granted. We set out our reasons for this conclusion below.

2. Introduction

2.1 Application for Authorisation

On 23 September 2016, Queensland Canegrowers Organisation Ltd (**QCGO**) made an application for authorisation for the collective bargaining and making of cane supply and related contracts between sugar cane growers, processors and sugar marketers (**Application**). The Application is broad and seeks authorisation, for 10 years:

(a) within each district, so that the relevant representative body can negotiate with the local mill owner and GEI sugar marketers on behalf of grower members;

(b) across and between each district that has common mill ownership, so that each of the relevant representative bodies, as well as QCGO, can negotiate collectively with the common mill owner and GEI sugar marketers; and

(c) across and between each district regardless of mill ownership, so that each of the relevant representative bodies, as well as QCGO, can negotiate collectively with all mill owners and GEI sugar marketers.

2.2 Wilmar

Wilmar International Limited commenced operations in Australia in 2010 following its $1.75 billion acquisition of Sucrogen Limited (now called Wilmar Sugar Australia Limited) from CSR Limited. Through its wholly owned subsidiaries, Wilmar Sugar Australia Limited (**Wilmar**) operates eight sugar mills in Queensland, namely the Macknade, Victoria, Invicta, Pioneer, Kalamia, Inkerman, Proserpine and Plane Creek mills.

Wilmar employs more than 2,000 people at the sugar mills and in its Australian offices. About 1,500 sugarcane growers supply Wilmar's mills. Wilmar produces 55 to 60 per cent of the raw sugar exported from Australia.

Since 2010, Wilmar has invested significant funds in the development of its sugar operations in Queensland, including over $400 million in capital expenditure in the mills and a similar amount in maintenance expenditure.

Wilmar is currently negotiating cane supply agreements (**CSAs**) with growers and grower collectives for the 2017 season and beyond, including the representative bodies named in the Application.

Wilmar International Limited (the ultimate holding company of Wilmar), through its subsidiary Wilmar Sugar Pte Ltd, also operates a sugar trading business and has trading desks in Paris, Geneva, Sao Paulo and Singapore.

3. Overview of Queensland's Sugar Industry

3.1 The industry

The sugar industry is one of Australia's largest and most important rural industries, with around $1.7 billion in export earnings. Australia is the third largest exporter of sugar worldwide, after Brazil and Thailand.[1]

In 2014, 30.8 million tonnes of sugar cane was crushed, producing approximately 4.2 million tonnes of sugar.[2]

Approximately 95 per cent of sugar produced in Australia is grown in Queensland with the remaining five per cent in northern New South Wales.[3] The Queensland sugar industry is located primarily along the east coastline of Australia between Mossman and Rocky Point.[4]

In Queensland, the sugar industry is made up of approximately 4,000 sugar cane farms, 21 mills, six bulk sugar terminals and two sugar refineries. While the average size of cane farms is around 100 hectares, the size of individual farms varies considerably.[5]

3.2 Production of sugar cane

Sugar cane is a giant tropical grass belonging to the Poaceae family which also includes barley, wheat, maize, rice and sorghum. It generally requires a tropical or temperate climate to grow, and reaches heights of between two and six metres.

---

[1] Queensland Productivity Commission, Decision – Regulatory Impact Statement on the *Sugar Industry (Real Choice in Marketing) Amendment Bill 2015*, November 2015, (**QPC Report**), page 14.

[2] QPC Report, page 14.

[3] Department of Agriculture, http://www.agriculture.gov.au/ag-farm-food/crops/sugar

[4] QPC Report, page 14.

[5] Senate Rural and Regional Affairs and Transport References Committee, *Inquiry into Current and Future Arrangements for the Marketing of Australian Sugar,* Report, June 2015, (**Senate Committee Report**), page 16.

Through the natural process of photosynthesis, the sugar cane leaves absorb energy from the sun, and carbon dioxide combines with the water from the plant's roots to convert into sucrose, which is then stored as a juice in its fibrous stalks.

Sugar cane crops are typically planted around the middle of each year, with crushing of the crop normally commencing around the middle of the following year, and continuing until late in the year. Sugar cane, once planted, can be re-grown and harvested for a number of years. This means that growers need to re-plant only part of their property each year.

Once sugar cane stalks are harvested it begins to deteriorate quickly and must be processed within 16 hours after harvest.[6] This means that cane can only be transported over a limited distance for crushing in a sugar mill. The practical effect of this is that most cane growers have no choice as to which mill will crush their cane. While there are some cane growing areas where growers have a choice of mill, this is the exception. The perishable nature of sugar cane also means that mill owners require harvested cane to be delivered quickly to their mill as it is not economically feasible to source cane from distant locations.[7]

3.3 Manufacture of raw sugar

Contracts between cane growers and mill owners commonly transfer ownership of the cane from the point of delivery, which often occurs at the rail siding close to where the cane is grown. At this point, title and risk in the cane will pass to the mill owner. Generally, these supply contracts contain no other encumbrance on the mill owner's title to the cane supplied to it under the contract. As a result, mill owners own the sugar cane at the time it is processed into raw sugar, and it is the mill owners who own the raw sugar produced in its mills.

After the sugar cane has been delivered to the mill, it is weighed and processed at automatic cane-receiving stations. The cane stalk is transported to a shredder, which chops the cane into fibrous material and separates the juice cells. It is then crushed using large rollers. The extracted juice is clarified to remove soil and impurities. This juice is concentrated into a syrup by boiling off the excess water. It is then seeded with sugar crystals in a vacuum pan and boiled until sugar crystals have formed and grown. The crystals are centrifuged to separate the molasses from the crystals and then dried.[8]

3.4 Sale of raw sugar

As the raw sugar produced at the mill requires further refining before consumption, mill owners either sell the raw sugar to domestic refineries or to a sugar marketer for sale on the export market.

Around 80 per cent of the raw sugar produced in Queensland is exported.[9] The remaining 20 per cent is refined and consumed domestically in Australia.[10]

Queensland has two refineries. The Racecourse Refinery is currently owned by Sugar Australia Limited, which is 75 per cent owned by Wilmar and 25 per cent owned by Mackay Sugar Limited. The Bundaberg Refinery is owned by Bundaberg Sugar and located on the same site as the Millaquin mill. Approximately 15 per cent of raw sugar produced in Queensland is currently delivered for processing to the two refineries, with the remainder being exported or supplied to interstate refineries.[11]

In the past, as a 'single desk' exporter, Queensland Sugar Limited (**QSL**) was responsible for marketing more than 90% of all of raw sugar exported from Australia. More recently other sugar

[6] QPC Report, page 14.

[7] *Ibid*.

[8] Cane Growers, http://www.canegrowers.com.au/page/archived-pages/About_Australian_Sugarcane/

[9] QPC Report, page 14.

[10] QPC Report, page 18.

[11] Senate Committee Report, page 17.

marketers have entered the market including Wilmar Sugar Australia Trading Pty Ltd, MSF Marketing Pty Ltd, MSF Sugar Limited and Tully Sugar Ltd.

3.5 Logistics

Queensland has one of the world's largest bulk raw sugar storage and handling systems. The sugar is transported by either road or rail to one of Queensland's six bulk sugar terminals where it is carried by conveyor into the storage shed.

Sugar Terminals Limited (**STL**) holds long term leases for Queensland's six bulk sugar terminals at Cairns, Mourilyan, Lucinda, Townsville, Mackay and Bundaberg. QSL currently subleases the operation of the terminals from STL.

The terminals can store approximately two and a half million tonnes of bulk raw sugar,[12] which is approximately 60 per cent of the state's total production. This means sugar marketers can structure sales to maximise revenue in terms of both the net premiums and the overall ICE#11 price able to be achieved.[13]

Table: Queensland bulk sugar terminal capacity versus district production

Bulk sugar terminal	*Cairns*	*Mourilyan*	*Lucinda*	*Townsville*	*Mackay*	*Bundaberg*
Storage capacity	250,000 tonnes	175,000 tonnes	235,000 tonnes	750,000 tonnes	750,000 tonnes	320,000 tonnes
Approximate local sugar production	290,000 tonnes	620,000 tonnes	560,000 tonnes	1,240,000 tonnes	990,000 tonnes	490,000 tonnes
Local sugar production able to be stored	86%	28%	42%	60%	76%	65%

Source: QSL (November 2015) Submission to Queensland Productivity Commission

3.6 Raw sugar pricing

Cane supply contracts in Queensland typically contain a formula for determining the price of cane (**cane price formula**). Variants of this formula have been used in Queensland for over a century.

The effect of the cane price formula is to expose cane growers to the world sugar price by setting the price for cane, in part, by reference to the price for sugar. The sugar price at any point in time may be determined by reference to current export prices or, in some cases, may have been set in advance under 'forward pricing' arrangements.

A grower's exposure to movements in sugar prices has been described as the grower's 'nominal sugar price exposure' or their 'grower economic interest' (ie. the extent to which a cane grower is exposed to world sugar prices (either in the spot market or in the future) for the cane they supply to the mill owner). We discuss this in more detail in section 3.7 below.

The cane price formula is a function of the tonnes of cane delivered, the commercial cane sugar (**CCS**) content of the cane, and the 'Sugar Value' received by the mill from the sale of sugar, expressed as follows:

'$/tonne cane = 0.009 × 'Sugar Value' × (CCS - 4) + 'Constant''

The 'Sugar Value' is a function of the world sugar price and any additional marketing premiums, net of marketing costs. [14] It represents the price paid to a mill owner for the sugar supplied to a sugar marketer.

[12] http://www.sugarterminals.com.au/

[13] QPC Report, page 17.

[14] MSF (2015), Submission to Agriculture and Environment Committee, page 5, as cited in the QPC Report, page 20.

Based on the average of the last five years of data from QSL, and using the QSL Harvest Pool as the reference, the globally traded 'Intercontinental Exchange No. 11 raw sugar futures contract' (known as the 'ICE No. 11' price) price represents approximately 99 per cent of the Sugar Value.

Marketing premiums are the difference between the ICE#11 price and the actual prices achieved by the marketer for the raw sugar it sells in export markets. There are two forms of marketing premiums, a 'physical premium' and a 'polarisation premium'.

- the 'physical premium' is negotiated between the marketer and the customer and is derived from the supply and demand at the time of sale, as well as the transport costs between different supply locations. It may also include the value paid by a customer for accessing higher quality Australian raw sugar compared with alternative products that may be available in the same shipment period.[15]

- the 'polarisation premium' is an additional premium relating to the quality of the raw sugar. It is paid where sugar has a higher 'sucrose purity' (or polarisation) relative to the standard quality benchmark under ICE#11.[16]

Marketing costs are those costs incurred by the marketer in the course of completing its sales to customers. These costs include, but are not limited to:

- storing, handling and transport of sugar at bulk sugar terminals;

- freight and port costs of shipping sugar to customers;

- financing advance payment to growers and the administration of pricing pools; and

- other direct operating costs.[17]

While marketing premiums fluctuate from year to year, on average, marketing premiums, net of marketing costs, have added approximately 1 per cent to the ICE#11 price achieved by QSL and paid to mill owners under Raw Sugar Supply Agreements (**RSSAs**) in recent years.

Historically, after sugar has been exported, the proceeds were pooled for payment purposes and distributed back to mill owners, after being adjusted for marketing costs. The mill owners would then pass a portion of their receipts to the growers through application of the cane price formula.

This pooling of sales proceeds meant that growers received an average of prices received from sales during the course of the year.[18] A grower had the option of participating in pricing pools that had varying risk profiles, or participating in pricing mechanisms where the grower could nominate a target price, with a specified pricing completion date.

The cane price formula was originally designed to provide for approximately two thirds of the proceeds of the sale of sugar to be passed through to the grower as payment for the cane, although in practice today the price paid to the grower varies, because the sugar price is ultimately determined by the pricing and pooling decisions made by individual growers under forward pricing arrangements with mill owners and varies from grower to grower.

Most mill owners have in recent years offered cane growers the ability to 'forward price' their cane via a choice of pools or individual grower forward pricing arrangements.

In Wilmar's case, growers were able to individually fix, for a proportion of the cane to be supplied in a future season, the sugar price on which the price of that cane is based up to three years in advance.

---

[15] QPC Report, page 19.

[16] QPC Report, page 20.

[17] QPC Report, page 21.

[18] Department of Agriculture, http://www.agriculture.gov.au/ag-farm-food/crops/sugar.

Wilmar then locked in those forward prices for sugar by entering into futures contracts in those future years. This meant the 'Sugar Value' (in the cane price formula) was not necessarily the world sugar price in the year the sugar was produced, but a price based on a sugar futures contract that was sold by Wilmar at an earlier point in time.

Growers supplying cane to Wilmar also had a choice of having a proportion of their cane based on a sugar price determined by the outcome of one or more pricing pools where the price of the pool was, in turn, determined by the hedging activities (via futures and forward currency contracts) of a pool manager.

3.7 'Nominal Sugar Exposure' and 'Grower Economic Interest' sugar

The concept of 'Nominal Sugar Exposure' has been used since 2008 to facilitate grower forward pricing, as it enables the quantification of a grower's exposure to sugar price (via the cane price formula) and subsequently the appropriate amount of physical sugar that a miller or QSL had to hedge in order to eliminate the sugar price exposure of agreeing to pay a grower for a specified volume of a cane based on an agreed sugar price.

'Nominal Sugar Exposure' is the estimate of the extent a grower is exposed to the sugar price, and for a given quantity of cane is expressed in tonnes of sugar, based on a derivation of the cane payment formula set out above.

The formula for calculating Nominal Sugar Exposure for a given quantity of cane is:

*Nominal Sugar Exposure = Tonnes of Cane * .009 * (CCS (Relative) – 4) / IPS Conversion Factor (Tonnes Actual)*

A typical grower's Nominal Sugar Exposure is approximately equal to two thirds of the sugar that is manufactured from the cane produced by the grower. However an important distinction is that Nominal Sugar Exposure is mathematically derived from the cane payment formula and is independent of the actual amount of sugar produced from cane by a mill.

While the *Sugar Industry Act 1999* (Qld) (**SIA**) refers to 'Grower Economic Interest' (see SIA, section 33(2)(c)(ii)) rather than 'Nominal Sugar Exposure', the concept encapsulated by the two terms is similar. The economic interest in the remaining sugar (and the sugar price exposure) resides with the mill owner (see SIA, section 33B(2)(c)(i)).

3.8 Other products produced through the manufacture of sugar

In the Queensland sugar industry, there are three main by-products associated with the production of raw sugar from sugar cane, namely molasses, bagasse (which is the fibre contained in the sugar cane plant) and mill mud/ash (a combination of filter mud and boiler ash).

Bagasse is used as a fuel in raw sugar mills to produce steam and electricity required to operate the mill. Excess electricity may be exported to the electricity grid and sold into the wholesale electricity market.

Molasses is sold as stock feed or as raw material for the production of other value added products including ethanol. Mill mud/ash is typically used on cane farms as a soil conditioner.

3.9 The key players

As set out in the table below, Queensland's mills are owned by seven different owners, a combination of publicly owned entities, companies limited by guarantee and co-operatives:

Wilmar accounts for around 55 to 60 per cent of Australia's total raw sugar exports. The next three largest millers — Mackay Sugar Limited, MSF Sugar Limited and Tully Sugar Limited — collectively account for about 30 per cent.[19]

[19] QPC Report, page 18.

Table: Queensland sugar mill ownership

Mill ownership	*Trading As*	*Operating mills*
Wilmar International Limited (Based in Singapore)	Wilmar Sugar Australia	Macknade Victoria Invicta Pioneer Kalamia Inkerman Proserpine Plane Creek
Grower owned limited company	Mackay Sugar Limited	Mossman Farleigh Marian Racecourse
Mitr Phol Sugar Corp (Based in Thailand)	MSF Sugar Limited	Tableland Mulgrave South Johnstone Maryborough
COFCO (Based in China)	Tully Sugar Limited	Tully
Finasucre (Based in Belgium)	Bundaberg Sugar Limited	Bingera Millaquin
Grower owned, shareholder co-operative	Isis Central Sugar Milling Company Limited	Isis
Family owned and operated	Heck & Sons Limited	Rocky Point

Source: Department of Agriculture and Fisheries

4. Background to the Application

4.1 History of sales and marketing arrangements for raw sugar

For much of its history, the Queensland sugar industry was highly regulated and all sugar exports were controlled by a single desk marketing board (initially the 'Sugar Board' and subsequently a statutory authority called the 'Queensland Sugar Corporation'). Queensland legislation required 100% of all bulk raw sugar produced be sold to the single desk for export.

Regulation under the single desk protected the Queensland sugar industry from competitive forces, resulting in complacency, inefficiency and a lack of innovation and uptake of new technology generally.[20]

The industry and the legislation that governs it has been subject to several major reforms in the last 20 years including the following:

(a) In 2000 QSL was created, replacing the Queensland Sugar Corporation, which had up until then engaged CSR Limited (**CSR**) to market the sugar as its agent.[21] The marketing of the sugar that was produced by the mills was taken over by QSL, with a proportion of the marketing staff moving across from CSR to QSL. From 2000, the sugar price on which a growers' cane price was based continued to be the result of QSL forward pricing and sales of sugar (as was the case with QSL's predecessors).

[20] QPC Report, page 15.

[21] QSL is a not-for-profit public company limited by guarantee. The current membership of QSL consists of 7 'Mill Owner Members' (who are the owners of sugar mills in Queensland) and 23 'Grower Representative Members' (who are representatives of Queensland growers and are either appointed by the Australian Cane Farmers Associated Limited and Queensland Cane Growers Organisation Limited or are elected or appointed to represent a particular mill area in accordance with QSL's Constitution).

(b) In 2000 the Queensland Sugar Corporation also transferred its bulk sugar terminal assets to STL.[22]

(c) On 1 March 2004, a Heads of Agreement was reached between QCGO, the Australian Sugar Milling Council and the Queensland Government committing to comprehensive reform of the SIA. On 18 March 2004 the Sugar Industry Reform Bill was introduced into Parliament and on 6 May was passed. This removed the statutory bargaining system that had previously been in place, and also introduced a transition away from compulsory arbitration to voluntary arrangements where the parties had to decide their own dispute resolution processes and could only include arbitration by agreement when entering into supply contracts.

(d) On 28 November 2005 the *Sugar Industry Amendment Act 2005* was passed, deregulating the marketing of raw sugar. From 1 January 2006, the provisions in the SIA for vesting of sugar and marketing arrangements were removed. The negotiating, making or varying of or giving effect to pooled export contracts and pooled domestic contracts between QSL and millers were authorised for competition legislation.

(e) In 2008 CSR introduced forward pricing to growers, allowing them to effectively set a forward price for cane delivered to the mill. Initially, grower take up was slow but by the 2009 season it had increased such that, of the quantity of sugar produced and supplied to QSL by CSR for export, some 47% was forward priced by both CSR and growers managing their respective exposure to sugar price. However, in every situation the actual forward pricing was carried out “on the book” of QSL meaning that it was QSL that entered into the sugar futures contracts and forward currency contracts and held them in its name.

Further detail of the reforms can be found on the Queensland Government's Department of Agriculture and Fisheries website at https://www.daf.qld.gov.au/plants/field-crops-and-pastures/sugar/changes-to-sugar-industry-legislation.

As a result of deregulation in the early 2000’s, the Australian sugar industry transitioned from one of the most heavily regulated sectors in Australia to one which has a much more appropriate and effective regulatory regime that encourages a more globally-focused and competitive industry.

4.2 Expansion of sugar marketing after deregulation and changed role of QSL

The 2005 amendments to the SIA fully deregulated export sugar marketing and removed QSL’s status as a single desk marketer, with arrangements between mills and QSL to be based on voluntary arrangements. In 2006 QSL entered into voluntary RSSAs,[23] with the majority of mill owners which required the millers to continue supply QSL with 100% of the raw sugar for export. Three mill owners (Maryborough, Mulgrave and Mossman) opted not to continue to supply QSL and marketed their sugar directly to export customers and any domestic customers, and as a result the growers who supplied to those mills were paid for their cane based on a sugar price established by their mill owner.

The RSSAs with other mill owners continued until 2012, when QSL allowed Wilmar to market and sell a portion of sugar representing its economic interest. By 2013, all millers were granted the option to buy back the miller economic interest (or **MEI**) sugar and arrange for its marketing and sale. It should be emphasised, however, that the sugar which was sold back to mill owners was the MEI sugar. QSL retained sole control over the marketing of the grower's 'Nominal Sugar Exposure' (now described as the 'GEI' sugar) (see section 3.7 above).

[22] STL is a public company limited by shares. It is owned by shareholders owning two classes of shares: G and M class. The G class shares (which are grower shares) are listed on the Newcastle Exchange, the M class shares (which are miller shares) are not listed.

[23] These agreements were originally called 'Voluntary Marketing Agreements', but were re-named with their current title in 2008.

In 2014, Wilmar, MSF and Tully Sugar provided notices to QSL that they would not be continuing with their RSSAs beyond 30 June 2017.[24] The RSSAs were three year 'rolling' agreements. Under their terms, mill owners could bring them to an end by giving notice that they did not intend to further extend the agreement.

4.3 The path to re-regulation

Sugar Industry (Real Choice in Marketing) Amendment Bill 2015

On 19 May 2015 the *Sugar Industry (Real Choice in Marketing) Amendment Bill 2015* was introduced into the Queensland Parliament as a private member's bill. The purpose of the Bill was to amend the SIA to address concerns expressed by some growers in relation to marketing arrangements for 'GEI sugar'.

The Queensland Productivity Commission summarised growers' concerns which the bill was to address as:

- the imbalance of power between growers and millers;
- the lack of transparency in miller marketing and potential for transfer pricing;
- ownership of GEI sugar;
- the future role of QSL;
- the need for an adequate dispute resolution system; and
- adverse impacts on future investment in Queensland cane farms.[25]

The Bill sought to give growers choice in nominating the marketing entity for the GEI sugar attributable to that grower (see section 3.7 above) and to create a regime for the resolution of commercial disputes between growers and millers relating to the terms of cane supply contracts.

One of the objectives of the Bill was to create competition in relation to the right to market GEI sugar. As the Member for Dalrymple (who introduced the Bill) said during the second reading debate:

> *'At present the millers are more or less saying to us that this is reregulation and that this is not about competition. That is what the growers are asking for at the moment. They are asking to have competition because, if the mill owners want to win the growers over to market their sugar, they have to work a lot harder—likewise if QSL want to win the growers over. But it is a choice and a choice of who is best serving the interests of the grower in regard to the sugar market and who is giving the best price. That is a natural thing.'* [26]

Prior to the Bill being passed, the Queensland Productivity Commission produced a Regulatory Impact Statement, dated 26 November 2015 (the **QPC Report**). This Report concluded that:

> *'retaining the existing regulatory framework, with no additional regulation, will provide the greatest net benefit to Queensland, and that there are sufficient protections already in place to protect against misuse of market [power].'* [27]

[24] QPC Report, page 19.

[25] QPC Report.

[26] *Hansard*, 2 December 2015, page 3105.

[27] QPC Report, page 86.

This conclusion was based on its findings that:

- there was no evidence of market failure to support government intervention, including no evidence of information asymmetries or a lack of transparency on the part of mill owners;
- there was no evidence of mill owners exercising market power;
- even if mill owners did abuse market power, there were existing regulatory options available to growers to remedy that abuse, for example, under the CCA;
- growers do not own or have an ownership interest in raw sugar for which they are seeking a choice of marketer; and
- the amendments to the SIA proposed under the Bill did not conform with the 1995 agreement between the Commonwealth and States that legislation restricting competition shall only be enacted where a public interest test confirms that the benefits of the restriction to the community as a whole outweigh the costs and objectives of the legislation or government policy can only be achieved by restricting competition.

The Australian Productivity Commission has also commented on the amendments to the SIA, finding that:

> *'Current proposals by sugar millers to seek higher premiums for growers through alternative marketing options are consistent with the goals of deregulation and competition policy generally (QPC 2015). Alternative marketing arrangements may attract premiums by providing products and marketing services tailored to new and emerging markets in which each marketer has a competitive advantage. Higher premiums could provide incentives for profitable restructuring of the sugarcane industry, enabling the owners of less efficient farms to leave the industry with financial security, while creating larger, more productive and profitable sugarcane farm businesses.*
>
> *Reregulating the Queensland sugar industry will limit the competitive forces driving innovation and productivity growth in sugarcane farming. It is also likely to constrain innovation in marketing and continue to limit the premiums available to sugarcane growers.*
>
> *The Commission's view is that costs of the Sugar Industry (Real Choice in Marketing) Amendment Act outweigh the benefits. Repealing the Act could enable consolidation and productivity gains which would enhance the international competitiveness of the sugar industry.'* [28]

2015 Amendments to the Sugar Industry Act

Despite the findings of the QPC Report, the amendments to the SIA were passed on 2 December 2015, and commenced on 17 December 2015.

The key amendments to the SIA include:

- an ability for growers to go to arbitration over disputed terms of a proposed CSA (section 33A);
- a right for growers to nominate the entity to undertake marketing of GEI sugar (section 33B(2)(e));

[28] Productivity Commission, *Regulation of Australian Agriculture, Draft Report*, July 2016 (**PC Draft Report**), pages 424-425.

- requiring a mill owner to have a term in a CSA that it have an agreement with a grower nominated marketing entity to sell the quantity of the on-supply sugar at least equal to the quantity of the GEI sugar (section 33B(2)(d)); and

- providing further statutory authorisation for the purposes of the CCA (section 238).

The Queensland Productivity Commission observed that certain conduct contemplated by the proposed amendments to the SIA could contravene the CCA. In particular:

- provisions restricting third-line forcing (sections 47(6) and (7)) – because the growers could make it a condition of supplying cane to a miller that the miller acquires marketing services from the nominated marketer;

- provisions prohibiting a contract, arrangement or understanding between competitors which contains an exclusionary provision (sections 45 and 4D) – because growers could agree amongst themselves to nominate the same marketer;

- criminal offence provisions preventing competitors from agreeing to limit the supply of goods or services to a third party (section 44ZZRF) – because growers could collude to restrict the supply of cane or marketing services to a particular miller or marketing entity;

- provisions prohibiting contracts, arrangements or understandings which have the purpose or effect of substantially lessening competition (section 45) – because a collective agreement which forces a miller to acquire marketing services from a nominated marketer is likely to substantially lessen competition if the agreement is between a significant number of growers.[29]

Any legislative exemption made by a state pursuant to section 51 of the CCA must be supported by evidence that there is a clear public benefit and that there are no other ways the policy objective can be achieved.[30] However, as noted by the Queensland Productivity Commission, no assessment of the net benefits of the additional authorisation was undertaken prior to introduction of the Bill.[31]

The statutory authorisation

Since 2006 sections 236 and 237 of the SIA have authorised, for the purposes of section 51(1)(b) of the CCA, cane growers in defined regions to collectively bargain with mill owners with respect to the timing of acceptance and crushing of cane and payment terms. The QCGO accepts that, even before the insertion of section 238, *'the industry has acted on the specific authorisations in the Act as being broad enough to allow for full collective bargaining on all cane supply and related contract issues.'* [32]

The amending Act authorised additional conduct with the insertion of a new section 238. The conduct authorised by section 238 is:

- a grower and mill owner making a supply contract including a GEI sugar marketing term (ie. a term required by section 33B(2)(d)(i));

- a mill owner and GEI sugar marketing entity (or **GEIM**) making an agreement to sell on-supply sugar in compliance with a GEI sugar marketing term and a GEIM selling on-supply sugar under such an agreement; and

- a grower and mill owner being taken to have made a supply contract under section 33A(10).

[29] QPC Report, pages 72 to 73.

[30] QPC Report, page 73.

[31] QPC Report, page 73.

[32] Application, paragraph 4(b), page 12.

5. The Relevant Areas of Competition

5.1 Overview

The Application gives only superficial treatment to the markets in which the proposed authorisation must be assessed.

The Australian raw sugar industry consists of a chain of interrelated markets, from the supply of cane to mills to the ultimate sale of raw sugar on the international and domestic markets.

Wilmar considers that there are five relevant markets to be considered when assessing the likely effect of the conduct sought to be authorised. Each is discussed separately below.

5.2 Supply and acquisition of sugar cane

There are a number of markets for supply and acquisition of sugar cane in Queensland; as illustrated on the map of Queensland Sugar Cane Production and Mill Areas included in the Application.

Each market is geographically constrained by the perishable nature of sugar cane and the limitations of cane rail networks. As noted in section 3.2 above, sugar cane must normally be processed within 16 hours of harvest so growers are geographically restricted in terms of the mills they can supply, and millers are equally restricted in the number of cane farms from which they can source cane for crushing.[33]

5.3 Logistics

There are six bulk sugar terminals in Queensland.[34] Each is located at a port.

Generally, the mill owner is responsible for and pays for transporting raw sugar to the port. Transportation is undertaken by rail or road.

The terminals are owned by STL but leased to QSL. QSL has responsibility for day to day operation of the terminals, storage of raw sugar (including sugar to be sold back to millers, as described section 4.2 above) and out-loading on to ships for export.

5.4 Sugar pricing

As a result of the cane price formula used in supply contracts, growers are exposed to raw sugar prices (see section 3.6 above). There is a market in which growers seek to manage this price exposure via grower forward pricing.

Prior to the December 2015 amendments to the SIA, grower forward cane pricing was undertaken by having the miller, either in its own right or through QSL, enter into forward sugar pricing arrangements.

The December 2015 amendments to the SIA created the concept of a GEIM. A GEIM may be nominated by a grower to market the GEI sugar attributable to that grower. GEIMs can provide forward pricing services to growers in this market. Growers are also able to manage their price exposure through financial institutions, such as banks.

While millers may also continue to provide forward pricing services, Wilmar, *as a mill owner*, will not be providing forward pricing following the amendments to the SIA. Wilmar's GEIM will offer forward pricing to those growers that nominate it as their GEIM. Other GEIMs will have the opportunity to offer forward pricing services to growers in competition with Wilmar.

[33] QPC Report, page 14.

[34] QPC Report, page 17.

5.5 GEI sugar marketing

As a consequence of the amendments to the SIA, each grower has the ability to nominate the GEIM that will market the GEI sugar attributable to that grower. This is a right conferred by a grower on a GEIM in trade or commerce. It is expected that marketers will compete for this right by offering the ability to achieve higher sugar prices (chiefly through offering professional forward pricing and pooling services to growers and higher net marketing premiums), thereby producing a higher sugar value, and better returns to growers. Marketers may also offer grower cash flow advances and other ancillary information and financial services. As noted above, there is competition in this market, both between marketers who are competing for the right to market GEI sugar, and between individual growers who exercise choice in relation to the GEIM.

Wilmar considers that GEI sugar marketing is a distinct market from sugar pricing. The right to market GEI sugar is a right conferred by growers only on GEIMs, who may (or may not) provide pooling and forward pricing services as part of their offering to growers. In contrast, there is a range of options open to growers who wish to manage their sugar price exposure. These *may* include, but are by no means limited to, pooling and forward pricing through their nominated GEIM.

5.6 Sale of raw sugar on export and domestic markets

International and domestic customers of raw sugar are generally sugar refineries. About 80% of Queensland's raw sugar is exported and the remaining 20% is sold domestically.

Australia's major competitors on the international market are Brazil and Thailand.[35]

The Australian sugar industry is a price taker in the international market[36] and the price received by marketers depends on the ICE#11, irrespective of whether sugar is exported or sold domestically.

The international market for raw sugar is highly competitive and subject to volatility.[37] As such, a key issue for growers and marketers is the management of forward pricing on the ICE #11 futures market and the sale of sugar internationally to achieve the highest net premium.

6. 'Future with and without'

6.1 In markets for the supply and acquisition of sugar cane

Whether or not authorisation is granted, the growers in each region will continue to negotiate CSAs with mill owners, including through collective bargaining.

Currently, around 90% of all growers are represented by bargaining representatives, and it is likely this degree of representation will continue. As noted above, QCGO has observed that negotiations of CSAs have been undertaken on the basis that collective bargaining is allowed. This is expected to continue whether the authorisation is granted or not.

If the Application is granted, coordination between growers in different regions may increase, and the process of negotiating supply agreements may become more coordinated. Growers in one region may, for example, be in a position to withhold agreement to a CSA in support of growers in a different region. There may also be less differentiation in the terms offered to growers by different mill owners.

Coordination between the grower collectives is not necessarily objectionable in every case, and does exist in a number of regions in which Wilmar operates. Efficiency gains may be possible where non-material terms of supply contracts can be consistently applied across regions. However, further coordination between grower collectives, beyond existing levels, would

[35] QPC Report, page 14.

[36] QPC Report, page 58.

[37] Hildebrand, *Independent Assessment of the Sugar Industry*, June 2002, page 9.

substantially increase growers' leverage in a way detrimental to the public. This is because grower collectives will have the ability to influence negotiations across different regions by withholding agreement to one CSA in order to force a mill owner to agree to certain terms in another CSA in a different region. The ability of growers to act in this way has been recognised by the Queensland Productivity Commission (as discussed further in section 8.2 below).

Further, given the 2015 amendments to the SIA are being implemented for the first time in the current negotiations for the 2017 season, granting the Authorisation is likely to introduce even more complexity in an already uncertain environment.

6.2 In logistics markets

The Application seeks authorisation of 'related agreements' without identifying the agreements to which it is referring.

If the Application is intended to encompass agreements in logistics markets in relation to storage and handling of sugar, the authorisation will permit growers, as a collective, to demand that terms be included, in supply contracts, about who will be responsible for transportation, storage and handling of raw sugar, and the terms on which this is to be done. A mill owner could, for example, face a demand from a grower group that it agree to the day to day storage and handing being undertaken by the incumbent operator (ie. QSL).

If the Application is not granted, negotiations in relation to storage and handling of sugar will continue to occur between mill owners and QSL or any alternate supplier of this service (eg. STL, which is the owner of the terminals).

6.3 In the market for sugar pricing

If the Application is granted, growers will be able to collectively demand that certain services be provided by a mill owner, or agree that growers will acquire such services from certain providers only. This would include, for example, forward pricing, which Wilmar does not propose to offer to growers as a mill owner, but rather through Wilmar's GEIM.[38]

There is a risk that other providers of pricing services (including other marketers and financial institutions) could be excluded from this market. In the absence of authorisation, various providers will continue to have the ability to offer (or not offer) forward pricing services as part of their competitive offering to individual growers.

6.4 In the market for GEI sugar marketing

If authorisation is granted, growers will have the ability to agree to use certain GEIMs only, or to exclude others. Growers will also have the ability to collectively demand the inclusion of terms relating to the sale of on-supply sugar in CSAs, giving them the ability to produce the same outcome indirectly.

In the absence of authorisation, the competitive market for GEI sugar marketing will continue to operate, as originally intended by the architects of the amendments to the SIA. In the absence of authorisation, GEIMs will continue to compete for growers' nominations as the GEIM of choice. This competition will continue to attract new entrants to the market and drive further innovation in delivery of marketing services including pricing, pooling and advances, leading to productivity gains.

6.5 In the market for the sale of raw sugar on export and domestic markets

Granting the Application is unlikely to have a significant effect on the sale of raw sugar by marketers to export and domestic markets. Marketers of Australian sugar will remain price takers in the export market.

[38] Please note, in this context, that the SIA does not compel a mill owner to offer forward pricing. Section 33B(2)(c) provides that, under a CSA, the price exposure for GEI sugar is to be borne by the grower unless the parties agree otherwise.

7. The Statutory Test

The ACCC may grant authorisation if it is satisfied in all the circumstances that the proposed conduct would result or be likely to result in a public benefit that outweighs the likely public detriment constituted by any lessening of competition.

8. Public Benefit

The Application identifies eight possible public benefits resulting from the granting of the Application.

There is, generally, an absence of detail linking the outcome of granting the authorisation to any of the benefits identified in the Application and most of the claimed public benefits are, on closer examination, the same.

There is also a lack of evidence supporting the public benefit claims in the Application, and some of the assertions and assumptions made in the Application are inconsistent with:

- the recent findings of the Queensland Productivity Commission in its RIS on the amendments to the SIA (the **QPC Report**); and
- the *Independent Assessment of the Sugar Industry* by Clive Hildebrand, received by the Federal Minister for Agriculture in June 2002 (**Hildebrand Report**).

Further, the Application does not clearly articulate how the conduct sought to be authorised will produce *public* benefits as opposed to private benefits to growers.

8.1 Collectively negotiated agreements provide the best option for acceptable and efficient harvesting, delivery, transport and crushing (see Application, section 4(a)(4))

The authorisation in section 237 of the SIA already allows growers to collectively bargain with a local mill owner in relation to the harvesting, delivery, transport and crushing of cane under a CSA. The Application provides no explanation as to why an extension to this existing collective bargaining authorisation would assist negotiations for regionally based supply contracts.

This is central to the ACCC's decision, as the public benefit relied upon most heavily by QCGO in seeking authorisation is the benefits associated with collective bargaining in relation to CSAs. However, this already exists. It will not be created, or its use in the negotiation of CSAs within a region materially increased, as a result of this authorisation.

In relation to collective bargaining across regions, Wilmar submits that the public benefits associated with the Application are minimal at best.

The logistical complexity involved in harvesting, delivering, transporting and crushing cane is unique to each region. Negotiation of these terms is best handled by parties that understand the circumstances of the particular region and the parties who will actually be responsible for cooperating and performing the supply contract once agreed.

In Wilmar's submission, allowing cross-regional collective bargaining would be inconsistent with achieving the best outcomes for terms relating to harvesting, delivery, transport and crushing for each mill area. This is supported by the findings by the Hildebrand Report, which after substantial consultation with all levels of the industry, found that the basic profit structure of the sugar industry is depicted as *Profit centre = mill area = farms + (harvest + transport) + factory*.[39]

The Hildebrand Report was critical of the habit of the then Miller Suppliers' Committees' (statutory bodies elected at the local level by cane farmers to represent farmers' interests in negotiations

[39] Hildebrand Report, page 13.

with mills) to seek QCGO approval when negotiating terms.[40] The Report made a number of findings in relation to the importance of *regionally* based negotiations to properly tailor the negotiations to each mill area and the danger of defaulting to the interests of state-wide grower representative bodies. For example, the Hildebrand Report stated:

> *'…this most important need for profit centres to stand alone is compromised if the first loyalty of farmers or miller in a mill area is to State or corporate based farmer or miller sectional-interest organisations, as sometimes occurs.'* [41]

and

> *'first loyalties of all parties should be to their mill area, not to wider sectional bodies. Mill areas are responsible for their own survival, not for that of all other mill areas.'* [42]

Similarly, in receiving the Hildebrand Report, the Federal Government stated that:

> *'It is clear that the effective operation of each mill area, or mill region, lies almost entirely in the hands of the local co-dependent participants. And it is important that this responsibility is accepted without resort to wider loyalties.'* [43]

The co-dependency of millers and growers in each mill area means that each has an incentive to reach efficient and profitable outcomes, and each is jointly reliant on the profitability and sustainability of the mill area.[44] If grower collectives outside the mill area are authorised to bargain on behalf of growers within a particular region, this incentive structure is undermined.

The Hildebrand Report:

- also recognised that mill owners are more likely to respect the negotiations if they are negotiating with parties which have a substantial personal financial investment committed to the mill area;[45] and
- ultimately recommended that the industry establish a strong mill area focus and that local economic leadership is developed in preference to sectoral state representation.[46]

A collective authorisation that allows cross-regional bargaining would be contrary to the recommendations in the Hildebrand Report and would be likely result in grower bodies defaulting to the interests of the broader grower interests, as was the case prior to deregulation.

8.2 Authorisation will remedy to some extent the imbalance in bargaining power between growers and mill owners (see Application, section 4(a)(5), 4(a)(7)(c))

The Application provides little support for its assertion that there is an imbalance of bargaining power between growers and mill owners, except to say that the Application will help to 'address the monopoly powers of the mill owner'.

In Wilmar's submission this aspect of the Application is apt to mislead and is inconsistent with multiple findings of previous reviews into the Queensland sugar industry.

---

[40] The Hildebrand Report found that despite having freedom under the SIA for individual Mill Suppliers' Committees to negotiate terms differently to other Committees, this had been 'dampened' by a lifetime habit of seeking collective CANEGROWERS approval and that this was a 'lost opportunity'.

[41] Hildebrand Report, page 13.

[42] Hildebrand Report, page 14

[43] ASMC, *Submission to the QPC Report*, 12 October 2016, page 16.

[44] Hildebrand Report

[45] Hildebrand Report, page 26.

[46] Hildebrand Report, page 46.

Most recently, the QPC Report expressly examined the existence and use of market power by millers and concluded that there is no evidence to suggest that millers can exercise monopoly power because they are constrained by the structural characteristics of the sugar industry itself.[47] The structural constraints identified in the QPC Report are:

(a) that the market is characterised by co-dependency between the growers and millers due to the perishable nature of sugar cane and the single use of the mill assets; and

(b) that mill owners must compete for the supply of sugar cane against other land uses, such as perennial horticulture, forestry and animal production.[48]

The QPC Report also found that there is no lack of transparency on the part of mill owners during negotiations with growers, and that the existing regulatory framework is sufficient to control any abuse of market power by millers should it arise.

Co-dependency of growers and millers and evenness in bargaining power

The co-dependency of regionally associated growers and millers prevents mill owners from acting unreasonably in commercial negotiations. As identified in the Hildebrand Report:

> *'The marketable raw sugar product results from joint efforts of both farmers and miller. Miller and farmers are therefore jointly reliant on each mill area for profitable outcomes, and each must be profitable for economic sustainability of the mill area'*

The Hildebrand Report therefore concluded that:

> *'there is no economic alternative to constructive cooperation between farmer and miller'*[49]

and that:

> *'[d]ue to the co-dependency it is difficult to see that mills can act without constraint in the way which is usually seen in true monopsony situations'.*[50]

Growers' and millers' awareness of their co-dependent relationship means that the bargaining power of each party is relatively even. The complexity and length of CSA negotiations confirms this.

The Application states that *'Sugarcane farms tend to be family-owned enterprises and the capacity to negotiate on even terms with large monopoly milling companies is very limited'*.[51] However, the existing statutory authorisation for collective bargaining already allows individual growers to collectively negotiate within larger grower groups. Growers do take advantage of this authorisation with more than 90% of all growers represented by bargaining representatives.[52] These bargaining representatives are sophisticated organisations that have many decades of experience in negotiating cane supply agreements.

The QPC Report recognises the power of regional grower groups stating that they allow *'growers to collectively make a decision that none of the cane growers will provide product to the miller until the miller agrees to the terms and conditions requested by the growers.'*[53]

---

[47] QPC Report, pages ix-x

[48] See also Hildebrand Report, page 13.

[49] Hildebrand Report, page 13.

[50] QPC Report, page 48.

[51] Page 11.

[52] Application page 12.

[53] QPC Report, page 48.

Similarly, the Industry Commission report into the Australian Sugar Industry (1992) stated that:

> *'… Growers have now formed strong organisations to negotiate on a collective basis. In some regions, growers have purchased their local mill. Growers have far greater access to information to allow them to assess whether terms offered by a mill are reasonable. The development of trade practices legislation also provides some protection for growers against the misuse of market power by mills. .. These developments, coupled with the millers' co-dependence on growers to supply sufficient cane to allows the mill to operate at satisfactory levels of capacity,* ***raise the possibility that it is growers rather than millers who possess the greater market power****.'* [54] (emphasis added)

The QPC Report also found that there was no difference in contractual arrangements negotiated with grower owned mills compared to private mills, which would have existed had there been an abuse of market power in the latter.[55]

Competition for other land use

The Hildebrand Report identified that as a result of competition faced by mill owners from other land uses, a mill owner must ensure that cane farming is the most profitable use of land in its feeder area, in order for the mill to remain commercially viable.[56]

In Wilmar's case it is estimated that a 5% decrease in cane volume translates to a reduction in earnings before interest and tax (EBIT) of more than 20%. Changes in land use also result in large cost increases for mills due to the increased logistical challenge of arranging cane to be transported from fragmented farms. Therefore, Wilmar and other millers have an interest in the ongoing viability and expansion of local cane growers that can continue to supply cane to the mill and understand that this is best achieved by ensuring cane growers receive sufficient returns under CSAs.

Millers' dependence on regional cane growers is also evidenced by their investment in the industry generally. Almost all mills offer planting incentives to growers[57] and each year, approximately $4 million is invested in industry owned productivity service organisations to enhance the productivity of farming sector. In total, Wilmar spends approximately $12 million per annum on research and development, on-farm extension and productivity programs. As an example, Wilmar has recently provided GPS units on cane harvesters at no cost to growers. This will provide valuable information for growers and contract harvesters regarding key cost elements of the production and harvesting process that may result in cost reductions. Millers' supply level investment can be contrasted to other industries such as wool, pork, cotton, grains and meat where processors make little cash contribution to industry research to enhance suppliers' productivity.[58]

No lack of transparency in negotiations

The Application cannot be justified on the basis of any alleged lack of transparency in negotiations on the part of mill owners.

The QPC Report found that there is no evidence of market failure in the sugar industry resulting from the provision of information to growers.[59] Specifically in relation to Wilmar's 2013 negotiations, the Queensland Productivity Commission stated that it could not find any evidence

---

[54] Industry Commission, *The Australian Sugar Industry*, 6 March 1992, Report No. 19, p. 42.

[55] QPC Report, page 52.

[56] Hildebrand Report, page 13.

[57] ASMC, *Submission to the Queensland Parliament Agriculture and Environment Committee*, 17 July 2015, page 16.

[58] *Ibid*.

[59] QPC Report, page 53.

of the growers' claim that there was a lack of transparency and conflicts of interest.[60] Similarly, in relation to MSF Sugar, the Queensland Productivity Commission found that the growers' submission that MSF Sugar provided no visibility on its pricing model was not correct.[61]

The QPC Report stated:

> *'the MSF Sugar Pricing model and the Wilmar Proposal 2015 seem to be a reasonable balance and, for example, seem to provide for almost complete transparency in respect of the premium'*[62]

The Queensland Productivity Commission also noted that the information which Wilmar and MSF had proposed to give growers, through comprehensive pricing mechanisms, monthly reporting requirements and independent audits of annual reporting, would have provided the information growers would need to make informed decisions on the risks, costs and premiums and to form a view on whether they are being paid premiums in accordance with the CSA.[63]

Other regulatory limitations

In relation to the future conduct of mill owners in negotiations, it is important to note that section 33A of the SIA now provides for growers to go to arbitration if they are unable to reach agreement with a mill owner about the terms of a CSA. This will negate any perceived bargaining power which might be said to remain with mill owners.

The QPC Report also pointed to the number of regulatory options available to growers if there was an abuse of market power. Growers would have recourse to the unconscionable conduct provisions of the CCA, section 46 of the CCA which prevents the abuse of market power and the prohibition on unfair contract terms in business-to-business contracts that will apply after 12 November 2016.[64]

Collective bargaining

In so far as the mill owner does possess any market power in its dealings with growers, it is addressed through provisions that authorise collective bargaining with the mill owner in relation to the CSA. As noted above, these benefits already exist in this market. They will not result from this authorisation being granted.

8.3 Collective negotiation is easier, having regard to the complexity and length of contracts (see Application, section 4(a)(6))

As noted at section 8.1 above, the existing statutory authorisation allows growers to collectively bargain to manage the complexity of CSA negotiations.

It is not clear how larger grower collectives, with interests beyond those of a single mill area, would *simplify* the negotiation process. The negotiation process is likely to be more difficult where the representative grower body is not familiar with the particular circumstances of the mill area.

CSAs are complex by nature, in part due to the cooperation required by growers and mill owners in the same region. Attempting to simplify the process further may lead to greater uniformity between regions, which in turn increases the risk of:

- unworkable outcomes that are not properly adapted to the needs of growers and mill owners in each region; and
- risks to the sector as a whole (eg. export price risks) impacting uniformly on the industry due to a lack of diversification in the terms of CSAs.

---

[60] QPC Report, page 51.

[61] *Ibid*.

[62] QPC Report, page 52.

[63] QPC Report, pages 53 to 55; endorsed by the Australian Productivity Commission (see PC Draft Report, page 420).

[64] QPC Report, pages ix-x, page 52.

8.4 Collective negotiation streamlines the negotiation process and saves transaction costs (see Application, section 4(a)(7)(a) and (b))

As discussed at sections 8.1 and 8.3 above, the existing statutory authorisation allows growers to undertake collective bargaining in relation to CSAs to save time and cost. Given the need for each supply agreement to respond to the requirements of the particular mill area, it is not clear how transaction costs would be saved if the Application was granted, because each individual CSA would still need to be tailored to each region. Significant input and direction from the regional growers would continue to be required.

To the extent growers wish to collectively bargain 'related agreements' this will in fact complicate the negotiation process and increase transaction costs for all parties (see section 6 above). Wilmar has already observed increased uniformity in the questions and comments about proposed CSAs which it has received from different grower collectives.

Finally, if this is viewed as a benefit, it is a benefit resulting from existing collective bargaining measures, not the proposed authorisation.

8.5 Collective negotiation provides an increased opportunity to negotiate tailored supply contracts (see Application, section 4(a)(7)(d))

The Application does not explain how collective bargaining will allow contracts to be better tailored. In any event, for the reasons outlined above:

- collective bargaining across regions is incompatible with the ability to negotiate agreements tailored to the specific mill area; and
- the benefits of collective bargaining within regions already exist.

8.6 Collective negotiation provides an increased opportunity to achieve workable implementation arrangements for growers to choose the marketer of GEI sugar (see Application, section 4(a)(7)(e))

The Application submits that collective negotiation will provide an increased opportunity to achieve workable implementation arrangements for growers to choose the marketer of their GEI sugar. However it does not explain what is meant by 'workable implementation arrangements', why these are needed, or why this necessitates the authorisation.

In Wilmar's submission, the 'implementation arrangements' are quite simple and do not require authorisation of the kind proposed to occur.

Section 33B(2)(d) of the SIA gives growers the right to select the marketer for GEI sugar. This is a statutory right that does not require further 'implementation arrangements' to achieve because it is a simple choice on the part of the grower that is communicated to the mill owner following negotiations of the CSA.

The grower is not a party to sugar sales agreements between mill owners and marketers, and has no role in negotiating the terms of that agreement. It is clear from the description of the agreement between the mill owner and the GEIM in section 33B(2)(d) of the SIA that it is a separate agreement, distinct from a 'supply contract'(ie. the CSA negotiated between growers and mill owners). The grower is not identified as a party to a sugar sales agreement (in contrast, a supply contract must have at least one grower party). Although the revenue generated by the GEIM acquiring sugar under the sugar sales agreement will ultimately affect what a grower is paid under the CSA for the cane supplied, it is not necessary to authorise collective bargaining for growers to be able to take the benefit of this.

It is possible that growers, if they are permitted to collectively bargain in relation to the terms on which GEI sugar is sold by a mill owner to a GEIM, might collectively demand that they be made a party to the sugar sales agreement, or that the mill owner agree to sell GEI sugar to a GEIM on terms dictated by growers. However, any benefits resulting from such conduct would be private

benefits accruing to certain growers and their favoured GEIMs, often to the detriment of mill owners.

Mill owners face a range of risks other than sugar price exposure (eg. supply risk, production risk, weather, mill performance). Expanding the scope of collective bargaining has the potential to give growers the ability to transfer to mill owners additional risks not only from growers, but from GEIMs who are favoured by those growers.

There will be no benefit to the public resulting from such conduct. Moreover, for the reasons set out below, such conduct would have the effect of hindering the competition in GEI sugar marketing created by the amendments to the SIA.

8.7 Collective negotiation provides an increased capacity to deal with information and commercial confidentiality and secure professional advice (where required) (see Application, section 4(a)(7)(f))

It is not apparent from the Application how growers' capacity to deal with information and commercial confidentiality will be enhanced if the Application were granted.

As noted at section 8.2 above, the Queensland Productivity Commission found no evidence of a lack of transparency during negotiations, finding that growers are provided with enough information to make informed decisions about risks, costs and premiums. Allowing growers to collectively bargain across a broader range of agreements than currently permitted will not materially increase transparency, and is likely to deliver only private benefits to growers by enhancing bargaining power.

Further, permitting a larger number of growers and collectives to have access to sensitive and regionally-specific information is likely to reduce growers' and millers ability to control the use of confidential information.

8.8 Collective negotiation reduces contract administration costs (see Application, section 4(a)(7)(g))

As already outlined in sections 8.1, 8.3 and 8.4 above, the existing statutory authorisation enables growers to save costs by collectively negotiating CSAs. Any further savings in contract administration costs would be a private benefit for the growers alone.

9. Public Detriment

The Application submits no public detriments will arise if the Application is granted. Wilmar disagrees and believes there would clearly be a number of detriments flowing from the conduct for which authorisation is sought. Each is discussed separately below.

9.1 Authorisation will increase costs and delay in negotiations

Conducting negotiations for a CSA and related contracts with a grower collective that is unfamiliar with the logistical and other particular circumstances of the region is likely to result in lengthier, more difficult and more expensive negotiations. Administration costs are likely to increase where large grower groups from outside the mill area must continually seek the regional growers' input and direction on a range of issues.

It is also likely that negotiations in respect of one mill area may be delayed if negotiations for another mill area are given a higher priority for a grower collective, and may be hindered if growers in one region, who are prepared to reach agreement on a CSA, are prevented from doing so in the interests of pursuing bargaining positions on a State-wide basis.

9.2 Authorisation will reduce competition in the market for the supply and acquisition of pricing and marketing services

If the authorisation were granted, growers would have the ability to:

- reach agreements as to how they would exercise their 'choice' (eg. who they would select, or not select, as a GEIM);
- demand that mill owners (who may also wish to operate as a GEIM) agree to terms about the sale of GEI sugar to competing marketers.

Allowing growers to behave in this way would undo the very competition that was sought to be created by the 2015 amendments to the SIA. As noted above, the amendments were intended to create competition in GEI marketing. While marketers compete with each other to win the right to market GEI sugar, the reverse is also true. Individual growers confer this right, in trade or commerce, in competition with each other. The Queensland Productivity Commission recognised this when it observed that growers would potentially violate section 45 (as a consequence of section 4D) of the CCA if they were to reach an agreement with each other about the identity of their preferred GEIM.

If growers are given the ability to reach such an agreement, they would have the power to demand terms that could:

- unduly favour the interests of growers over the interests of GEIMs generally; or
- favour a preferred GEIM over others; or
- exclude a GEIM from the market if the grower collective saw fit to do so.

Any one of these outcomes would result in a lessening of competition in the market for GEI marketing rights, threatening the claimed competition benefits of the 2015 amendments to the SIA.

9.3 Authorisation would make the Queensland sugar industry less attractive to investment

The 2015 amendments to the SIA have already significantly affected mill owners' operations in Queensland. If the Application is granted it will further increase mill owners' risk position making the Queensland sugar industry less attractive to investment. As stated in the Federal Productivity Draft Report:

> *'The QPC has found that the Act increases risk for millers, which is likely to 'make Queensland a less desirable investment destination, compared with other jurisdictions.'* [65]

Since 2010 Wilmar has invested over $400 million in capital expenditure in the mills, and a similar amount in maintenance expenditure. In 2011, Wilmar also acquired the Proserpine Mill, which was in voluntary administration, for $120 million. The jobs of approximately 250 people, including seasonal staff, in the Proserpine region were protected through Wilmar's purchase and reinvestment in the mill.

This investment in the Queensland sugar industry was made in the knowledge that foreign companies operating in Australia must comply with the same business and competition policy law as Australian owned companies and on the assumption that a deregulated and stable sugar regulatory environment existed and that the wider Australian political economic environment included safeguards to avoid sovereign risks that would otherwise discourage foreign investment.

Foreign investment in the sugar industry has had a positive impact by helping to recapitalise the industry, sustain it and introduce new ideas and technologies and ensuring it is sustainable in the future. In a deregulated environment foreign investment has helped integrate the Australian industry with the global market and ensured an on-going flow of capital, best practice ideas and new market opportunities.

[65] PC Draft Report, page 421.

Further reductions the miller's ability to engage freely in commercial negotiations with interested parties is likely to influence the capital and operating investment decisions not only of potential investors, but also those companies that have already sunk significant capital into the Queensland sugar industry.

For example, Wilmar's annual capital reinvestment in the milling business has doubled from what was occurring under CSR in the early to mid-2000's, to $78 million in 2015 alone. In addition, the cost of transporting raw sugar from Wilmar mills to the relevant ports ranges from $3.78 to $19.06 per tonne of sugar. In total in 2014, Wilmar paid $23 million in transport costs to move its raw sugar from the mills to the ports, including about $6 million per year in harbour dues.

These are costs the miller could not necessarily be expected to continue to bear if mill owners are further exposed to the will of growers in both the market for the supply and acquisition of sugar cane and the market for the sale and marketing of raw sugar for export.

If the Application is granted, mill owners and marketers may choose to leave the Queensland sugar industry, and competition in the industry as a whole would be significantly reduced.

9.4 Authorisation would impact on outcomes already agreed

If the Application were granted, it may have the effect of undermining arrangements already agreed between growers, mill owners and GEIMs across the State for future seasons.

CSAs are generally 'roll over' contracts. If the Application is granted, it is possible some growers might seek renegotiation of CSAs already agreed for future seasons, which would require the parties to allocate significant resources to repeating protracted and costly negotiations, for agreements freely entered into, within a short period of time.

10. Conclusion

In Wilmar's submission the ACCC should decline to grant the authorisation sought by QCGO.

The passing of the amendments to the SIA has already significantly altered Wilmar's ability to deal freely with raw sugar produced at its mills by permitting growers to nominate the entity to undertake marketing of the majority of the raw sugar owned by Wilmar. This occurred in circumstances where the QPC Report found that the legislation interferes with the property rights of millers[66] and the Australian Productivity Commission has issued a draft recommendation that the amending Act based on the Bill be repealed on the basis that it limits the competitive forces driving innovation and productivity growth in the industry.[67]

Despite these concerns (and against the wishes of the Queensland government) the Queensland Parliament saw fit to pass legislation to re-regulate aspects of the Queensland sugar industry, purporting to balance the interests of growers and mill owners. This proposed authorisation seeks to further advance the interests of growers at the expense of mill owners, and potential competitors for the right to market GEI sugar.

[66] QPC Report pages x-ix.

[67] PC Draft Report page 425 and draft recommendation 11.2.