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28 October 2016

Australian Competition and Consumer Commission
Attention: David Hatfield / Jaime Martin
23 Marcus Clarke Street
Canberra ACT 2601

By email: adjudication@accc.gov.au

A91558 – Queensland Cane Growers Organisation Ltd – submission

We refer to:

- the application for non-merger authorisation lodged by Queensland Cane Growers Organisation Ltd for the collective bargaining and making of cane supply and related contracts between sugar cane growers, processors and sugar marketers, dated 23 September 2016; and
- the ACCC's letter to Queensland Sugar Limited dated 7 October 2016 seeking submissions from interested parties.

Please find enclosed on behalf of Queensland Sugar Limited a submission in respect of the authorisation application.

Queensland Sugar Limited strongly supports the authorisation application, and considers that there would be significant public benefits and no public detriment arising from the proposed arrangements.

The proposed collective bargaining arrangements:

- are the most effective way to correct the significant imbalance of bargaining power between sugar cane growers and sugar cane processors (and their vertically integrated marketers); and
- will facilitate the introduction of greater competition in the market for sugar export marketing services to growers as intended by the 'Marketing Choice' amendments to the *Sugar Industry Act 1999* (Qld).

If Queensland Sugar Limited can be of any further assistance in the ACCC's consideration of the proposed authorisation or proposed arrangements, please do not hesitate to contact me.

Yours sincerely

Greg Beashel – Managing Director/CEO

1 About Queensland Sugar Limited

Queensland Sugar Limited (***QSL***) is a not-for-profit company which serves the interests of the Queensland sugar industry. Its members comprise each of the Queensland mill owners, and representatives of each of the Queensland cane grower regions. QSL is currently the entity responsible for marketing to export customers the majority of raw sugar produced in Queensland and operating the six bulk sugar terminals used for storage and handling of all raw sugar produced in Queensland.

QSL markets raw sugar (being the result of processing sugar cane at a mill) to export markets on behalf of mills and growers. QSL acquires sugar from mill owners and does not own or operate mills or process sugar cane itself.

Consequently, QSL is not party to cane supply agreements. It considers, however, that arrangements that it may enter into with growers in relation to marketing or pricing of 'grower economic interest sugar' (explained later in this submission) would constitute 'related contracts' with respect to marketing for the purposes of the authorisation application.

2 Context

The *Sugar Industry Act 1999* (Qld) requires sugar cane growers to have a signed cane supply agreement (***CSA***) before they are permitted to deliver cane to a sugar mill for processing.[1] This means that sugar cane growers must negotiate and execute a CSA with a mill before they are able to generate income from their farming activities. Sugar cane growers must execute a CSA with the mill to which they intend to supply cane. As noted in the authorisation application, the contractual structures for the supply of cane often involve related contracts for pricing and pooling.

QSL acknowledges the collective bargaining of CSAs and related contracts which determine how growers will be paid for their sugar cane would technically constitute a cartel arrangement for the purposes of the *Competition and Consumer Act 2010* (Cth). However, it is clear to QSL that collective bargaining is essential to the effective operation of the sugar industry in Queensland and that any technically prohibited conduct generates clear public benefits that outweigh any harm.

It is also important to note that the proposed conduct would not result in new negotiating arrangements, but instead ensure that CSA negotiations are not impeded by existing authorisations no longer precisely capturing sensible negotiating structures (as discussed below). To this end, QSL considers that there are there are a number of issues relating to the negotiation of the CSAs that are not appropriately captured by existing authorisations. In particular, this submission considers:

(a) the need for grower collectives to negotiate across different regions, as defined in the regulations to the *Sugar Industry Act 1999* (Qld); and

(b) the need for growers to negotiate terms relating to marketing and the on-supply of grower economic interest sugar.

These two matters are discussed in detail below. QSL notes that the authorisation application also relates to by-products and related matters. While QSL does not have a direct interest in these matters, it understands that these issues have historically been included in CSAs and related contracts. QSL fully supports any authorisation including authorisation for terms relating to such matters in CSAs.

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1 See section 31(1), *Sugar Industry Act 1999* (Qld).

3 The need for collective bargaining across regions

As a general rule, sugar cane growers do not have an ability to choose a preferred mill or milling company to process their sugar cane. The quality of sugar cane degrades significantly within 12 hours of it being cut, which means that it must be delivered to a mill as soon as possible. Additionally, transport costs and the location of mills makes it difficult, if not impossible, for growers to have a choice of the mill supplied. As such, growers are generally geographically bound to the mill closest to the their farm, and the vast majority of sugar cane growers cannot realistically seek to supply a different mill owner on an economically sustainable basis.

This means that milling companies, as a general rule, enjoy a monopoly position as the sole acquirer of cane in the region surrounding the relevant mills. As such, the need for sugar cane growers to collectively negotiate CSAs is well-recognised in the industry. The *Sugar Industry Act 1999* (Qld) contains authorisation provisions that aim to mitigate the effects of mill monopoly power by allowing collective negotiation of CSAs by growers. These legislative provisions are recognition of the disparity of bargaining power between mills and growers, and attempt to correct the imbalance between parties to CSAs. As noted in the application, however, the authorisation provisions in the *Sugar Industry Act 1999* (Qld) geographically limit which growers can bargain together using those exemptions.

The *Sugar Industry Act 1999* (Qld) defines regions by reference to local government areas, and limits its provisions for collective authorisation to those regions. There are four regions listed in the *Sugar Industry Act 1999* (Qld). Of the seven milling companies in Queensland, three of the seven companies operate across different regions (Wilmar Sugar, Mackay Sugar and MSF Sugar).

In the experience of QSL, there are no significant differences between the terms on which CSAs are agreed across regions. The price and quality of sugar cane is of a consistently high standard across Queensland, and the process for collecting and milling cane is the same across different regions. Historically, milling companies did not operate across multiple regions with the frequency that now exists. Milling companies negotiating CSAs on the same issues with multiple groups of cane growers allows milling companies to have significantly better insight and transparency into the negotiations than cane grower groups. This issue is exacerbated by the near-identical nature of the issues negotiated by each of the groups. Milling companies are placed in a position where they can potentially use concessions made by one group of growers against another group of growers, without those growers having the benefit of the insight into alternative negotiations in the same way as the milling company.

As noted in the authorisation application, the regulations to the *Sugar Industry Act 1999* (Qld) which prescribe the regions for the purposes of collective negotiation were last reviewed in 2010, and have not been amended to take into account amended local government boundaries, changes in the sugar industry or altered mill ownership structures in Queensland. QSL considers that allowing collective negotiations for growers within existing prescribed boundaries does not adequately address the imbalance of bargaining power that exists under the existing regulations.

QSL does not consider the fact that Mackay Sugar and MSF have successfully negotiated CSAs for the upcoming season to be indicative that the bargaining power between milling companies and growers is balanced, or that milling companies do not enjoy a significant benefit from cross-regional insight that growers do not. Milling companies do not behave uniformly across the industry, and strengthening the bargaining position of growers will enable growers to more effectively negotiate with mills that operate in multiple regions and enjoy significant monopoly power.

4 Marketing Choice

4.1 Legislative background

Many milling companies operate both milling and processing functions and marketing and trading activities. Under existing arrangements, QSL markets a significant portion of the sugar for each of the milling companies who export raw sugar, and some of those milling companies market raw sugar in their own right.

In December 2015, the Queensland parliament passed the *Sugar Industry (Real Choice in Marketing) Amendment Act 2015* (Qld). This act (known as '***Marketing Choice***') was introduced to address concerns by growers that milling companies had terminated sugar supply arrangements under which QSL marketed raw sugar on behalf of growers, and intended to instead market sugar on behalf of the growers in their own right.

Marketing Choice was intended to ensure that growers had an ability to select a marketer for the sugar in which the growers bear price exposure under the cane pricing formula in the CSA (known as grower economic interest sugar, or ***GEI Sugar***). This was achieved by requiring that a cane supply agreement contain a term requiring a mill owner to have an agreement with a stated GEI Sugar Marketing Entity to sell the quantity of sugar that is at least equal to the amount of GEI Sugar (unless otherwise agreed).[2] The mills which have not otherwise agreed arrangements to allow QSL to market grower economic interest sugar are MSF, Wilmar Sugar and Tully Sugar. QSL has either entered into, or sought to enter into, a sugar supply agreement for the sale of GEI sugar with each of these mills to give effect to Marketing Choice (known as ***On-Supply Agreements***).

If a grower does not elect an alternative GEI marketing entity (either by choice or because no On-Supply Agreement has been agreed), the GEI Sugar defaults back to the marketing entity of the miller's choice (which, in the case of MSF, Wilmar and Tully is each of their related marketing entities).

4.2 Need for growers to negotiate Marketing Choice provisions

Marketing Choice is important to growers because not all marketing entities operate in the same way, or produce the same price results for growers. QSL, for example, is a not-for-profit entity that does not make any profit on its marketing activities, and therefore delivers efficient and transparent pricing results to the customers it markets for. Additionally, QSL has significant market knowledge and expertise and has performed better in its pricing results than a number of its competitors in recent years. This is part of the reasons growers see value in being able to choose who markets their GEI Sugar, rather than having that role default to their milling company (who the growers would be 'stuck with' irrespective of performance).

Additionally, the introduction of Marketing Choice has created a market in which GEI marketing entities (which includes QSL and each of the milling companies which intend to market GEI sugar in future seasons) must compete for the business of growers. This creates clear incentives for GEI marketing entities to operate efficiently and maximise marketing revenue and thereby deliver the best possible net price results to the growers that elect them as marketer.

Given the vertical integration of some milling companies and GEI marketing entities, there is a clear risk that milling companies will frustrate negotiations for On-Supply Agreements so that they can secure the rights to market GEI Sugar for their own marketing entities. Milling companies which are vertically integrated in that way have clear economic incentives to do exactly that.

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[2] Section 33B(d) *Sugar Industry Act 1999* (Qld).

Growers do not enjoy insight into the negotiations of On-Supply Agreements, but have the ability to negotiate On-Supply Agreement terms or principles in their CSAs. For example, growers may seek to ensure that their milling company enters an On-Supply Agreement on a specified set of terms (as without the assurance of such terms, the ability to nominate a GEI marketing entity is relatively meaningless) on at least minimum terms. If growers are unable to do so, they may be restrained from having any commercial input into the terms on which their GEI Sugar is sold to their preferred marketer, or whether their preferred marketer is offered reasonably fair and commercial terms in an On-Supply Agreement.

4.3 Need for authorisation for Marketing Choice

The existing *Sugar Industry Act 1999* (Qld) authorisation provisions only extend to protect collective contracts for:

(a) the acceptance and crushing of cane by a mill at a time fixed under the collective contact; and

(b) the terms on which payments are to be made by a mill owner for cane to be supplied to a mill by a grower under the collective contact.

QSL considers that authorising growers to negotiate terms within a CSA that relate to the terms of On-Supply Agreements may not be captured by these provisions. However, it believes that this is the result of the provisions falling 'out of touch' with the conditions in the industry, rather than a deliberate exclusion.

QSL does not consider that any competitive harm accrues from growers being allowed to negotiate terms related to their GEI Sugar and On-Supply Agreements, and considers that such conduct would redress the imbalance of negotiating power between millers and growers. This is particularly the case given it is growers who benefit from On-Supply Agreements, and millers do not have the same commercial interests as growers, despite being in the position to negotiate the arrangements due the drafting of the Marketing Choice provisions.

5 Public benefit claims

As discussed above, QSL considers that numerous public benefits would arise from the proposed conduct:

(a) Sugar cane farms are generally small businesses, and often family owned. This means that the capacity and capability of an individual farm owner to successful negotiate on an individual basis with sophisticated and well-resources milling companies is often limited. Collective negotiating of all relevant terms in a CSA would correct this significant imbalance.

(b) As discussed above, milling companies often enjoy monopolistic power with respect to the processing of cane. This means that there is a significant imbalance of bargaining power between growers and millers. Allowing collective bargaining addresses, to some extent, this significant disparity. Collective bargaining will not completely redress this significant issue, but will create fairer conditions for growers to negotiate necessary commercial arrangements with the milling companies they have no choice but to deal with (due to monopoly positions). In particular, allowing growers to have the same transparency over negotiations as the milling companies by ensuring that all growers engaging with a milling company can negotiate together will create fairer outcomes for growers.

(c) CSAs and related contracts are often complicated, long and difficult. It is more likely that growers can afford external legal representation to draft and review complex commercial arrangements if they are able to collectively engage in negotiations.

(d) The effective implementation of Marketing Choice will create substantially greater competition in the market for provision of export marketing services to growers by creating a market in which marketers compete for grower nominations. Allowing growers to collectively negotiate terms to facilitate Marketing Choice in their CSAs and related agreements will clearly streamline the introduction of this competition into the sugar industry, which will improve efficiency, innovation and pricing outcomes for the Queensland sugar industry.

QSL does not consider that there are any detriments that occur from authorising the proposed conduct. Growers which wish to do so would continue to have a right to negotiate individually.

6 Effect on Competition

QSL does not consider the incremental expansion of the terms authorised to be collectively negotiated will have a negative impact on competition. In fact, it considers that empowering growers to most effectively negotiate with milling companies and marketers promotes healthy competition within the export marketing services market and ameliorates the adverse impacts created by the natural monopoly position most mill owners enjoy (and the vertical integration of those monopoly mill owners with marketers).

As discussed above, QSL considers that the effective implementation of Marketing Choice will increase competition in the Queensland sugar industry, and allowing growers to negotiate the terms on which On-Supply Agreements are offered to GEI marketers will likely assist in the implementation of those arrangements (where On-Supply Agreements have not already been negotiated).

Further, QSL does not considers that allowing grower from different regions to negotiate with each other impacts competition. A grower from one region cannot transport cane in a commercially sensible way to a mill in a different region. As such, it is difficult to see how growers who supply cane in vastly removed geographic locations could ever compete with each other to supply to a mill. This means that in instances where the milling entity (rather than the parent company or marketing entity) is the CSA counterparty, the growers are not in competition with each other to supply cane to the mills in regions other than their own (and there is an existing authorisation for collective negotiation with growers who supply to the same mill).

7 Conclusion

QSL strongly supports the authorisation application, and considers that it will result in heightened competition in the Queensland sugar industry and significant public benefits.

QSL is willing to discuss any of the issues raised in the authorisation application or this submission further with the ACCC if it would assist the ACCC's consideration of the application.