



Australian  
Competition &  
Consumer  
Commission

# Draft Determination

Application for authorisation

lodged by

Queensland Cane Growers Organisation Ltd

in respect of

the proposed collective bargaining and making of  
cane supply and related contracts between sugarcane  
growers, processors and sugar marketers

Date: 15 December 2016

Authorisation number: A91558

Commissioners: Sims  
Rickard  
Schaper  
Cifuentes  
Court  
Featherston

# Summary

**The ACCC proposes to grant authorisation to allow current and future members of the Queensland Cane Growers Organisation Ltd (Canegrowers) to collectively bargain in relation to cane supply and related agreements with sugar processors (mills) and marketers.**

**The ACCC proposes to grant authorisation for the proposed collective bargaining arrangements for ten years.**

**The ACCC seeks submissions in relation to this draft determination, before making a final decision.**

## Background

Under long standing industry arrangements, growers sell their sugar cane to a local mill, which processes it into raw sugar to sell to a sugar marketer. As payment, the grower receives a portion (typically around 60 per cent) of the revenue that the marketer makes on the sale of the raw sugar in the international market, less the marketer's fees. This has become known as the Grower's Economic Interest (GEI). The remainder is paid to the mill owner as payment for processing the cane.

Since 1999, the Sugar Industry Act (SIA) in Queensland has allowed cane growers to collectively bargain certain terms and conditions of their Cane Supply Agreements with their local mill.

For many years, all raw sugar was sold to Queensland Sugar Limited to be marketed under a 'single desk' arrangement. Following deregulation of the Queensland sugar industry, some mill owners established their own sugar marketing entities. Cane growers became concerned about these miller-marketers having market power and the lack of transparency in contractual arrangements between the mill and the marketer, which impacted the payment growers received for their cane.

In response to grower concerns, in 2015 the Queensland Parliament passed an amendment to the SIA (known as the 'Marketing Choice Amendment'), creating a right for growers to nominate which entity would market their GEI sugar and requiring mill owners to have an agreement (known as an 'On-Supply Agreement') with the grower nominated entity to on-supply at least a specified amount of raw sugar.

## Application for ACCC authorisation

Canegrowers, representing the interests of sugar cane growers in Queensland, seeks authorisation for proposed collective bargaining conduct with millers and sugar marketers. Following the lodgement of the application for authorisation, Canegrowers clarified its role in the proposed collective negotiations, the nature of information sharing between growers across cane growing districts, and that it was not seeking authorisation to negotiate state-wide cane supply arrangements. The ACCC has assessed the proposed arrangements based on these clarifications.

Canegrowers lodged this application in part because it is concerned about the implementation of the Marketing Choice Amendment by some mill owners that are yet to reach On-Supply Agreements with an alternative sugar marketer – effectively restricting growers to use the sugar marketing entity related to the mill to market their GEI sugar.

Canegrowers is also concerned that some mill owners consider that collective bargaining in certain circumstances falls outside the scope of the statutory authorisation afforded by the SIA – for example, not engaging in any collective bargaining around GEI marketing terms, on-supply agreements, pricing and pooling agreements and agreements on other issues that have traditionally been part of cane supply agreements, such as molasses gain sharing.

Canegrowers submits that as well as providing cost savings by streamlining the negotiation process, collective bargaining will provide increased opportunity to negotiate terms of a supply contract that better reflect the needs of growers and to achieve workable implementation arrangements for growers to nominate their GEI sugar marketer.

## **Consultation**

While some industry participants support the proposed arrangements, others, particularly mill owners, are concerned that they will result in increased costs and delays in negotiations, reduced competition in GEI marketing services, increased coordination between Canegrower companies and increased bargaining power, making the Queensland sugar industry less attractive for investment. Concerns were also raised that the breadth of proposed collective bargaining across growing regions is likely to lead to greater uniformity in cane supply agreements between regions – which is seen as a step back towards a more centralised approach.

In response to concerns about centralised bargaining, Canegrowers confirmed that primary negotiations will remain at the local level, and its head office will not assume a principal bargaining role, nor does it intend for a single state-wide cane supply agreement to be negotiated.

## **Assessment**

The ACCC considers the proposed arrangements are likely to result in public benefits from transaction cost savings, by facilitating more effective and timely grower input into negotiations with mill owners.

The ACCC is aware that there is ongoing debate within the industry about the recent Marketing Choice amendments to the SIA. The ACCC's role in assessing this application is not to comment on this, but rather to consider what benefits and detriments are likely to result from the proposed conduct, given the framework within which the industry operates. In circumstances where growers have a right to nominate a marketer of their GEI sugar, the ACCC considers there are benefits in allowing growers to collectively bargain with mill owners and marketers over terms relating to cane supply and the marketing of GEI sugar. This is likely to facilitate grower choice, and therefore competition, in the provision of GEI marketing services to growers.

The ACCC does not consider that the proposed arrangements are likely to result in significant public detriment given that collective negotiations are voluntary for growers, millers and marketers. The primary collective negotiations will remain at the local mill level and cater for regional differences, with Canegrowers proposing to only facilitate the exchange of information in relation to common industry issues.

The ACCC is satisfied that the likely benefit to the public would outweigh the detriment to the public constituted by any lessening of competition and is proposing to grant authorisation for 10 years.

## **Next steps**

The ACCC now seeks submissions on the draft determination from interested parties, including on the proposed duration of authorisation. Canegrowers and interested parties may also request that the ACCC hold a pre-decision conference to allow oral submissions on the draft determination.

# Contents

<b>Summary</b> .....	<b>i</b>
<b>Contents</b> .....	<b>iv</b>
<b>Abbreviations</b> .....	<b>v</b>
<b>The application for authorisation</b> .....	<b>1</b>
The conduct .....	1
The applicants .....	3
The targets .....	4
<b>Background</b> .....	<b>6</b>
Overview of Queensland sugar industry .....	6
The supply chain .....	7
Cane supply and payment .....	10
Raw sugar marketing arrangements .....	13
Brief history .....	13
The role of QSL .....	14
Recent developments .....	14
Queensland sugar industry legislation .....	16
The proposed collective bargaining processes and timing .....	17
<b>Submissions received by the ACCC</b> .....	<b>23</b>
Canegrowers .....	23
Interested parties .....	24
<b>ACCC assessment</b> .....	<b>27</b>
The relevant areas of competition .....	27
The future with and without .....	30
Public benefits .....	32
Public detriments .....	36
Potential for increased costs and delays in negotiations .....	37
Potential to increase contract uniformity .....	38
Reduced competition in the provision of GEI marketing services .....	40
Breadth and uncertainty of proposed conduct .....	43
Balance of public benefits and detriments .....	44
Length of authorisation .....	45
<b>Draft determination</b> .....	<b>46</b>
The application .....	46
The net public benefit test .....	47
Conduct which the ACCC proposes to authorise .....	47
Conduct not proposed to be authorised .....	48
Further submissions .....	48
<b>Attachment A - Summary of relevant statutory tests</b> .....	<b>49</b>

## Abbreviations

ACCC	Australian Competition and Consumer Commission
The Act	<i>Competition and Consumer Act 2010</i>
ASMC	Australian Sugar Milling Council
Canegrowers	Queensland Cane Growers Organisation Ltd
CCS	The recoverable sugar content of sugar cane.
GEI	Grower Economic Interest
SIA	<i>Sugar Industry Act 1999</i>
Marketing Choice Amendment	<i>Sugar Industry (Real Choice in Marketing) Amendment Act 2015</i>
QSL	Queensland Sugar Limited
RSSA	Raw Sugar Supply Agreement

## The application for authorisation

1. On 23 September 2016 the Queensland Cane Growers Organisation Ltd (**Canegrowers**) lodged application A91558 with the ACCC seeking authorisation for proposed collective bargaining conduct.
2. Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the *Competition and Consumer Act 2010 (the Act)*. The ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not. Before making its final decision on an application for authorisation the ACCC must first issue a draft determination.<sup>1</sup>

## The conduct

3. Canegrowers seeks authorisation for the collective bargaining and making of cane supply and related contracts between sugar cane growers, processors and sugar marketers on behalf of their current and future grower members in relation to the following matters:<sup>2</sup>
  - a. harvesting of cane
  - b. delivery of cane to the mill or delivery points
  - c. transport and handling of cane by the mill
  - d. acceptance and crushing of cane by the mill
  - e. payment to growers by the mill owner
  - f. forward pricing terms
  - g. essential terms governing the supply of Grower Economic Interest (**GEI**) sugar to the GEI sugar marketers
  - h. capturing the value of the by-products and related products from sugar cane and
  - i. any other contracts or arrangements relating to the supply of or processing of sugar cane.

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<sup>1</sup> Detailed information about the authorisation process is contained in the ACCC's Authorisation Guidelines available on the ACCC's website <http://www.accc.gov.au/publications/authorisation-guidelines-2013>.

<sup>2</sup> Canegrowers' application for authorisation A91558, 23 September 2016, pp. 3-4.

4. Canegrowers also sought authorisation for collective bargaining across three levels:<sup>3</sup>
  - i. within each district by each relevant local Canegrowers company so that collective negotiation can occur with the local mill owner and sugar marketer ('**tier 1**')
  - ii. across and between each district that has common mill ownership so that each of the relevant local Canegrowers companies and Canegrowers can negotiate collectively with the common mill owners and sugar marketer ('**tier 2**') and
  - iii. across and between each district regardless of mill ownership so that each of the relevant local Canegrowers companies and Canegrowers can negotiate collectively with any and all mill owners and sugar marketers ('**tier 3**').
5. In response to a request from the ACCC for further information about the proposal, Canegrowers subsequently clarified that it does '**not** seek authorisation for itself to assume the direct principal bargaining role', this will remain with the local Canegrowers companies. Canegrowers' role is to provide advice and assistance to local Canegrowers' companies. Also Canegrowers advised that it does '**not** seek authorisation to negotiate single state-wide cane supply and related agreements.'<sup>4</sup>
6. In relation to 'tier 3' collective bargaining, Canegrowers clarified that it seeks authorisation to allow information to be shared across districts.<sup>5</sup> From time to time, Canegrowers (head office) may be invited to participate directly in a local negotiation in one area and then be invited to participate in the negotiation occurring in a different area, sometimes on similar issues and with representatives of a different miller (or the same miller, in the case of 'tier 2').
7. The ACCC's assessment of the proposed collective bargaining arrangements is based on Canegrowers' clarification of the conduct.
8. Further detail about the proposed collective bargaining process, timing of negotiations and the types of agreements sought to be collectively bargained is provided in the Background section of this draft determination (from paragraph 79).
9. The application for authorisation is lodged for and on behalf of current and future members of the Canegrowers organisation. Membership is comprised of members of Queensland Cane Growers Organisation Ltd and members of each of the twelve local Canegrowers companies, which may change from time to time. The current Canegrowers companies are:
  - Queensland Cane Growers Organisation Ltd
  - Herbert River District Cane Growers Organisation Ltd
  - Canegrowers Burdekin Ltd
  - Proserpine District Cane Growers Cooperative Ltd
  - Mackay Canegrowers Ltd

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<sup>3</sup> Canegrowers' application for authorisation A91558, 23 September 2016, pp. 10-11.

<sup>4</sup> Submission from Canegrowers, 18 November 2016, p. 2.

<sup>5</sup> Submission from Canegrowers, 18 November 2016, p. 4.

- Mossman Canegrowers Ltd
- Tableland Canegrowers Ltd
- Canegrowers Cairns Region Ltd
- Innisfail District Cane Growers Organisation Ltd
- Bundaberg Canegrowers Ltd
- Canegrowers Isis Ltd
- Maryborough Canegrowers Ltd and
- Canegrowers Rocky Point Ltd.

10. Authorisation is sought for 10 years.

11. There is currently a statutory exemption from competition legislation for Queensland sugarcane growers to collectively negotiate certain terms and conditions of Cane Supply Agreements with processors within defined growing regions. Further information about the statutory exemption provided by the *Sugar Industry Act 1999 (SIA)* is provided from paragraph 69.

12. However, Canegrowers submits that in recent times certain processors have questioned the coverage of the statutory authorisation provided under the SIA, which has resulted in the need to seek authorisation from the ACCC. It considers that:<sup>6</sup>

The authorisation currently in place under the Act [the SIA] may not be sufficiently wide enough, as it appears in the eyes of some mill owners, for growers to properly and freely collectively bargain for all matters relating to cane supply and related agreements as required.

13. More specifically, Canegrowers submits that some mills are adopting a ‘very narrow and strict interpretation’<sup>7</sup> of the statutory exemption under the SIA. As a result, it submits that some mills are openly refusing to engage in, or permit, any collective bargaining around GEI marketing terms, on-supply agreements, pricing and pooling agreements and on other issues which they contend do not form part of Cane Supply Agreements.

## The applicants

14. Formed in 1926, Queensland Cane Growers Organisation Ltd (Canegrowers) is the overarching state body representing the interests of sugarcane growers in Queensland. It is a not for profit company limited by guarantee.

15. Canegrowers is based in Brisbane, and supports local offices to service members and also drives state-wide issues at the direction of the State Board and Policy Council. The Policy Council is made up of 21 grower representatives, nominated by the Canegrowers district companies. The Board consists of nine Directors,

<sup>6</sup> Canegrowers’ application for authorisation A91558, 23 September 2016, p. 16.

<sup>7</sup> Submission from Canegrowers, 18 November 2016, p. 10.

made up of one independent Director and eight grower Directors elected by the Policy Council. Elections are held every three years.<sup>8</sup>

16. The twelve local Canegrower companies have traditionally acted as grower bargaining representatives and negotiated cane supply and related agreements with the local mill owner in their respective regions. Canegrowers submits that it does not generally act as bargaining representative, but assists the local Canegrowers' companies act in their role as bargaining representatives for their grower members.<sup>9</sup>
17. Since 2001, membership of Canegrowers (either at state or local level) has been voluntary. Around 80 per cent of Queensland sugarcane growers are members of the Canegrowers organisation,<sup>10</sup> with local membership varying slightly between mill districts (that is, between 80-98 per cent membership). However, only around 30 per cent of growers in the Burdekin district are members of the local Canegrowers company – that is, Canegrowers Burdekin Ltd. The majority of growers in the Burdekin are members of an alternative grower group called Burdekin District Cane Growers Limited (which has three member organisations called Pioneer Cane Growers Ltd, Kalamia Cane Growers Ltd and Invicta Cane Growers Ltd).

## The targets

18. Authorisation is sought for collective bargaining with processors/millers and sugar marketers. There are currently seven **mill owners**, namely:<sup>11</sup>
  - Wilmar Sugar Australia Ltd
  - Tully Sugar Ltd
  - MSF Sugar Ltd
  - ISIS Central Sugar Mill Co Ltd
  - WH Heck and Sons
  - Mackay Sugar Ltd and
  - Bundaberg Sugar Ltd.
19. A summary of the ownership arrangements, location of the mills operated by each of the mill owners and an approximation of the volume of sugarcane crushed by each miller is provided in Table 1.

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<sup>8</sup> Canegrowers' website, [http://www.canegrowers.com.au/page/Industry\\_Centre/About\\_Us/company-structure/](http://www.canegrowers.com.au/page/Industry_Centre/About_Us/company-structure/), viewed on 4 November 2016.

<sup>9</sup> Canegrowers' application for authorisation A91558, 23 September 2016, p. 10.

<sup>10</sup> Canegrowers' application for authorisation A91558, 23 September 2016, p. 15.

<sup>11</sup> Canegrowers' application for authorisation A91558, 23 September 2016, p. 7.

**Table 1: Queensland sugar mills**

Milling company	Mill ownership	Operating mills	Marketing business	Tonnes cane/year
Wilmar Sugar Australia	Wilmar International Limited (based in Singapore)	Macknade Victoria Invicta Pioneer Kalamia Inkerman Proserpine Plane Creek	Miller-marketer	15 mtpa <sup>12</sup>
Mackay Sugar Limited	Grower owned limited company	Mossman Farleigh Marian Racecourse	No	6.2 mtpa <sup>13</sup>
MSF Sugar Limited	Mitr Phol Sugar Corp (based in Thailand)	Tableland Mulgrave South Johnstone Maryborough	Miller-marketer	4.7 mtpa <sup>14</sup>
Tully Sugar Limited	COFCO (based in China)	Tully	Miller-marketer	2.4 mtpa <sup>15</sup>
Bundaberg Sugar Limited	Finasucre (based in Belgium)	Bingera Millaquin	No	1.5 mtpa <sup>16</sup>
Isis Central Sugar Milling Company Limited	Grower owned, shareholder co-operative	Isis	No	1.4 mtpa <sup>17</sup>
Heck & Sons Limited	Family owned and operated	Rocky Point	No	Annual average 300 000 - 350 000 tonnes. <sup>18</sup>

20. Wilmar Sugar accounts for around 55-60 per cent of Australia's raw sugar exports. The next three largest millers – Mackay Sugar, MSF Sugar and Tully Sugar – together account for approximately 30 per cent of raw sugar exports.<sup>19</sup>

<sup>12</sup> Wilmar Sugar website: <https://www.wilmarsugarmills.com.au/about-us>, viewed on 10 November 2016.

<sup>13</sup> Mackay Sugar Annual Report 2016, p. 1.

<sup>14</sup> MSF Sugar website: <http://www.msfsugar.com.au/about-us/>, viewed on 10 November 2016.

<sup>15</sup> Tully Sugar website, <http://www.tullysugar.com.au/index.php/products/operationalstatistics>, viewed on 10 November 2016.

<sup>16</sup> Bundaberg Sugar website: <http://www.bundysugar.com.au/company/cane>, viewed on 10 November 2016.

<sup>17</sup> Isis Central Sugar Milling Company website: <https://www.isissugar.com.au/>, viewed on 10 November 2016.

<sup>18</sup> Heck Group website: <http://www.heckgroup.com.au/rocky-point-sugar-mill/introduction>, viewed on 10 November 2016.

<sup>19</sup> Queensland Productivity Commission, *Decision Regulatory Impact Statement, Sugar Industry (Real Choice in Marketing) Amendment Bill 2015*, November 2015, p. 18.

21. Authorisation is also sought for proposed collective bargaining with the following raw sugar **marketers**.<sup>20</sup>

- Queensland Sugar Limited (**QSL**)
- Wilmar Sugar Australia Trading Pty Ltd
- MSF Marketing Pty Ltd
- MSF Sugar Limited and
- Tully Sugar Ltd.

## Background

### Overview of Queensland sugar industry<sup>21</sup>

22. Sugarcane is grown in high rainfall and irrigated districts along the eastern coastline – between Mossman in far north Queensland to Rocky Point in south east Queensland. Queensland accounts for 95 per cent of Australia’s sugarcane production, of which 80 per cent is exported. The remaining 20 per cent is refined and consumed domestically. Australia is the third largest exporter of sugar, after Brazil and Thailand, with around \$1.7 billion in export earnings.
23. There are around 4000 cane farms in Queensland, covering approximately 350 000 hectares. The majority of cane farms are owned by sole proprietors or family partnerships.
24. Sugarcane is processed by 21 mills which are owned by seven different milling companies. In 2014, 30.8 million tonnes of sugarcane was crushed by processors, which produced approximately 4.2 million tonnes of sugar.
25. Prior to 2006, the sugar industry was heavily regulated with a legislated single desk marketing arrangement conducted by QSL or its predecessors. Following deregulation, a voluntary marketing arrangement was established where QSL continued to market the majority of raw sugar.
26. Three out of the seven milling companies operate both milling and processing functions and marketing and trading functions. Currently, QSL markets a significant proportion 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.<sup>22</sup>
27. In 2014, three out of the seven mill owners gave notice to QSL that they would not be continuing with their voluntary Raw Sugar Supply Agreements (**RSSA**) with it beyond 30 June 2017. These milling companies were Wilmar Sugar, MSF Sugar and Tully Sugar.

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<sup>20</sup> Canegrowers’ application for authorisation A91588, 23 September 2016, p. 7.

<sup>21</sup> Unless otherwise stated, information appearing under this heading was obtained from the Queensland Productivity Commission, *Decision Regulatory Impact Statement, Sugar Industry (Real Choice in Marketing) Amendment Bill 2015*, November 2015, p. 14 -19.

<sup>22</sup> Submission from QSL, 28 October 2016, p. 4.

## The supply chain

28. Sugarcane is a low value, high volume perishable product that must be processed within 16 hours after harvest. The average 'cut to crush time' is 12 hours.<sup>23</sup> Location and transport costs limit which mills can process growers' cane. Growers generally use the services of a miller close to their farm. This means that in most cases, growers have no alternative mill to supply their sugarcane.
29. The perishable nature of sugarcane also means that processors require harvested cane to be delivered quickly to their mills and it is not economically feasible to source cane from distant locations. In addition, the capital investment in mill capacity, when combined with the seasonal and time-sensitive demand for milling services, requires scheduling delivery of cane to mills.
30. The Queensland industry is divided into four growing regions (as defined by the *Queensland Sugar Industry Regulation 2010*) for collective cane supply contracts. These are based on local government areas and comprise the:
- North region – consisting of the local government areas of Cairns, Cassowary Coast\*, Cook, Hinchinbrook\* and Tablelands.
  - Herbert River and Burdekin region – consisting of the local government areas of Burdekin\*, Cassowary Coast, Hinchinbrook\*, Townsville and Whitsunday\*.
  - Central Region – consisting of the local government areas of Burdekin\*, Isaac, Mackay and Whitsunday\*.
  - South region – consisting of the local government areas of Banana, Bundaberg, Fraser Coast, Gladstone, Gold Coast, Gympie, Logan, Moreton Bay, North Burnett, Scenic Rim and Sunshine Coast.
31. Three of the seven Queensland milling companies operate mills across regions. Namely:<sup>24</sup>
- Wilmar Sugar – operates mills in the Herbert River and Burdekin region, as well as in the Central region
  - Mackay Sugar – operates mills in the Central and North regions and
  - MSF Sugar – operates mills in the South and North regions.

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<sup>23</sup> Canegrowers' application for authorisation A91558, 23 September 2016, p. 15.

\* The local government areas of Burdekin, Cassowary Coast, Hinchinbrook and Whitsunday are in more than one region.

<sup>24</sup> Canegrowers' application for authorisation A91558, 23 September 2016, p. 5.

32. In 2014, the following volumes of sugarcane were produced in each growing region in Queensland:<sup>25</sup>
- North region – 10.8 million tonnes
  - Burdekin region – 8.1 million tonnes
  - Central region – 8.6 million tonnes and
  - South region – 3.4 million tonnes.
33. The sugarcane crushing season runs for six months, usually commencing in June and ending in mid-November. Most sugarcane is transported to the mills by rail (up to 32 million tonnes of sugar cane each season<sup>26</sup>), with some via road.
34. A sugar cane farmer grows cane to sell to a local mill, which processes the cane into raw sugar to sell to a sugar marketer. The grower receives a portion of the revenue that the marketer makes on the sale of the raw sugar.
35. The sugar cane is transferred from the grower to the miller at an agreed rail siding or truck pick up point (before the mill). From this point, the miller takes responsibility for transporting sugar cane to the mill, the conversion of sugarcane into raw sugar and the delivery of the raw sugar to a bulk sugar export terminal.<sup>27</sup>
36. Until recently, millers have passed title of the raw sugar to QSL at the point of delivery to QSL (under Raw Sugar Supply Agreements), and QSL sold raw sugar to international buyers, with the title transferring on delivery. In some instances, mills purchased raw sugar equivalent to their 'Miller Economic Interest' back from QSL for them to market.<sup>28</sup>
37. As shown in Figure 1, there are six bulk sugar terminals in Queensland, located at the ports of Cairns, Mourilyan, Lucinda, Townsville, Mackay and Bundaberg. The terminals have a combined storage capacity of 2.5 million tonnes of bulk raw sugar, which is around 60 per cent of Queensland's total annual production. This storage capacity allows year round exports of raw sugar.
38. The bulk sugar terminals are leased from the relevant port authorities by Sugar Terminals Limited under long term leases. QSL currently subleases the terminals from Sugar Terminals Limited. QSL stores all Queensland raw sugar in the bulk sugar terminals on an open access and cost recovery basis, including domestic and export sugar for which QSL is not conducting the marketing.

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<sup>25</sup> Canegrowers' website, [http://www.canegrowers.com.au/page/Industry\\_Centre/About\\_Us/statistics-facts-figures/#map-of-sugarcane-areas](http://www.canegrowers.com.au/page/Industry_Centre/About_Us/statistics-facts-figures/#map-of-sugarcane-areas), viewed on 10 November 2016.

<sup>26</sup> Australian Sugar Milling Council, *Cane railways in the sugar industry*, viewed on its website: <http://asmc.com.au/wp-content/uploads/2013/08/cane-railways-info.pdf> on 9 November 2016.

<sup>27</sup> Submission from MSF Sugar, 28 October 2016, p. 9.

<sup>28</sup> Queensland Productivity Commission, *Decision Regulatory Impact Statement, Sugar Industry (Real Choice in Marketing) Amendment Bill 2016*, November 2015, p. 41-42.

Figure 1: map of Queensland sugar industry<sup>29</sup>



<sup>29</sup> Queensland Productivity Commission, *Decision Regulatory Impact Statement, Sugar Industry (Real Choice in Marketing) Amendment Bill 2015*, November 2015, p. 14.

## Cane supply and payment

39. In accordance with the SIA, a grower can only supply sugar cane to a mill if they have a signed supply contract with the mill for the crushing season – known as a Cane Supply Agreement. The SIA provides that a supply contract may be an individual contract or a collective contract.<sup>30</sup> Further detail about the relevant Queensland sugar industry legislation is provided later in the Background section of this draft determination.
40. The ACCC is advised that growers group together to form harvesting groups and harvest their cane proportionally and rotationally throughout the season to ensure equitable and efficient use of transport and milling capacity.<sup>31</sup>
41. As previously mentioned, most growers can only supply their sugar cane to their local miller. However there appears to be some limited exceptions for alternative supply for growers with farms that are located close to a bordering mill district. An overview of the extent to which there may be an alternative mill for growers to supply their sugarcane to is provided in Table 2.

**Table 2: Sugar mills and possible alternatives<sup>32</sup>**

Milling company	Mills	Growers	Alternative
Wilmar Sugar	Macknade Victoria Invicta Pioneer Kalamia Inkerman Proserpine Plane Creek	Approx. 1500 growers supply Wilmar Mills <sup>33</sup>	Growers in the Herbert and Burdekin districts only have the option to supply Wilmar mills.  Some growers in Proserpine and Plane Creek seem to be close enough to supply Mackay Sugar (in Farleigh or Marian).
Mackay Sugar	Mossman Farleigh Marian Racecourse	Approx. 1025 growers supply Mackay Sugar mills. <sup>34</sup>	n/a
MSF Sugar	Tableland Mulgrave South Johnstone Maryborough	Sources cane from its own property holdings and around 630 independent growers. <sup>35</sup>	Some Tableland and Mulgrave growers could supply Mackay Sugar (at the Mossman mill).  Maryborough growers could supply Isis Central Sugar (at the

<sup>30</sup> Section 31 of the *Sugar Industry Act 1999*.

<sup>31</sup> Canegrowers' application for authorisation A91558, 23 September 2016, p. 11.

<sup>32</sup> Unless otherwise stated, the information in this table was compiled from Queensland Productivity Commission, *Decision Regulatory Impact Statement, Sugar Industry (Real Choice in Marketing) Amendment Bill 2015*, November 2015, p. 47.

<sup>33</sup> Canegrowers application for authorisation A91558, 23 September 2016, p. 4.

<sup>34</sup> Mackay Sugar Limited, Annual Report 2016, p. C.

<sup>35</sup> MSF Sugar website: <http://www.msfsugar.com.au/>, viewed on 10 November 2016.

Milling company	Mills	Growers	Alternative
			Isis mill).
Tully Sugar	Tully	Approx. 325 growers supply the Tully mill. <sup>36</sup>	n/a
Bundaberg Sugar	Bingera Millaquin	Approx. 236 growers supply Bundaberg Sugar mills. <sup>37</sup>	Some growers could supply Isis Central (at the Isis mill in Childers).
Isis Central Sugar	Isis	Approx 300 growers supply the Isis mill. <sup>38</sup>	n/a
Heck & Sons	Rocky Point	Approx. 50 growers supply the Rocky Point mill. <sup>39</sup>	In rare circumstances, some limited tonnes of cane could be transported to mills in northern NSW. <sup>40</sup>

42. The price growers receive for their cane under Cane Supply Agreements is linked to the price of raw sugar, as determined by the **Cane Payment Formula** (as shown below). The ACCC understands that the industry has used variants of this formula for around 100 years, and it was developed to calculate how the returns from the raw sugar produced by millers would be allocated between growers and millers.<sup>41</sup>

$$\text{Cane Price} = \text{Net Sugar Price} \times (0.009^{42}) \times (\text{CCS}-4) + \text{Constant}$$

43. The effect of the Cane Payment 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.'<sup>43</sup>
44. The ACCC understands that the cane price formula in effect splits the net revenue from the sale of raw sugar between the grower and the miller. The revenue to pay for the cane supplied by a grower started to be called GEI sugar in around 2012, and then later included in the SIA in 2015. The grower share of the revenue from the sale of raw sugar is about of 60-65 per cent, depending on the sugar content of their cane.<sup>44</sup>

<sup>36</sup> Tully Sugar website, <http://www.tullysugar.com.au/index.php/about-us/early-days>, viewed on 10 November 2016.

<sup>37</sup> Bundaberg Canegrowers Ltd Annual Report, 2014/15, p. 23.

<sup>38</sup> Isis Central Sugar Milling Company website: <https://www.isissugar.com.au/Public/History.aspx>, viewed on 10 November 2016.

<sup>39</sup> M. McCarthy, *Rocky Point: Calls for Queensland's oldest cane growing region to become motorsport hotspot* 29 April 2016, <http://www.abc.net.au/news/2016-04-29/calls-for-queensland-cane-region-to-host-motorsport-events/7349866>, viewed on 10 November 2016.

<sup>40</sup> Canegrowers' application for authorisation A91558, 23 September 2016, p. 4.

<sup>41</sup> Queensland Productivity Commission, *Decision Regulatory Impact Statement, Sugar Industry (Real Choice in Marketing) Amendment Bill 2015*, November 2015, p. 19.

<sup>42</sup> Represents 'milling recovery efficiency'.

<sup>43</sup> Submission from Wilmar Sugar, 2 November 2016, p. 7.

<sup>44</sup> Submission from MSF Sugar, 28 October 2016, p. 9.

45. Growers and millers may negotiate variations to the Cane Payment Formula in their Cane Supply Agreements. However, the cane price is generally based on:<sup>45</sup>
- the 'Net Sugar Price'
  - the recoverable sugar content of their cane (known as 'CCS') and
  - a regionally specified 'constant' amount which varies according to the mill area.

#### **The Net Sugar Price<sup>46</sup>**

46. The Net Sugar Price equals:

*Raw sugar futures contract price*

*plus marketing premiums*

*less marketing costs*

47. The raw sugar futures contract price is the globally traded 'Intercontinental Exchange No. 11 raw sugar futures contract price' (ICE11). The ICE11 price currently contributes to more than 95 per cent of the net sugar price.
48. Marketing premiums are the additional returns over and above the global sugar price, and are a sum of the 'physical premium' and 'polarisation premium'. The physical premium is negotiated between the sugar marketer and raw sugar customer and can be due to the locational advantage in supplying some markets, such as Asian markets, which might result in lower freight and other transportation costs for Australian marketers. The polarisation (or quality) premium arises where the 'sucrose purity' is greater than the reference level set in the ICE11 contract.<sup>47</sup>
49. Marketing costs are those costs incurred by the sugar marketer in the course of completing its sales to customers. These costs include, but are not limited to:
- storing and handling 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.

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<sup>45</sup> Queensland Productivity Commission, *Decision Regulatory Impact Statement, Sugar Industry (Real Choice in Marketing) Amendment Bill 2015*, November 2015, p. 20.

<sup>46</sup> Unless otherwise states, the information appearing under this heading was obtained from Queensland Productivity Commission, *Decision Regulatory Impact Statement, Sugar Industry (Real Choice in Marketing) Amendment Bill 2015*, November 2015, pp. 20 - 21.

<sup>47</sup> Dimasi and Samuel, *An assessment of Australian Sugar Marketing Commercial Arrangements*, 28 April 2015, p. 2.

50. In a recent Queensland Productivity Commission report, the Australian Sugar Milling Council submitted that growers:

now have a range of mechanisms through which they can influence the price of sugar that will ultimately be used in their cane price formula. These include through participation in various mills or QSL pooling arrangements or through agreement with their mills to have their sugar price directly or indirectly hedged via derivatives.

51. The ACCC understands that in recent years most mill owners have offered cane growers the ability to 'forward price' their cane via a choice of pools or individual grower forward pricing arrangements. For example, Wilmar Sugar advises that growers are able to 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.<sup>48</sup>
52. In this regard, Canegrowers advises that growers can manage the futures price risk up to a certain percentage of their production, usually no more than 65 per cent in the year of harvest. The balance of futures price risk is managed by the GEI marketer in their seasonal (or harvest) pool. The GEI marketer manages the physical price risk – namely, the difference between the actual sales price of the physical sugar and the price at which the sugar was hedged in the futures market. Canegrowers advises that growers are exposed to and share whatever costs are incurred by the GEI marketer in the marketing of the GEI sugar and whatever marketing charges are agreed or provided for in the GEI sugar On-Supply Agreement.<sup>49</sup>
53. The ACCC also understands that relative payment schemes exist so that growers are largely indifferent to when they supply their cane. That is, the CCS is adjusted to ensure that growers which deliver cane to mills in the shoulder months (as opposed to those periods when CCS is typically at its highest) are not disadvantaged. Each grower's CCS is adjusted relative to other growers supplying cane in the same month.

## Raw sugar marketing arrangements<sup>50</sup>

### Brief history

54. As previously mentioned, prior to 2006, Queensland had a legislated single desk marketing arrangement through QSL. Compulsory vesting of sugar to QSL was removed and control of raw sugar consequently reverted to millers.
55. At that time, QSL entered into voluntary arrangements with the majority of Queensland mills to continue to market their raw sugar for export. Under these RSSAs, millers supplied 100 per cent of their raw sugar production intended for bulk export to QSL. However, many millers 'buy back' their Miller Economic Interest sugar to market themselves. Growers are not a party to RSSAs.

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<sup>48</sup> Submission from Wilmar Sugar, 2 November 2016, p. 8.

<sup>49</sup> Submission from Canegrowers, 18 November 2016, p. 9.

<sup>50</sup> Unless otherwise stated, information appearing under this heading was obtained from Queensland Productivity Commission, *Decision Regulatory Impact Statement, Sugar Industry (Real Choice in Marketing) Amendment Bill 2015*, November 2015, pp. 15 – 19.

## The role of QSL

56. QSL is a not for profit company in which growers and millers own shares. QSL currently markets to overseas customers the majority of raw sugar produced in Queensland and operates the six bulk sugar terminals for the storage and handling of all raw sugar produced. It does not own or operate mills or process sugarcane itself.<sup>51</sup>
57. The main activities undertaken by QSL include:
- acquiring raw sugar intended for bulk export from Queensland mill owners under RSSAs
  - selling export raw sugar
  - chartering shipping for export raw sugar
  - raw sugar financing and hedging activities
  - sub-leasing operating and providing storage and handling services at the six bulk sugar terminals and
  - conducting other initiatives considered to be in the interest of the Queensland sugar industry.
58. QSL sells raw sugar directly to overseas refineries. Proceeds are pooled for payment purposes and distributed back to millers and growers after being adjusted for marketing costs incurred by QSL. QSL's major marketing costs are its sub-leasing payments to Sugar Terminal Limited.
59. The RSSAs acknowledge that growers have an 'economic interest' in the raw sugar produced from their sugar cane crop – which is equal to around two-thirds of the raw sugar sold. The miller has the remaining one-third interest.

## Recent developments

60. In 2014 Wilmar Sugar, MSF Sugar and Tully Sugar gave notice to QSL that they would not be continuing with their RSSAs beyond 30 June 2017. These miller-marketers now intend to market raw sugar in their own right.
61. Growers became concerned about miller-marketers, particularly in relation to their market power in milling and the lack of transparency about future marketing premiums and costs. In particular, the concerns included:
- The lack of transparency leading to millers increasing their slice of the pie at the expense of growers in situations where foreign mill owners also own their own refineries and facilities overseas and
  - Transparency about marketing risks, costs and premiums could effectively be removed to the benefit of the milling company.<sup>52</sup>

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<sup>51</sup> Submission from QSL, 28 October 2016, p. 2.

<sup>52</sup> Queensland Productivity Commission, *Decision Regulatory Impact Statement, Sugar Industry (Real Choice in Marketing) Amendment Bill 2015*, November 2015, p. 25.

62. In December 2015, the Queensland Parliament passed the *Sugar Industry (Real Choice in Marketing) Amendment Act 2015 (the Marketing Choice Amendment)*.

63. The Revised Explanatory Notes for the Sugar Industry (Real Choice in Marketing) Amendment Bill 2015 states that:<sup>53</sup>

It provides both growers and miller owners with the right to determine how their respective economic interest in on-supply sugar is taken to the market.

64. The subsequent amendments to the SIA regarding GEI sugar include:<sup>54</sup>

- a right for growers to nominate the entity to undertake marketing of GEI sugar<sup>55</sup>
- requiring a mill owner to have an agreement with a grower nominated entity to sell the quantity of the on-supply sugar (that is, raw sugar manufactured from sugar cane) at least equal to the quantity of the GEI sugar.<sup>56</sup>

65. Canegrowers advises that in nominating a GEI marketer, growers are restricted to choose those GEI marketers with which the miller has an On-Supply Agreement for raw sugar.<sup>57</sup>

66. QSL advises that it has either entered into, or sought to enter into, a supply agreement (now known as 'On-Supply Agreements') for the sale of GEI sugar with Wilmar Sugar, MSF Sugar and Tully Sugar in order to give effect to the Marketing Choice Amendment.<sup>58</sup> At the time this application for authorisation was lodged with the ACCC, QSL had finalised an On-Supply Agreement with MSF Sugar only. MSF Sugar advised the ACCC that at each of its four mills, from 2017 onwards growers will have the choice of MSF Sugar or QSL marketing systems.<sup>59</sup>

67. Further, QSL advises that if a grower does not elect an alternative GEI marketing entity (either through 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 Wilmar Sugar, MSF Sugar and Tully Sugar, is each of their related marketing entities.<sup>60</sup>

68. Similarly, Canegrowers advises that in the Cane Supply Agreements that have been negotiated since the Marketing Choice Amendment, the default GEI sugar marketer is nominated by the miller.

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<sup>53</sup> Sugar Industry (Real Choice in Marketing) Amendment Bill 2015 – Revised Explanatory Notes, p. 2.

<sup>54</sup> Insertion of new section 33B of the *Sugar Industry Act 1999*.

<sup>55</sup> Section 33B(2)(d)(ii) of the SIA.

<sup>56</sup> Section 33B(2)(d)(i) of the SIA.

<sup>57</sup> Submission from Canegrowers, 18 November 2016, p. 7.

<sup>58</sup> Submission from QSL, 28 October 2016, p. 4.

<sup>59</sup> Submission from MSF Sugar, 28 October 2016, p. 10.

<sup>60</sup> Ibid.

## Queensland sugar industry legislation

69. Since 1999, the SIA has allowed cane growers to collectively bargain Cane Supply Agreements with mills within their growing region (that is, North, Central, Herbert River and Burdekin and South regions). Following the Marketing Choice Amendment in 2015, the SIA also allows growers to nominate a marketing entity for their GEI sugar, as well as refer disputes during negotiations of Cane Supply Agreements to arbitration.
70. More specifically, the SIA currently provides that:
- a grower may supply cane to a mill for a crushing season only if the grower has a supply contract with the mill owner for the season (section 31(1))
  - a supply contract can be an individual or collective contract (section 31(3))
  - a disputed term of an intended supply contract can be referred to arbitration (section 33A(2))
  - if a grower proposes to nominate an entity to be the GEI sugar marketing entity, a term of the intended supply contract must not have the effect of unreasonably treating the grower less favourably than the grower would be likely to be treated if a mill-related entity were to be the GEI sugar marketing entity (sections 33A(7) and 33A(8))
  - the supply contract must contain a term regarding the payment of sugar cane
  - the supply contract must link cane payment to the sale price of the on-supply sugar (that is, raw sugar produced from sugar cane), unless otherwise agreed by the grower and miller
  - if the supply contract contains a GEI sugar price exposure term, the miller must have an agreement with a stated GEI sugar marketing entity to sell the quantity of on-supply sugar (or raw sugar) that is at least equal to the quantity of GEI sugar (section 33B(2)(d))
  - growers may nominate the entity to undertake marketing of GEI sugar (section 33B(2)(d))
  - if the supply contract provides for an entity nominated by the grower to be the GEI sugar marketing entity, a term requiring the mill owner to deliver for sale the quantity of the on-supply sugar that is at least equal to the quantity of the GEI sugar, as directed by the entity, within a stated reasonable period (section 33B(2)(e)).
71. The SIA provides statutory exemption from competition legislation for collective bargaining between a group of growers and a mill owner who are within the *same region*. Regions are defined within the Sugar Industry Regulation 2010.

72. In particular, section 237 of the SIA specifically authorises the following:

- the making of a collective contract
- the variation of a collective contract
- the acceptance and crushing of cane by a mill at a time fixed under the collective contract
- the payment of a price for cane by a mill owner to a grower under the collective contract
- the receipt of a price for cane by a grower from a mill owner under the collective contract and
- a financial incentive scheme of premiums, discounts and allowances relating to cane and sugar quality or to anything that may affect cane and sugar quality having regard to best practice under the collective contract.

73. Regarding GEI sugar, section 238 of the SIA specifically authorises:

- a grower and mill owner making a supply contract including a 'GEI sugar marketing term' (that is, a term requiring the mill owner to have an agreement with a stated entity to sell the quantity of on-supply sugar that is at least equal to the quantity of the GEI sugar)
- a mill owner and GEI sugar marketing entity making an agreement to sell on-supply sugar in compliance with a GEI sugar marketing term, as well as a GEI sugar marketing entity selling on-supply sugar under that agreement and
- a grower and mill owner being taken to have made a supply contract, which includes terms decided by an arbitration tribunal.

74. The ACCC acknowledges there has been significant and ongoing debate within government and the sugar industry in relation to the Marketing Choice Amendment. These broader issues provide context to the current application for authorisation from Canegrowers. The ACCC notes the Marketing Choice Amendment currently forms part of the Queensland sugar industry regulatory framework.

## **The proposed collective bargaining processes and timing**

### **Timing**

75. In order to supply cane to a mill, a grower must have a signed Cane Supply Agreement before the commencement of the relevant harvest season. Depending on the mill area, the 2017 harvest season will commence around June 2017.<sup>61</sup>

76. Canegrowers advises that Cane Supply Agreements are typically rolling agreements,<sup>62</sup> after an initial term of up to three years. Canegrowers advises that agreements are structured in such a way that, for sugar not yet committed, growers can update their pricing and marketing elections annually should they wish to do

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<sup>61</sup> Submission from Canegrowers, 18 November 2016, p. 9.

<sup>62</sup> Canegrowers' application for authorisation A91558, 23 September 2016, p. 6.

so. In addition, Canegrowers advises that there is an opportunity for the local Canegrowers companies and the relevant mill to revisit Cane Supply Agreements each year. These reviews generally focus on operational issues associated with the delivery of cane to a mill.

77. Regarding the 2017 season, Canegrowers advises that Cane Supply Agreements are settled for all mills except those mills owned by Wilmar Sugar and Tully Sugar. Without Cane Supply Agreements, growers supplying cane to mills owned by these companies are 'unable to manage their forward price exposure unless they accept the mills' standard form contract and accept the mill-nominated entity as their GEI marketer for the 2017 season'.<sup>63</sup>
78. In terms of the timing of grower decisions, Canegrowers submits that growers are restricted to choose those GEI marketers with which the miller has an On-Supply Agreement.<sup>64</sup> In the absence of an On-Supply Agreement, the alternative GEI marketer is unable to offer an information package to growers as its development and terms will be linked to the terms and conditions contained in the On-Supply Agreement.<sup>65</sup> At the time the current application for authorisation was lodged by Canegrowers, only one out of the three miller-marketers (namely, MSF Sugar) had an On-Supply Agreement with QSL.

### **Collective bargaining process**

79. Canegrowers seeks authorisation for growers to collectively bargain with processors (millers) and sugar marketing entities the full terms and conditions relating to the supply of sugar cane, namely:
- harvesting cane
  - delivery of cane to the mill or delivery points
  - transport and handling of cane by the mill
  - acceptance and crushing of cane by the mill
  - payment to growers by the mill owner
  - forwards pricing terms
  - essential terms governing the supply of GEI sugar to the GEI sugar marketers
  - capturing the value of the by-products and related products from sugar cane and
  - any other contracts or arrangements relating to the supply of or processing of sugar cane.

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<sup>63</sup> Ibid.

<sup>64</sup> Submission from Canegrowers, 18 November 2016, p. 7.

<sup>65</sup> Submission from Canegrowers, 18 November 2016, p. 7.

80. Authorisation was sought for collective bargaining across three levels:
- tier 1 – within each district by each relevant local Canegrowers company so that collective negotiation can occur with the local mill owner and sugar marketer
  - tier 2 – across and between each district that has common mill ownership so that each of the relevant local Canegrowers companies and Canegrowers can negotiate collectively with the common mill owners and sugar marketer and
  - tier 3 – across and between each district regardless of mill ownership so that each of the relevant local Canegrowers companies and Canegrowers can negotiate collectively with any and all mill owners and sugar marketers.
81. On 18 November 2016 Canegrowers clarified that primary negotiation for Cane Supply Agreements occurs at the ‘tier 1 level – that is, within the local mill supply area by the local Canegrowers company.’<sup>66</sup> Canegrowers envisages that from ‘time to time there may be a small number of significant issues (for example, those associated with marketing GEI sugar) that are common to different mill areas.’<sup>67</sup>
82. Under ‘tier 3’, Canegrowers proposes that growers across and between districts will be able to share information and facilitate the adoption of best practice in terms of contracts and related provisions where they choose to do so.<sup>68</sup> Canegrowers submits that this information sharing occurs in an environment where individual growers remain free to negotiate individual contracts with the mill owner.<sup>69</sup>
83. Regarding the role of Canegrowers (head office) and the local Canegrowers companies across the three proposed tiers of collective negotiations, Canegrowers advises that it does **not** seek authorisation for itself to assume the direct principal bargaining role. In addition, it is **not** seeking authorisation to negotiate single state-wide cane supply and related agreements. In particular, it submits that:<sup>70</sup>
- in most instances the collective negotiations are conducted by the local Canegrowers company and the miller
  - in ‘tier 2’ negotiations with a common mill owner and sugar marketer across districts, Canegrowers may provide information and advice to assist its local Canegrowers companies. The relevant local Canegrowers companies may, but are not obliged to, negotiate collectively with the same mill owner.
  - On occasions in ‘tier 2’ and ‘tier 3’ negotiations, Canegrowers staff might be invited to participate directly in a local negotiation in one area and then separately to participate directly in the collective negotiation occurring in a different area. Canegrowers may provide or facilitate the provision of legal advice and other services to assist the local areas draft contracts and dispute resolution procedures.

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<sup>66</sup> Submission from Canegrowers, 18 November 2016, p. 3.

<sup>67</sup> Ibid, p. 3.

<sup>68</sup> Ibid, p.4.

<sup>69</sup> Ibid.

<sup>70</sup> Submission from Canegrowers, 18 November 2016, p. 2.

84. Further, Canegrowers advises that for the purposes of the SIA, growers appoint their local Canegrowers company (and not Canegrowers head office) to be their bargaining representative.
85. Canegrowers submits that the proposed terms and conditions of supply and related agreements are similar in each mill area throughout the Queensland. The following issues are proposed to be collectively negotiated within Cane Supply Agreements:<sup>71</sup>
- term of agreement
  - mechanism for review or variation of the agreement
  - obligation to supply cane and terms of supply
  - commencement of crushing, crushing season length and termination of crushing
  - estimate and allotment
  - points of delivery
  - essential GEI marketing provisions and
  - cane payment.
86. Following a request from the ACCC for further information, Canegrowers provided the following examples of **'other contracts or arrangements'** relating to the supply of or processing of sugar cane' for which it seeks authorisation:<sup>72</sup>
- The supply of GEI sugar from the miller to the GEI marketing entity. While the parties to the On-Supply Agreement are the miller and the GEI marketer, Canegrowers submits that growers have a clear beneficial interest in the terms of that agreement as its terms directly influence the value to them for the sale of GEI sugar. It is open to the growers to collectively negotiate the essential GEI marketing provisions in a Cane Supply Agreement that the grower enters into with the mill owner and under which the mill owner will enter into an On-Supply Agreement with the GEI marketer. On-Supply Agreement essential terms include, among other things, those related to:
    - payment
    - GEI sugar quality
    - risk
    - liability
    - contract termination and
    - logistics.

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<sup>71</sup> Submission from Canegrowers, 18 November 2016, p. 3.

<sup>72</sup> Submission from Canegrowers, 18 November 2016, pp. 4-5.

- pricing, pooling and payment contracts between the growers and the GEI marketer. The GEI sugar marketer could be either the miller or a third party marketer, such as QSL.
- the sharing of revenue from by-products of sugar cane – for example, the Molasses Gain Sharing Agreements that exist in the Wilmar mill areas between Wilmar and individual growers. Until recently, the terms of these Molasses Gain Sharing Agreements formed part of the Cane Supply Agreements and allowed growers to share in the revenues received from molasses sales by Wilmar. However, Wilmar is now proposing that these provisions be removed from the Cane Supply Agreements into another separate agreement. Because this is not a Cane Supply Agreement, Wilmar contends therefore that the collective bargaining statutory exemption in the SIA would not apply to collective negotiation on the Molasses Gain Sharing Agreement.

87. Canegrowers also provided further detail about the specific terms and conditions relating to the **marketing of GEI sugar** that local Canegrowers' companies seek to collectively negotiate with mill owners. In particular, Canegrowers advises that it seeks authorisation for two things, namely:<sup>73</sup>

- It is seeking authorisation to collectively negotiate proposed marketing terms in Cane Supply Agreements and related pricing agreements with the mill owner. This is proposed to provide for the 'essential principals' under which the mill owner will negotiate an On-Supply Agreement for the supply of nominated GEI sugar to the GEI sugar marketer and
- Given the importance of the On-Supply Agreement and its potential impact on the flow of proceeds from the sale of GEI sugar to growers, it is also seeking authorisation to participate in negotiations directly relating to the establishment of the On-Supply Agreement between the mill owner and the GEI marketer. In this regard, Canegrowers advises that its preferred position is that it would like to be 'at the table and involved in the discussion and negotiation of the On-Supply Agreement. There is no reason why the On-Supply Agreement should not be a tripartite agreement between the miller, GEI marketer and the local Canegrowers companies.'<sup>74</sup>

88. The essential terms of the On-Supply Agreement can affect the value of GEI sugar and include terms relating to:<sup>75</sup>

- the duration of the contract and its termination provisions
- delivery and receipt terms of the sugar at the bulk storage facility
- the quantity of GEI sugar
- reporting
- transfer of title and risk of the sugar from the miller to the GEI marketers
- pricing provisions

<sup>73</sup> Submission from Canegrowers, 18 November 2016, pp. 5-6.

<sup>74</sup> Submission from Canegrowers, 18 November 2016, p. 6.

<sup>75</sup> Submission from Canegrowers, 18 November 2016, p. 6.

- flow of moneys between the GEI marketers, millers and growers
  - variations in tonnages and
  - failure to deliver committed sugar.
89. In choosing their GEI sugar marketer, growers will be seeking to collectively negotiate the terms and conditions of the marketing and related services the GEI marketer is providing to growers, including those relating to:<sup>76</sup>
- access to the terms of On-Supply Agreements
  - details of pooling terms and any proposed amendments
  - market commentary
  - marketing plans
  - development of benchmarks and
  - provision of Sugar Market and Pricing Information services.
90. Further, Canegrowers advises that in an agreement between growers and the GEI marketer, growers will also want to be able to negotiate collectively with the GEI marketer about the pricing and payment of GEI sugar.<sup>77</sup>
91. In relation to the specific '**forward pricing terms and conditions**' that local Canegrowers companies seek to collectively negotiate, Canegrowers notes that these are sometimes captured within Cane Supply Agreements. However, some millers insist in these forward pricing terms and conditions being captured in separate agreement between the grower and the miller. Therefore, Canegrowers seeks to collectively negotiate these issues whether they form part of a Cane Supply Agreement or separate, but related pricing agreement.<sup>78</sup>
92. In particular, forward pricing terms and conditions may include:<sup>79</sup>
- the duration of the contract and its termination provisions
  - management fees and conditions
  - payment provisions
  - nomination dates and
  - pooling options.

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<sup>76</sup> Submission from Canegrowers, 18 November 2016, p. 6.

<sup>77</sup> Ibid.

<sup>78</sup> Submission from Canegrowers, 18 November 2016, p. 7.

<sup>79</sup> Ibid.

## Submissions received by the ACCC

93. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process.
94. The ACCC sought submissions from 27 interested parties potentially affected by Canegrowers' application, including the miller-marketers, sugar marketers, other grower and industry groups and government.
95. The ACCC received public submissions from eight interested parties, both in support of and opposing authorisation of the proposed collective bargaining arrangements. Only one of the proposed targets of the collective bargaining arrangements, QSL, supports authorisation.
96. An overview of the public submissions received from Canegrowers and interested parties follows. The views of Canegrowers and interested parties are considered in the assessment section of this draft determination.
97. Copies of public submissions may be obtained from the [Public register](#) on the ACCC's website.

## Canegrowers

98. Broadly, Canegrowers submits that since deregulation, the Queensland sugar industry has viewed the specific statutory exemption provided under the SIA as being broad enough to allow for full collective bargaining on all cane supply and related contract issues.<sup>80</sup> However, in recent times some mill owners have questioned the coverage of the statutory exemption for collective bargaining provided by the SIA.
99. In particular, Canegrowers advises that some millers are refusing to engage in or permit any collective bargaining around GEI marketing terms, on-supply agreements, pricing and pooling agreements and on other issues which they contend do not form part of Cane Supply Agreements.
100. Canegrowers provides the following examples of where millers have refused to collectively negotiate specific issues with growers because they sit outside Cane Supply Agreements:
  - Regarding capturing the value of the by-products of sugar cane, Canegrowers notes:

the Molasses Gain Sharing Agreements that exist in the Wilmar mill areas between Wilmar and individual growers. Up until the current round of negotiations the terms of these Molasses Gain Sharing Agreements formed part of the CSA [Cane Supply Agreement] and provided for growers to share in the revenues received from molasses sales by Wilmar. In the current negotiations Wilmar is insisting that these provisions be removed from the CSA [Cane Supply Agreement] and be provided for in a separate agreement. They go on to say that as the separate agreement is not a CSA, the collective

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<sup>80</sup> Canegrowers' application for authorisation A91558, 23 September 2016, p. 12.

bargaining authorisations contained in the Act do not extend to the negotiation of the Molasses Gain Sharing Agreement.<sup>81</sup>

- Regarding forward pricing terms, Canegrowers submits:

Some CSAs include the relevant forward pricing terms and conditions. Some mills seek to insist on these forward pricing terms and conditions being contained in a separate agreement between the grower and the mill. In these cases mills commonly argue that because they are in a separate agreement outside the CSA that they are not subject to the collective bargaining authorisation arrangements contained in the Act.<sup>82</sup>

101. Canegrowers considers that should growers choose to enter collective bargaining negotiations with mill owners and GEI marketers, it is important that those negotiations cover all matters relating to the supply and delivery of cane to a mill, the associated pricing arrangements and payment flows.<sup>83</sup>
102. Importantly, Canegrowers submits that the application for authorisation does not seek to centralise negotiations, 'but to support negotiations at the local level ensuring that all issues can be dealt with in these negotiations'.<sup>84</sup>

## Interested parties

### Grower groups

103. The ACCC received submissions in **support** of the proposed collective bargaining arrangements from three industry groups. In particular:
  - **Kalamia District Cane Growers Organisation Ltd** – represents 150 growers and is not a member of the Canegrowers organisation. It submits that recent changes to the SIA have allowed the miller in the Burdekin cane growing district to construct a series of commercial agreements to cover different aspects of the commercial arrangements affecting growers which sit outside Cane Supply Agreements. In these circumstances, growers do not have the rights conferred under the SIA to collectively bargain on these other agreements. It considers that it is in the growers' interests and is not unduly detrimental to the miller's interests for collective bargaining to be authorised in relation to all matters between growers and a miller.<sup>85</sup>
  - **Burdekin District Cane Growers Limited** – represents growers in the Burdekin district who only supply Wilmar Sugar and who are not members of the Canegrowers organisation. It submits that following the passage of the Marketing Choice Amendment, growers can choose a marketer to determine the sugar value of their portion of GEI sugar. Therefore, it considers that growers have an interest in the contract between the miller and the grower's choice of marketer. It advises that Wilmar Sugar has refused to discuss marketing arrangements with bargaining representatives on the basis that the statutory authorisation under the SIA does not extend to this.

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<sup>81</sup> Submission from Canegrowers, 18 November 2016, p. 5.

<sup>82</sup> Ibid, p. 7.

<sup>83</sup> Submission from Canegrowers, 18 November 2016, p. 1.

<sup>84</sup> Ibid.

<sup>85</sup> Submission from Kalamia Cane Growers Organisation Ltd, 27 October 2016, p. 1.

Burdekin District Cane Growers Limited submits that the proposed collective bargaining arrangements will have no impact on competition between growers or sugar marketers. It considers that the benefit of collective bargaining to ensure that growers receive a 'fair and reasonable contract' with a monopoly miller, including determination of terms of cane payment, is essential for the Burdekin region.<sup>86</sup>

- **Australian Cane Farmers Association** – represents Australian cane farmers from far north Queensland to northern New South Wales. It supports authorisation of the proposed collective bargaining arrangements for the 10 year period requested. In particular, it considers that when supplying a monopoly miller, it is important for growers to 'have a contractual line of sight from cane supply contracts through to contracts for the marketing of raw sugar', to be able to collectively bargain within and across growing regions and for bargaining representatives to be able to consult fellow representatives and specialist advisers in related grower entities.<sup>87</sup>

### Millers and marketers

104. The ACCC received a submission from one marketer in support of authorisation:

- **QSL** – supports authorisation of the proposed collective bargaining arrangements and considers there is likely to be significant public benefits and no public detriment arising from the arrangements. QSL considers the proposed arrangements facilitate the introduction of greater competition in the market for sugar export marketing services (as intended by the Marketing Choice Amendment). It also considers collective bargaining is the most effective way for growers to correct the significant imbalance of bargaining power between growers and millers and their vertically integrated marketers.<sup>88</sup>

105. The ACCC received submissions from the following millers and milling industry group opposing the proposed collective bargaining arrangements:

- **Wilmar Sugar** – is a 'miller-marketer' and considers that authorisation should not be granted. It believes there is minimal, at best, public benefits likely to arise from the proposal and there is likely to be a detrimental impact on competition in relation to the supply and acquisition of sugar cane, the supply of raw sugar by mill owners to sugar marketers and the supply of forward pricing, pooling and marketing services to growers.

Wilmar Sugar is particularly concerned that should authorisation be granted by the ACCC, it would jeopardise competition in the market in which sugar marketing entities compete for the right to market the GEI sugar attributable to individual cane growers. It submits that one of the explicit objectives of the Marketing Choice Amendment was to foster competition for the right to market GEI sugar. Allowing growers to exercise that choice collectively would 'threaten to hinder competition in this market before it has been allowed to take root.'<sup>89</sup>

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<sup>86</sup> Submission from Burdekin District Cane Growers Limited, 3 November 2016, p. 2.

<sup>87</sup> Submission from Australian Cane Farmers Association, 28 October 2016, p. 1.

<sup>88</sup> Submission from QSL, 28 October 2016, p. 1.

<sup>89</sup> Submission from Wilmar Sugar, 2 November 2016, p. 4.

- **Isis Central Sugar Mill** – operates the grower-owned cooperative mill near Childers. It submits that should authorisation be granted by the ACCC for the ‘additional collective bargaining rights’ proposed under the Canegrowers’ application, then any such conduct with the Isis Central Sugar Milling Company should not be authorised. It submits that the primary basis for Canegrowers’ application appears to be that ‘there is very limited competition for cane and that milling companies generally operate in a monopoly market for cane’.<sup>90</sup> It submits that there is extensive competition for cane in the Isis mill supply area (with 49 per cent of cane crushed at its mill last year coming from land that has previously grown cane that was supplied to a competing mill).<sup>91</sup>
- **MSF Sugar** – is a ‘miller-marketer’ and does not support authorisation. Overall, it considers that the collective bargaining arrangements proposed by Canegrowers represent a substantial change on current provisions authorised for competition legislation under the SIA. If authorisation was granted by the ACCC, MSF Sugar considers it ‘would move the industry back into a regulated environment’.<sup>92</sup> Among other things it submits that:<sup>93</sup>
  - it is not practical or desirable for growers to collectively bargain forward pricing terms
  - it is not practical or reasonable for mill owners to bear the commercial risk and responsibilities of selling on-supply sugar to marketers while having the terms subject to collective bargaining by growers who are not party to the On-Supply Agreement
  - extending collective bargaining to ‘any other contracts or arrangements relating to the supply of or processing of sugar cane’ is too broad and uncertain to allow the ACCC to properly assess the likely public benefits and detriments from any such conduct and
  - there are significant differences between each mill and each sugar cane growing region and as such, proposed collective bargaining of Cane Supply Agreements across regions is not practical.
- **Australian Sugar Milling Council (ASMC)** – is the peak policy body representing Australian sugar milling companies. It submits that the ACCC should deny authorisation to the proposed arrangements. The members of ASMC include each of the miller-targets of the proposed conduct, with the exception of WH Heck and Sons. While the ASMC supports ‘the principle of collective bargaining in relation to cane supply agreements on a region by region basis’, it considers that the proposed arrangements represent a ‘significant expansion on the growers’ current ability to collectively bargain authorised by...the SIA’.<sup>94</sup> It believes Canegrowers has failed to demonstrate any level of market failure with existing arrangements which warrant the expansion of the scope and area of collective bargaining. In addition, it considers Canegrowers has not identified any additional public

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<sup>90</sup> Submission from Isis Central Sugar Mill, 28 October 2016, p. 1

<sup>91</sup> Ibid, p. 2.

<sup>92</sup> Submission from MSF Sugar, 28 October 2016, p. 4.

<sup>93</sup> Ibid, pp. 4-8.

<sup>94</sup> Submission from ASMC, 28 October 2016, pp. 2-3.

benefits which would arise from any authorisation granted by the ACCC, as opposed to the collective bargaining currently authorised under the SIA.

## ACCC assessment

106. The ACCC's evaluation of the proposed collective bargaining arrangements is in accordance with the relevant net public benefit tests<sup>95</sup> contained in the Act.
107. In broad terms, under the relevant tests the ACCC shall not grant authorisation unless it is satisfied that the likely benefit to the public would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result.
108. The ACCC is often asked to authorise collective bargaining arrangements. Collective bargaining refers to an arrangement under which two or more competitors come together to negotiate terms and conditions (which can include price) with a supplier or a customer.
109. Under the Act, except in certain limited circumstances, businesses are required to act independently of their competitors when making decisions about pricing and other terms and conditions of business, so collective bargaining conduct may breach the Act.
110. However, bargaining collectively, rather than on an individual basis, can generate public benefits by improving the efficiency of the bargaining process and negotiated arrangements. These benefits are achieved by lowering the time and costs associated with putting supply arrangements in place (transactions costs), reducing information asymmetries and strengthening bargaining power.
111. In order to assess the effect of Canegrowers' proposed collective bargaining conduct and the public benefits and detriments likely to result, the ACCC identifies the relevant areas of competition and the likely future should authorisation not be granted.

## The relevant areas of competition

112. **Canegrowers** submits that sugar mills largely enjoy geographical monopolies and there is little competition between mill owners for supply of cane by growers. In most cases, growers are compelled to deliver their cane to the local miller. In most situations, even if there is more than one local mill, they are owned by the same mill owner. In the few circumstances where there is a potentially another mill owner that a grower could supply to, it is only those growers on the boundary of the mill area that could economically transport and deliver the high volume, low value, perishable sugar cane to the alternative mill.<sup>96</sup>

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<sup>95</sup> Subsections 90(5A), 90(5B), 90(6) and 90(7) of the Act. The relevant tests are set out in Attachment A of this draft determination.

<sup>96</sup> Canegrowers' application for authorisation A91558, 23 September 2016, p. 15.

113. **Wilmar Sugar** submits there are a five interrelated areas of competition that are relevant for assessing the impact of the proposed collective bargaining arrangements. Namely:<sup>97</sup>

- the supply and acquisition of sugar cane – given the perishability of sugar cane and limitations of cane rail networks, there are localised cane production and mill supply areas across Queensland
- transport and logistics
- sugar pricing services – as a result of the cane price formula used in supply contracts between growers and millers, growers are exposed to international raw sugar prices. As such, ‘there is a market in which growers seek to manage this price exposure via grower forward pricing’
- GEI sugar marketing – marketers will compete for the right to market GEI sugar. This will primarily be through ‘offering professional forward pricing and pooling services to growers and higher net marketing premiums.’ GEI marketers may, or may not, provide pooling and forward pricing services as part of their offering to growers and
- sale of raw sugar on export and domestic markets – around 80 per cent of Queensland’s raw sugar is exported, with the remaining 20 per cent sold domestically. The sugar industry is a price taker in the international raw sugar market.

114. Regarding the supply of sugar cane, **QSL** submits that transport costs and the location of mills makes it difficult, if not impossible, for the majority of growers to have choice of sugar miller. As such, growers are generally geographically bound to the mill closest to their farm and the vast majority of growers cannot realistically seek to supply a different miller on an economically sustainable basis.<sup>98</sup>

115. Regarding sugar marketing, QSL submits that the introduction of the Marketing Choice Amendment 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...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 Agreement so that they can secure the rights to market GEI sugar for their own marketing entities.<sup>99</sup>

### **ACCC view**

116. The ACCC considers precise identification of the relevant areas of competition is not required for the purpose of assessing Canegrowers’ collective bargaining application for authorisation. The ACCC can consider the areas of competition in a broad sense when assessing the public benefits and detriments that would likely result from the proposed collective bargaining conduct.

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<sup>97</sup> Submission from Wilmar Sugar, 2 November 2016, pp. 15-16.

<sup>98</sup> Submission from QSL, 28 October 2016, p. 3.

<sup>99</sup> Submission from QSL, 28 October 2016, p. 4.

117. Given the breadth of the proposed conduct and the nature of the Queensland sugar industry, the ACCC considers there are a number of related areas of competition likely to be affected by the proposed arrangements, namely:
- the supply of sugar cane in relevant growing regions
  - the supply of milling services in those growing regions and
  - the supply of sugar marketing services, including for GEI marketing services, in Queensland (and potentially Northern NSW).
118. Given the perishability of cane, which needs to be crushed within 16 hours of harvest, and transport costs, the supply of sugar cane and milling services occurs in localised areas around the mill. The majority of growers only have one option to supply cane to their local miller. There is generally only limited competition between growers in neighbouring cane growing districts, as well as between millers in the supply of milling services to growers.
119. Regarding the supply of sugar cane and milling services the ACCC also notes that cane growers tend to be small entities, while milling services are typically provided by large, often multi-national, companies:
- while there are some corporately owned farms, the majority of sugar cane farms are owned by sole proprietors or family partnerships,<sup>100</sup> and the average size of a cane farm is 100 hectares<sup>101</sup>
  - seven milling companies operate Queensland's 21 sugar mills.
  - Wilmar Sugar accounts for around 55-60 per cent of Australia's raw sugar exports. The next three largest millers – Mackay Sugar, MSF Sugar and Tully Sugar – account for approximately 30 per cent of raw sugar exports
  - three out of the seven milling companies also currently operate their own sugar marketing business – that is, Wilmar Sugar, MSF Sugar and Tully Sugar.
120. Regarding the supply of GEI sugar marketing services to growers the ACCC notes:
- There are currently four GEI sugar marketers in Queensland – three of which are vertically integrated miller-marketers and the other, QSL.
  - Until deregulation in 2006, all sugar was compulsory acquired by QSL. Until recently, voluntary marketing arrangements with QSL continued under RSSAs.
  - There currently appears to be some competition in the provision of GEI sugar marketing services to growers in some regions – for example, from the 2017 crushing season onwards, growers supplying cane to MSF Sugar mills can nominate QSL's GEI sugar marketing system or MSF Sugar's GEI sugar marketing system.

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<sup>100</sup> Queensland Productivity Commission, *Decision Regulatory Impact Statement, Sugar Industry (Real Choice in Marketing) Amendment Bill 2015*, p. 14.

<sup>101</sup> Canegrowers' application for authorisation A91558, 23 September 2016, p. 13.

- The ACCC is advised that grower choice of GEI sugar marketer is restricted to those GEI sugar marketers with which their miller has an On-Supply Agreement.<sup>102</sup>
- The ACCC is advised that in Cane Supply Agreements that have been negotiated since the Marketing Choice Amendment, the ‘default GEI marketer’ has been nominated by the miller. A ‘default GEI marketer’ is used when a grower does not nominate a GEI sugar marketer within a Cane Supply Agreement.<sup>103</sup>

## The future with and without

121. The ACCC compares the public benefits and detriments likely to arise in the future where the proposed collective bargaining conduct occurs against the future in which the conduct does not occur.

122. **Canegrowers** submits that without the proposed collective bargaining conduct:

Implementation of the new [grower marketing choice] provisions is being frustrated by the corporate decisions taken by Wilmar and Tully mills to limit the way in which alternative GEI marketers access GEI sugar.

Some mills are adopting a very narrow and strict interpretation of the extent of the authorisations and exemptions set out in the [Sugar Industry] Act. They are openly refusing to engage in or permit any collective bargaining around GEI marketing terms, On-Supply Agreements, pricing and pooling agreements and agreements on other issues such as molasses that they contend do not form part of cane supply arrangements.<sup>104</sup>

123. **Kalamia Cane Growers Organisation** also submits that Wilmar Sugar (who owns all four mills in the Burdekin district), has moved a number of commercial arrangements affecting growers out of Cane Supply Agreements. In these circumstances, growers do not have collective bargaining ‘rights’ conferred under the SIA.<sup>105</sup>

124. **QSL** submits that authorisation of the proposed conduct:

...would not result in new negotiating arrangements, but instead ensure that CSA [Cane Supply Agreement] negotiations are not impeded by existing authorisation no longer precisely capturing sensible negotiating structures.<sup>106</sup>

125. For example, QSL considers the need for grower collectives to negotiate across different regions, and the need for growers to negotiate terms relating to the marketing and on-supply of GEI sugar is not appropriately covered by the existing statutory exemption under the SIA.<sup>107</sup>

126. **Wilmar Sugar** submits that without authorisation of the proposed collective bargaining conduct, growers will continue to be able to collectively negotiate Cane

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<sup>102</sup> Submission from Canegrowers, 18 November 2016, p. 7.

<sup>103</sup> Submission from Canegrowers, 18 November 2016, p. 8.

<sup>104</sup> Submission from Canegrowers, 18 November 2016, p. 10.

<sup>105</sup> Submission from Kalamia Cane Growers Organisation Ltd, 27 October 2016, p. 1.

<sup>106</sup> Submission from QSL, 28 October 2016, p. 2.

<sup>107</sup> Submission from QSL, 28 October 2016, p. 2.

Supply Agreements with mills *within* their region, as currently allowed under the SIA. However, if authorisation is granted by the ACCC coordination between growers in different cane growing regions will increase and there may be fewer differences in the terms offered to growers by different mill owners.<sup>108</sup>

127. Further, in the absence of authorisation, Wilmar Sugar also submits that:

...the competitive market for GEI sugar marketing will continue to operate, as originally intended by the architects of the amendments to the SIA...GEIMs [GEI marketers] will continue to compete for growers' nominations as the GEIM of choice.<sup>109</sup>

128. However, Wilmar Sugar considers that if authorisation is granted to the proposed arrangements, growers will have the ability to collectively agree to use certain GEI marketers only, or to exclude others.

129. The **ASMC** noted that under the SIA and associated Regulation, growers have had the express right to collectively bargain sugarcane supply agreements with millers on a regional basis since 1999. It considers that authorisation of the proposed conduct is a significant expansion on growers' current ability to collectively bargain under the SIA.<sup>110</sup>

#### **ACCC view**

130. The ACCC notes that a portion of the proposed conduct for which authorisation is sought has a statutory exemption from competition legislation, and would continue with or without authorisation of Canegrowers' proposed collective bargaining arrangements.

131. In particular, the SIA provides a statutory exemption for a group of growers and a mill owner that are within the *same region* to collectively negotiate a Cane Supply Agreement – including in respect of acceptance and crushing of cane at a fixed time, the cane payment price, and a financial incentive scheme of premiums, discounts and allowances relating to cane and sugar quality or to anything that may impact cane and sugar quality having regard to best practice.

132. However, the ACCC understands that some millers consider collective bargaining in certain circumstances falls outside the scope of the statutory exemption under the SIA. The impact of this is that they are advising Canegrowers groups that they are not permitted to collectively negotiate in these circumstances.

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<sup>108</sup> Submission from Wilmar Sugar, 2 November 2016, p. 16.

<sup>109</sup> Submission from Wilmar Sugar, 2 November 2016, p. 17.

<sup>110</sup> Submission from ASMC, 28 October 2016, p. 4.

133. Further, while the 2015 amendments to the SIA provide for growers to nominate their choice of GEI marketer in Cane Supply Agreements, the ACCC is also advised that some millers have not participated in collective negotiations in relation to terms governing the supply of GEI sugar to marketers. For example, Burdekin District Cane Growers submits that:

Wilmar Sugar has refuted that...authorisation pursuant to the SIA provides umbrella coverage of matters specifically pertaining to the 2015 amendments of the SIA. Willmar Sugar has refused to discuss marketing arrangements with bargaining representatives on the basis that authorisation pursuant to the SIA is deficient (which we deny).<sup>111</sup>

134. Therefore, the ACCC considers that without authorisation of the proposed collective bargaining conduct, current contracting processes would continue, which includes collective bargaining albeit on a narrower scale. The ACCC considers that this could result in a higher risk that some millers would not reach On-Supply Agreements with GEI sugar marketers – currently QSL – prior to a grower deciding whether or not to nominate an alternative GEI marketer. In circumstances where growers do not, or are unable to, nominate an alternative marketer, the right to market their GEI sugar defaults to the miller’s nominated marketer.

135. In the future where the proposed collective bargaining conduct occurs the growers would be able to collectively negotiate on the full range of issues relevant to cane supply and payment with millers and marketers. Participation in the collective bargaining would be voluntary for growers, millers and marketers.

## Public benefits

136. Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.<sup>112</sup>

137. **Canegrowers** submits that while collective bargaining of cane supply and related agreements will not completely address the monopoly power of the mill owner, it will go some way to addressing the imbalance of bargaining power that exists and provide a more level playing field for those growers that wish to participate.<sup>113</sup>

138. Canegrowers considers that the proposed conduct will:

- provide increased opportunity to negotiate terms of a supply contract that better reflects the needs of growers than the terms of a standard form contract

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<sup>111</sup> Submission from Burdekin District Cane Growers Limited, 3 November 2016, p. 2.

<sup>112</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

<sup>113</sup> Canegrowers application for authorisation A91558, 23 September 2016, pp 11-12.

- provide increased opportunity to achieve workable implementation arrangements for growers to choose the marketer of grower economic interest sugar.

139. Canegrowers also submits that the cane supply contract and related agreements can be complex and the full suite of documents relating to a grower's cane supply and payment can lead to a number of contracts and hundreds of pages. Collective negotiation of these contracts makes the task easier, rather than individual growers having to embark on such a process. They submit the proposed conduct will result in additional considerable transaction costs savings by:

- streamlining the negotiating process, saving time for both growers and millers in establishing supply contracts
- providing increased capacity to deal with information and commercial confidentiality and securing professional advice where required and
- reduced contract administration costs.

140. **The Australian Sugar Milling Council** submits that:

- While it supports collective bargaining and agrees that it benefits the sugar industry, collective bargaining should not be unlimited and needs a reasonable scope.
- The benefits alleged to arise from the application for authorisation already exist under the current regime authorised by the SIA.
- Mill owners and growers are interdependent and the existing authorisation rectifies any perceived imbalance in bargaining power between growers and mill owners.<sup>114</sup>

141. **MSF Sugar** submits that aspects of the application 'are too broad and uncertain to allow the Commission to ascertain and weigh the public benefits.'<sup>115</sup>

142. It also submits that there is no significant imbalance in bargaining power due to a very close symbiotic relationship between cane growers and millers. 'MSF Sugar cannot afford to treat growers poorly as it will have insufficient cane to profitably operate a sugar mill.'<sup>116</sup>

143. **Wilmar Sugar** submits that:

- Many of the benefits claimed can and are already realised under collective bargaining arrangements authorised by the SIA.
- The logistical complexity involved in harvesting, delivering, transporting and crushing cane is unique to each region, so the benefits of collective bargaining across regions are minimal at best.

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<sup>114</sup> Submission from the Australian Sugar Milling Council, 28 October 2016, p. 5.

<sup>115</sup> Submission from MSF Sugar, 28 October 2016, p. 5.

<sup>116</sup> Submission from MSF Sugar, 28 October 2016, p. 10.

- Claims that there is an imbalance of bargaining power is inconsistent with multiple findings of previous reviews into the Queensland sugar industry.
- It is not clear how larger grower collectives with interests beyond those of a single mill area would simplify the process.
- 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.
- The 'implementation arrangements' for growers to choose the marketer of GEI sugar are quite simple and do not require authorisation of the kind proposed to occur.
- 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 GEI Marketer, might collectively demand that they be made a party to the sugar sales agreement, or that the mill owner agree to sell the GEI sugar to a GEI Marketer on terms dictated by growers. However, any benefits resulting from such conduct would be private benefits accruing to certain growers and their favoured GEI Marketers, often to the detriment of mill owners.<sup>117</sup>

144. **Queensland Sugar Limited** submits that:

- Milling companies often enjoy monopolistic power with respect to the processing of cane. This means there is a significant imbalance of bargaining power between growers and millers. Allowing collective bargaining addresses, to some extent, this significant disparity.
- Cane Supply Agreements 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.
- Milling companies negotiating Cane Supply Agreements 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 being negotiated by each of the groups. Milling companies can use concessions made by one group of growers against another group, without those growers having the benefit of the insight into alternative negotiations in the same way as the milling company. 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.
- The introduction of the Marketing Choice Amendment has created a market in which GEI marketing entities must compete for the business of growers. 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. 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 Cane Supply Agreements.

<sup>117</sup> Submission from Wilmar Sugar, 2 November 2016, pp. 18-24.

Authorising growers to negotiate terms within a Cane Supply Agreement that relate to the terms of On-Supply Agreements may not be captured by the SIA provisions. Such conduct would redress the imbalance of negotiating power between millers and growers.

- The effective implementation of the Marketing Choice Amendment 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 Cane Supply Agreements 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.<sup>118</sup>

145. In a later submission responding to some of the issues raised by interested parties, **Canegrowers** submits that:

- the current interpretation of the statutory exemptions by certain millers is very narrow and they have been actively excluding from collective negotiations matters that have traditionally been accepted as being part of Cane Supply Agreements (such as molasses gain sharing and in some cases pricing and pooling).
- Millers are also excluding from collective negotiations any proper consideration of the essential components of the terms under which GEI marketers can acquire GEI sugar. In doing so, they are limiting growers' ability to ensure consistency between Cane Supply Agreements and sugar On-Supply Agreements.
- An ability for growers to be engaged in the development of terms of an On-Supply Agreement will hasten the development of that agreement and the Cane Supply Agreement. Such a process occurred with MSF Sugar where Canegrowers and the relevant local Canegrowers companies were actively involved in establishing the key principles on which the On-Supply Agreement would be based. This smoothed the development of the On-Supply Agreement and enabled the timely conclusion of the associated Cane Supply Agreement.<sup>119</sup>

### **ACCC view**

146. The ACCC considers the proposed conduct is likely to result in public benefits from transaction cost savings and better input into contracts.

147. The ACCC recognises that the relevant benefits from being able to negotiate terms to deal with procedural complexities such as harvest rotation systems and CCS averaging across canegrowers supplying a mill are reduced because some of them would likely be achieved in the future without the conduct, since the SIA authorises collective bargaining by growers supplying a common mill. However, some aspects of arrangements relevant to cane growers' supply of cane to mills may not be clearly allowed for under the SIA. Further it would appear that the protection afforded by the SIA does not extend to collective negotiation of terms in Cane Supply Agreements that relate to millers' On-Supply Agreements with sugar

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<sup>118</sup> Submission from QSL, 28 October 2016, pp. 3-6.

<sup>119</sup> Submission from Canegrowers, 18 November 2016, pp. 11-12.

marketers and any agreements growers may wish to enter into with sugar marketers.

148. The ACCC considers that the proposed conduct is likely to result in public benefit through reducing growers' bargaining disadvantage. Individual growers generally do not have access to the same resources and information that millers have. This may allow for more effective negotiation, allowing negotiating parties a greater opportunity to identify and achieve efficiencies that better reflect the circumstances of growers and millers. Collective bargaining is also likely to enable growers to become better informed of relevant market conditions and options available to them, which is likely to improve their input into contractual negotiations with millers to achieve more efficient outcomes.
149. The ACCC considers that collective bargaining by growers about terms and conditions relating to terms of Cane Supply Agreements that relate to millers contracting with sugar marketers and any agreements growers may wish to enter into with sugar marketers may facilitate the introduction of competition in the provision of GEI sugar marketing services. To the extent this occurs, the ACCC considers this would be a public benefit.

## Public detriments

150. Public detriment is also not defined in the Act and the ACCC adopts a broad approach. This is consistent with the Tribunal, which has defined it as:

...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.<sup>120</sup>

151. **Canegrowers** submits that the proposed collective bargaining conduct will not result in any public detriment. In particular, it submits that the sugar industry has been built on a system of 'statutory authorised' collective bargaining of cane supply contracts. Following deregulation, there has been a range of related agreements that are essential parts of the cane supply and payment chain for growers – for example, forward pricing contracts, and On-Supply Agreements dealing with the sale of GEI sugar to GEI marketers.
152. However, Canegrowers submits that the statutory exemption for collective bargaining under the SIA may no longer be sufficiently wide enough, for growers to properly and freely collectively bargain all matters relating to cane supply and in related agreements.
153. Canegrowers submits that with or without the proposed collective bargaining conduct, growers and millers are free to enter individual agreements should they choose to do so. Further, it considers the following features of the application for authorisation also minimises, if not eliminates, any public detriments likely to be generated by the proposed arrangements:
- it does not propose to centralise negotiations for the negotiation of a single-state wide cane supply and related agreements, but to support collective negotiations at the local level on all relevant issues and

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<sup>120</sup> *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

- Canegrowers (head office) does not seek authorisation for itself to assume the direct principal bargaining role, but merely to provide advice and assistance to local Canegrowers companies in support of the local collective bargaining activities.

154. Some interested parties consider the proposed collective bargaining arrangements are likely to result in public detriments, including:

- increased costs and delays in negotiations
- reducing competition in the market for the supply of pricing and GEI marketing services
- increased coordination between local Canegrowers companies beyond existing levels will substantially increase growers' bargaining power
- uncertainty surrounding the breadth of proposed collective bargaining for 'any other contracts or arrangements' relating to the supply or processing of sugar cane and
- the Queensland sugar industry will be less attractive for investment.

155. The ACCC's assessment of the likely public detriments from the proposed conduct follows.

### Potential for increased costs and delays in negotiations

156. **Wilmar Sugar** submits that collectively negotiating Cane Supply Agreements and related agreements across growing regions is likely to result in lengthier, more difficult and more expensive negotiations. In particular it submits that:

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.<sup>121</sup>

157. Further, Wilmar Sugar considers that negotiation in one mill area could 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 Cane Supply Agreement, are prevented from doing so in the interests of pursuing bargaining positions on a State-wide basis.<sup>122</sup>

### ACCC view

158. The ACCC notes that Canegrowers has expressly stated that it does not intend to negotiate state-wide Cane Supply Agreements or related agreements. It is also not seeking authorisation for one regional group of growers to hold up finalising cane supply negotiations in another mill area. Canegrowers (head office) advises that its primary role in relation to cross regional collective negotiations will be to share information about common industry issues and to provide assistance to local Canegrowers companies, who will still be responsible for conducting mill-area specific collective negotiations.

<sup>121</sup> Submission from Wilmar Sugar, 2 November 2016, p. 24.

<sup>122</sup> Ibid.

159. The ACCC notes that of the seven milling companies in Queensland, only three have mills that operate across sugar cane growing regions – that is, Wilmar Sugar, Mackay Sugar and MSF Sugar.
160. With respect to proposed collective negotiations across regions with common mill ownership or with any mill owner or GEI marketer (that is, ‘tier 2’ or ‘tier 3’ negotiations), Canegrowers (head office) may be invited to participate directly in a local negotiation in one area and then separately to participate directly in the negotiation occurring in a different area. Also, for proposed collective bargaining across regions with common mill ownership (that is, ‘tier 2’), the relevant local Canegrower companies may, but are not obliged to, negotiate collectively with the same mill owner.
161. The ACCC considers that given the proposed collective bargaining arrangements are voluntary, and primary collective negotiations will continue at the local mill level, the conduct is not likely to result in a significant increase in costs associated with bargaining or lead to a significant increase in delays in bargaining with millers or sugar marketers. Indeed, the ACCC notes Wilmar Sugar’s submission that ‘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.’<sup>123</sup>
162. In addition, the ACCC notes the submission from Canegrowers that in negotiations with MSF Sugar, ‘local Canegrowers companies were actively involved in establishing the key principles on which the On-Supply Agreement would be based. This smoothed the development of the On-Supply Agreement and enabled the timely conclusion of the associated Cane Supply Agreement.’<sup>124</sup>

### Potential to increase contract uniformity

163. **MSF Sugar** is concerned that Canegrowers’ application seeks authorisation for collective bargaining across a wider geographic range than what is currently authorised under the SIA – that is, across regions with a common mill owner or sugar marketer, and across regions with any miller or sugar marketer. It is concerned that this aspect of the proposed conduct fails to recognise that:
- ...there are significant differences across cane growing regions which require different terms in cane supply contracts. As the details of cane supply contracts across regions are not uniform due to regional variances...it is not feasible or desirable for growers to collectively bargain for the terms of cane supply contracts that do not, and in many instances, cannot, apply to their cane.<sup>125</sup>
164. Similarly, the **ASMC** expressed concerns that should authorisation be granted by the ACCC, ‘it would provide the means for Canegrowers to shift the sugarcane industry ‘back in time’ to a more centralised approach’.<sup>126</sup>
165. Further, **Wilmar Sugar** submits that proposed collective bargaining across regions may result in less differentiation in the terms offered to growers by different millers.<sup>127</sup>

<sup>123</sup> Submission from Wilmar Sugar, 2 November 2016, p. 16.

<sup>124</sup> Submission from Canegrowers, 18 November 2016, p. 12.

<sup>125</sup> Submission from MSF Sugar, 28 October 2016, p. 8.

<sup>126</sup> Submission from ASMC, 28 October 2016, p. 6.

166. Conversely, **Australian Cane Farmers** submits that in order to maintain a competitive position when supplying a monopoly miller, it is necessary for growers:
- To have the ability to collectively bargain within and across regions and
  - For growers and their bargaining representatives to be able to consult their fellow representatives and specialist advisers in related entities.<sup>128</sup>
167. **QSL** submits that allowing growers from different regions to negotiate with each other would not impact competition. In particular, it submits that a grower from one region cannot transport cane in a commercially sensible way to a mill in a different region. As such, it considers that it is difficult to see how growers who supply cane in vastly removed geographic locations could ever compete with each other to supply a mill.<sup>129</sup>
168. Further, QSL notes that ‘historically, milling companies did not operate across multiple regions with the frequency that now exists.’ It considers that:
- Milling companies negotiating CSAs [Cane Supply Agreements] on the same issues with multiple groups of growers allows milling companies to have significantly better insight and transparency into the negotiations than cane grower 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.<sup>130</sup>

#### **ACCC view**

169. Generally, the ACCC considers that arrangements which result in inefficient uniformity across supply contracts would be a public detriment. However, the ACCC considers that any such detriment is likely to be limited in the current application, particularly given that:
- Canegrowers is not seeking to collectively negotiate a single state-wide cane supply agreement
  - primary negotiations of Cane Supply Agreements and other agreements will still be locally based, taking into account regional supply and pricing issues and
  - the proposed collective bargaining arrangements are voluntary and as such, parties would not be expected to enter into arrangements that are not mutually beneficial.
170. Further, Canegrowers submits that there are differences between cane growing areas that will appropriately result in differences in some of the terms of Cane Supply Agreements across regions.

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<sup>127</sup> Submission from Wilmar Sugar, 2 November 2016, p. 16.

<sup>128</sup> Submission from Australian Cane Farmers, 28 October 2016, p. 1.

<sup>129</sup> Submission from QSL, 28 October 2016, p. 6.

<sup>130</sup> Submission from QSL, 28 October 2016, p. 3.

## Reduced competition in the provision of GEI marketing services

171. **Canegrowers** submits that given growers bear the full financial consequences (revenues and cost) arising from the sale of GEI sugar, it is clearly important that the proposed authorisation provide the ability for growers to collectively bargain all matters associated with the transfer of title to GEI sugar from the mill owner to the GEI marketer. Because the grower is restricted to choose a GEI marketer with which the mill owner has an On-Supply Agreement and because the terms of the On-Supply Agreement directly impact the flow of revenues and costs to growers, it considers it is important that proposed collective bargaining arrangements cover the 'essential terms under which the mill owner will enter an On-Supply Agreement with the GEI marketer.'<sup>131</sup>
172. **Wilmar Sugar** considers that the proposed arrangements are likely to reduce competition in the market for the supply and acquisition of GEI marketing services. In particular, Wilmar Sugar considers that the proposed arrangements would provide growers the ability to:
- reach agreement as to how they would exercise their 'choice'
  - demand that mill owners (who may also operate as a GEIM [GEI sugar marketer]) agree to terms about the sale of GEI sugar to competing marketers.<sup>132</sup>
173. Further, Wilmar Sugar considers that the proposed conduct would provide growers with the power to:
- unduly favour the interests of growers over the interests of GEIMs [GEI sugar marketers] generally or
  - favour a preferred GEIM over others or
  - exclude a GEIM from the market if the grower collective saw fit to do so.<sup>133</sup>
174. For these reasons, Wilmar Sugar considers the proposed conduct 'would undo the very competition that was sought to be created by the 2015 amendments to the SIA.'
175. Similarly, the **ASMC** submits that the proposed arrangements could potentially lessen competition if individual growers seek to collectively bargain the terms on which competitive marketing entities market GEI sugar.<sup>134</sup>
176. In response, **Canegrowers** submits that:
- Giving growers or their collective bargaining agents an ability to reach agreements on how they exercise their choice in the marketing of GEI sugar is precisely what the SIA sought to enable. Rather than undoing competition, the negotiating ability will strengthen competition by ensuring mills do not use the OSA [On-Supply Agreement] as a means of limiting the ability of GEI marketers (current or potential) to make competitive offerings to growers.<sup>135</sup>

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<sup>131</sup> Submission from Canegrowers, 18 November 2016, p. 1.

<sup>132</sup> Submission from Wilmar Sugar, 2 November 2016, p. 2.

<sup>133</sup> Submission from Wilmar Sugar, 2 November 2016, p. 25.

<sup>134</sup> Submission from the ASMC, 28 October 2016, p. 6.

<sup>135</sup> Submission from Canegrowers, 18 November 2016, p. 11.

177. **MSF Sugar** notes that the effect of the 2015 amendments to the SIA regarding grower choice of marketing is that the ‘mill owner bears the commercial risk and responsibility of developing commercial terms with sugar marketers, ensuring that these terms are congruent with the mill owner’s terms with the grower, and ultimately to effect the sale of the on-supply sugar equivalent to the GEI sugar.’<sup>136</sup>
178. In this regard, MSF Sugar considers it is not ‘practical or reasonable’ for mill owners to have the terms under On-Supply Agreements for GEI sugar subject to collective bargaining by growers, who are not party to that On-Supply Agreement.
179. Conversely, **Burdekin District Cane Growers Limited** submits that following the Marketing Choice Amendment, growers have a statutory interest in the sugar produced from their sugar cane and can choose a marketer to determine the sugar value of their portion of the GEI sugar. As such, it submits that:
- ...growers have an interest in the contract between the miller and the grower’s choice of marketer for the sale of GEI Sugar, given the proceeds of sale of GEI Sugar are directly correlated to what growers are paid by the miller for their cane.<sup>137</sup>
180. **QSL** considers that one of the matters not appropriately captured by the existing statutory exemption under the SIA is the ‘need for growers to negotiate terms relating to the marketing and the on-supply of grower economic interest sugar.’<sup>138</sup>
181. QSL goes on to submit that 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 the Cane Supply Agreements with their miller. For example, growers may seek to ensure that their milling company enters an On-Supply Agreement on a specified set of terms. QSL considers that without the ability to specify such terms, the ability to nominate a GEI marketing entity under the SIA is relatively meaningless.<sup>139</sup>
182. Further, QSL submits that allowing growers to collectively negotiate terms related to their GEI sugar and On-Supply Agreements between their miller and nominated GEI marketer, redresses 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 any On-Supply Agreement, due to the drafting of the Marketing Choice provisions of the SIA.<sup>140</sup>

### **ACCC view**

183. The ACCC considers that, given the arrangements are voluntary, proposed collective negotiations with mill owners, specifically in relation to terms or principles concerning marketing of GEI sugar within a Cane Supply Agreement, are unlikely to reduce competition between GEI marketers. For the same reason, the ACCC considers that collective negotiation of pricing and pooling contracts between growers and GEI marketers is unlikely to lessen competition in the provision of GEI marketing services to growers.

<sup>136</sup> Submission from MSF Sugar, 28 October 2016, pp. 4-5.

<sup>137</sup> Submission from Burdekin District Cane Growers Limited, 3 November 2016, p. 2.

<sup>138</sup> Submission from QSL, 28 October 2016, p. 2.

<sup>139</sup> Submission from QSL, 28 October 2016, p.5.

<sup>140</sup> Submission from QSL, 28 October 2016, p. 5.

184. Importantly, authorisation is not sought for a collective boycott, and as such, any authorisation granted by the ACCC would not provide immunity to local Canegrowers companies to collectively decide to not deal with or exclude particular GEI marketers.
185. Further, the ACCC considers that rather than seeking to reduce competition, Canegrowers is seeking to engage in the proposed conduct to increase the likelihood of the negotiation of acceptable On-Supply Agreements, or to help avoid further delays in finalising such agreements with a nominated third-party GEI marketer. Growers are restricted to choose a GEI marketer that has signed an On-Supply Agreement with their local miller. In circumstances where growers do not, or are unable to, nominate an alternative marketer, the right to market their GEI sugar defaults to the miller's nominated marketer (often a related entity). The ACCC considers the proposed collective bargaining arrangements could facilitate parties reaching On-Supply Agreements, and therefore enable growers to exercise their choice of GEI marketer, which would result in increased competition in the provision of GEI marketing services to those growers.
186. The ACCC notes that Canegrowers is also seeking authorisation to participate in negotiations directly relating to the establishment of the On-Supply Agreement between the mill owner and the GEI marketer. Canegrowers advises that its preferred position is that it would like to be at the table and involved in the discussion and negotiation of the On-Supply Agreement. It considers there is no reason why the On-Supply Agreement should not be a tripartite agreement between the miller, GEI marketer and the local growers.
187. In this regard, the ACCC notes that any authorisation of proposed voluntary collective bargaining arrangements cannot force the various parties to negotiate with each other. In this case, an ACCC authorisation cannot force the miller to collectively negotiate an On-Supply Agreement with QSL and the local Canegrowers' company. Having said this, the ACCC understands there is a recent example within the industry where the parties successfully adopted a 'tripartite approach' to the negotiation of an On-Supply Agreement. In a recent statement issued by QSL concerning its ongoing negotiations with Wilmar Sugar, it explained that it considers:
- ...the most expeditious and effective way to reach agreement is a tripartite approach to negotiations, involving Wilmar Sugar, QSL and the growers who will ultimately bear the cost of this OSA [On-Supply Agreement]. This approach not only ensures transparency, but has proven success, and made a significant contribution to the Marketing Choice arrangements now in place with MSF Sugar. There is absolutely no reason why this approach cannot be replicated, should Wilmar sincerely believe their full proposal will withstand grower scrutiny.<sup>141</sup>
188. Given the voluntary nature of the proposed collective bargaining arrangements the ACCC considers that, to the extent parties within the sugar industry consider a tripartite approach to negotiating On-Supply Agreements could lead to mutually beneficial outcomes, any such negotiations are unlikely to result in public detriment.

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<sup>141</sup> QSL Update, *2017 Marketing Choice*, p. 218 November 2016.

## Breadth and uncertainty of proposed conduct

189. **MSF Sugar** submits that the potential breadth of proposed collective negotiations could result in inefficient outcomes. In particular, MSF Sugar expressed concern that seeking authorisation to extend collective bargaining to '*any other contracts or arrangements relating to the supply or processing of sugar cane*' is too broad and uncertain to allow the ACCC to assess and weigh the likely public benefits and detriments. This uncertainty could lead to disagreements between growers and millers about the coverage of any ACCC authorisation, producing inefficient outcomes for the industry.

190. For example, MSF Sugar contends that:

...this could extend to authorisation of collective bargaining in relation to cane transport costs, fuel supply contracts related to that transport, procurement contracts for milling and related processing equipment, and even enterprise bargaining agreements with staff operating the supply and processing of sugarcane.<sup>142</sup>

191. **Canegrowers** submits that certain mills' current approach to collective bargaining and the statutory exemption provided under the SIA is to adopt a narrow interpretation, and some millers have:

...actively excluded from collective negotiation matters that have traditionally been accepted as being part of CSA [Cane Supply Agreement] negotiations (such as molasses gain sharing and in some cases, pricing and pooling).<sup>143</sup>

### ACCC view

192. In response to a request for further information about the proposed conduct from the ACCC, Canegrowers advised that in addition to collective negotiation of terms and conditions relating to the supply of sugar cane to millers within Cane Supply Agreements, 'related agreements' could include:<sup>144</sup>

- pricing, pooling and payment contracts between the grower and GEI marketer. The GEI marketer could be either the local miller or a third party GEI marketer, such as QSL and
- Molasses Gain Sharing Agreements (that exist in Wilmar Sugar mill areas), the terms of which were recently included in Cane Supply Agreements with Wilmar Sugar.

193. The ACCC notes that Canegrowers does not intend to extend collective negotiations more broadly to the kinds of contracts referred to in MSF Sugar's submission. Generally, Canegrowers seeks authorisation for terms and conditions relating to the supply of and payment for sugar cane with millers and marketers, regardless of what agreement these terms and conditions ultimately fall within. The ACCC notes that the movement of certain terms and conditions that have historically fallen within Cane Supply Agreements into new agreements has occurred, and is outside the control of growers. The current statutory authorisation under the SIA is linked to Cane Supply Agreements only.

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<sup>142</sup> Submission from MSF Sugar, 28 October 2016, p. 5.

<sup>143</sup> Submission from Canegrowers, 18 November 2016, p. 11.

<sup>144</sup> Submission from Canegrowers, 18 November 2016, p.5.

194. Given that the proposed arrangements are voluntary (for growers, millers and marketers), relate to cane supply and payment terms and conditions, and will primarily be locally based, the ACCC considers that there is unlikely to be any significant public detriment arising from the collective negotiation of 'any other contract relating to the supply of or processing of sugar cane.'

## **Balance of public benefits and detriments**

195. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the proposed collective bargaining conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment, including any lessening of competition.

196. The ACCC acknowledges that many terms of Cane Supply Agreements can be collectively negotiated in Queensland with or without ACCC authorisation (under the statutory exemption provided by the SIA). However, to the extent that there is uncertainty within the industry about the scope of the SIA, the purpose of the proposed arrangements is for local Canegrowers companies to engage in collective negotiations on behalf of growers in relation to the full range of terms and conditions relating to cane supply and cane payment with mill owners and sugar marketers, regardless of which agreement they ultimately fall within.

197. The ACCC considers the proposed arrangements are likely to result in public benefits from:

- transaction cost savings and
- facilitating growers having more effective and timely input into negotiations with mill owners and marketers.

198. Also, in circumstances where growers have a right to nominate a marketer of their GEI sugar, the ACCC considers that the proposed arrangements are likely to result in public benefit by facilitating grower choice, and therefore competition, in the provision of GEI marketing services to growers.

199. Conversely, the ACCC does not consider that the proposed arrangements are likely to result in significant public detriment given that:

- collective negotiations are voluntary for growers, millers and marketers
- Canegrowers does not intend to negotiate and enter into a single state-wide Cane Supply Agreement or related agreements and
- primary collective negotiation will remain at the local level and cater for regional differences, with Canegrowers proposing to facilitate the exchange of information in relation to common industry issues only.

200. Therefore, the ACCC is satisfied that the likely benefit to the public would outweigh the detriment to the public including the detriment constituted by any lessening of competition that would be likely to result.

201. Accordingly, the ACCC is satisfied that the relevant net public benefit tests are met.

202. The ACCC notes that its assessment of the proposed arrangements has taken account of clarifications set out in Canegrowers' submission of 18 November 2016, including its role in collective negotiations, the nature of information sharing between growers across cane growing regions, and importantly, what conduct is not intended under the proposal. The ACCC considers that the conduct described by Canegrowers in its submission of 18 November 2016 is narrower than the conduct described in the application for authorisation.

## Length of authorisation

203. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>145</sup> This allows the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

204. In this instance, Canegrowers seeks authorisation for ten years. In support of its request, Canegrowers advises that the normal crop cycle for sugar cane is five years, with plant year and then re-harvesting of the ratoons for a further four years. The cane is then ploughed out, the ground left fallow or rejuvenated with a rotation crop and then replanted.<sup>146</sup>

205. Further, Canegrowers advises that the usual approach to Cane Supply Agreements is that after a typical initial term of up to three years, they are rolling agreements. The ACCC understands that there is an opportunity for the local Canegrowers companies and the relevant miller to revisit the agreements annually. These reviews generally focus on operational issues associated with the delivery of cane to a mill. Canegrowers also advises that contracts are also structured in a way that, for sugar not yet committed, growers can update their pricing and marketing elections annually should they so wish.

206. Wilmar Sugar submits that Cane Supply Agreements are generally 'roll over contracts'. It considers that should authorisation be granted by the ACCC, it is possible that some growers might seek re-negotiation of Cane Supply Agreements already agreed for future seasons, which would require the parties to allocate significant resources to repeat protracted and costly negotiations, for agreements freely entered into, within a short period of time.<sup>147</sup>

207. The ACCC notes that the statutory exemption provided by the SIA also covers any variations of a collective cane supply agreement.

208. Given the voluntary nature of the proposed arrangements, and the ACCC's conclusions that the arrangements are likely to result in public benefits and no significant public detriments, the ACCC is proposing to grant authorisation for ten years. The authorisation would commence from the date the proposed authorisation takes effect. The ACCC invites feedback from interested parties regarding the proposed period of authorisation.

209. The ACCC notes that pursuant to section 91B of the Act, it is able to revoke an authorisation where there has been a material change in circumstances, among other things, since authorisation was granted.

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<sup>145</sup> Subsection 91(1).

<sup>146</sup> Canegrowers' application for authorisation A91558, 23 September 2016, p. 6.

# Draft determination

## The application

210. On 23 September 2016 Queensland Cane Growers Organisation Ltd (**Canegrowers**) lodged application for authorisation A91558 with the Australian Competition and Consumer Commission (ACCC). Application A91558 was made using Form B, Schedule 1 of the Competition and Consumer Regulations 2010.
211. The application was made under subsection 88(1) and 88(1A) of the *Competition and Consumer Act 2010* (the Act) to collectively bargain and make cane supply and related contracts between sugarcane growers, processors (millers) and sugar marketers.
212. Canegrowers seeks authorisation for collective bargaining in relation to the following matters:
- harvesting of cane
  - delivery of cane to the mill or delivery points
  - transport and handling of cane by the mill
  - acceptance and crushing of cane by the mill
  - payment to growers by the mill owner
  - forward pricing terms
  - essential terms governing the supply of Grower Economic Interest (GEI) sugar to the GEI sugar marketers
  - capturing the value of the by-products and related products from sugar cane and
  - any other contracts or arrangements relating to the supply of or processing of sugar cane.
213. Further, authorisation was sought for collective bargaining across three levels:
- i. within each district by each relevant local Canegrowers company so that collective negotiation can occur with the local mill owner and sugar marketer (**'tier 1'**)
  - ii. across and between each district that has common mill ownership so that each of the relevant local Canegrowers companies and Canegrowers can negotiate collectively with the common mill owners and sugar marketers (**'tier 2'**) and
  - iii. across and between each district regardless of mill ownership so that each of the relevant local Canegrowers companies and Canegrowers can

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<sup>147</sup> Submission from Wilmar Sugar, 2 November 2016, p. 26.

negotiate collectively with any and all mill owners and sugar marketers ('**tier 3**').

214. Canegrowers subsequently clarified on 18 November 2016 that it does **not** seek authorisation for itself to assume the direct principal bargaining role, this will remain with local Canegrowers companies. Canegrowers' role is to provide advice and assistance to local Canegrowers companies. Further, Canegrowers advises that it does **not** seek authorisation to negotiate single state-wide cane supply and related agreements. Canegrowers also clarified the nature of the information sharing proposed under 'tier 2' and 'tier 3'.
215. Canegrowers seeks authorisation of these arrangements as they may contain a cartel provision and may have the effect of substantially lessening competition within the meaning of section 45 of the Act.
216. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

## **The net public benefit test**

217. For the reasons outlined in this draft determination, pursuant to sections 90(5A), 90(5B), 90(6) and 90(7) of the Act the ACCC considers that in all the circumstances the proposed collective bargaining arrangements for which authorisation is sought is likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct.

## **Conduct which the ACCC proposes to authorise**

218. The ACCC proposes to grant authorisation to Canegrowers (including current and future members of Canegrowers and local Canegrowers companies):
  - i. who supply cane to the same mill – to collectively bargain, and make and give effect to provisions of cane supply and related contracts, with that miller and with sugar marketers in relation to:
    - harvesting of cane
    - delivery of cane to the mill or delivery points
    - transport and handling of cane by the mill
    - acceptance and crushing of cane by the mill
    - payment to growers by the mill owner
    - forward pricing terms
    - essential terms governing the supply of Grower Economic Interest (GEI) sugar to the GEI sugar marketers, and
    - capturing the value of the by-products and related products from sugar cane (collectively '**Cane Supply Terms and Conditions**');

- ii. who supply cane to any mill that has the same owner – collectively bargain, and make and give effect to provisions of cane supply and related contracts, with that mill owner and with sugar marketers in relation to Cane Supply Terms and Conditions; and
  - iii. to share information across and within districts to facilitate the adoption of best practice in terms of contracts and related provisions where they choose to do so. The proposed authorisation also allows Canegrowers (head office) to provide information and services to local Canegrowers companies to support their local collective negotiations, including drafting contracts and dispute resolution procedures.
219. The ACCC proposes to grant authorisation A91558 for ten years, commencing from the date the proposed authorisation takes effect.
220. The ACCC notes that authorisation does not oblige parties to participate in collective bargaining arrangements.
221. This draft determination is made on 15 December 2016.

## **Conduct not proposed to be authorised**

222. In accordance with the additional information provided by Canegrowers on 18 November 2016, the proposed authorisation does not extend to Canegrowers collectively negotiating a single state-wide Cane Supply Agreement or related agreements with processors or sugar marketers. It also does not extend to Canegrowers (head office) assuming the principal bargaining role in any collective negotiations.

## **Further submissions**

223. The ACCC now seeks submissions on the draft determination from interested parties, including in relation to the proposed duration of authorisation. In addition, Canegrowers or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.

## Attachment A - Summary of relevant statutory tests

**Subsections 90(5A) and 90(5B)** of the Act provide that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:

- the provision, in the case of subsection 90(5A) would result, or be likely to result, or in the case of subsection 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(5A) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of subsection 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

**Subsections 90(6) and 90(7)** of the Act state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:

- the provision of the proposed contract, arrangement or understanding in the case of subsection 90(6) would result, or be likely to result, or in the case of subsection 90(7) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 90(6) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to, or in the case of subsection 90(7) has resulted or is likely to result from giving effect to the provision.