30 January 2017

David Hatfield
Director
Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601

BY EMAIL: adjudication@accc.gov.au

Dear Mr Hatfield

Submission by the Australian Sugar Milling Council to the Australian Competition and Consumer Commission in response to the DRAFT determination relating to the application for authorisation lodged by Queensland Canegrowers (A91558)

The Australian Sugar Milling Council (ASMC) made a submission to the ACCC relating to this matter on 21 October 2016.

Subsequently, the ACCC announced on 15 December 2016 that it 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.

ASMC submitted in October 2016 that the ACCC should refuse to grant the authorisation requested. ASMC retains this view on the basis that the sugar industry was de-regulated in 2006 to break free from the inefficient, anti-competitive practices that characterised the Queensland sugar industry prior to 1 January 2006. ASMC notes the proposed conditions around conduct not proposed to be authorised go some way to addressing the ASMC's concerns in relation to the Application, however there are a number of areas that bear further consideration and clarification.

In particular, there is a degree of ambiguity about what is intended to be authorised, and what is authorised in practice. ASMC contends this will lead to further costs and uncertainty.

ASMC submits that the ACCC should be very clear in its final determination about what conduct is and isn't authorised. The ASMC makes suggestions in the attached submission as to how the final determination could be varied to provide a greater level of clarity for interested parties.

ASMC in this submission also comments on a number of matters discussed by the ACCC in the DRAFT determination which are inaccurate or require further explanation.

Should you have any further questions or wish to discuss the content of this submission, please contact me on 07 3231 5000 or at asmc@asmc.com.au.

Yours sincerely

Dominic V Nolan

Chief Executive Officer

1. Potential conflict in conduct authorised and not authorised in the DRAFT determination

In paragraph **218** the ACCC outlines the conduct which is proposed to be authorised. Included at **iii** is the provision:

> *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.*

In paragraph **222** the ACCC sets out conduct not proposed to be authorised as follows:

> *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.*

The potential for there to be conflict in the conduct which is authorised and that which isn't arises by the inclusion of the term "best practice" in paragraph **218**. It is difficult to see how the conduct authorised in paragraph 218(iii) will encourage anything other than the proliferation of almost identical terms and conditions across multiple "contracts and related provisions" – something akin to the state-wide arrangements that are expressly not proposed to be authorised.

The DRAFT determination proposes that Canegrowers would have oversight of potentially all cane supply agreements. This is likely to act as a disincentive for mill companies to negotiate new and novel terms and conditions in cane supply agreements with their growers because any terms proposed by one mill will be shared by Canegrowers across and within districts. These will become subject to comparisons with terms and conditions proposed by other mill owners and open the opportunity for a 'cherry-picking' approach to negotiations.

ASMC is aware that new arrangements have been included in contracts negotiated in the recent past to retain cane supply where there is competition between mills for cane supply, or where there is competition for land use for purposes other than growing sugarcane. By authorising the sharing of information across districts that do not share common owners, potentially competitive and confidential information will be shared between grower collectives, to the detriment of mill companies in competition with other mills and marketing companies. Mill and marketing companies will not have the same access to their competitors' information.

Given the nature of the Canegrowers organisation, it will find it very challenging to accept a situation where different levels of incentives are offered across its membership in cane supply agreements by different mill and marketing companies. ASMC contends that the ACCC's authorisation of Canegrowers "to share information across and within districts to facilitate the adoption of best practice in terms of contracts and related provisions" will facilitate a return to the non-competitive and debilitating 'adverse effects' filter being once again applied to cane supply agreements,[1] and a move back to a 'one-size-fits-all' mentality that has plagued the

[1] The 'adverse effects' principle was a set of formal and informal rules which had the effect of blocking productivity uptake by preventing individual agreements from including provisions that would have a significant adverse effect on growers supplying cane to a mill under a collective agreement. The principle and its impact on the Queensland Sugar Industry was discussed in the 2003 report commissioned by the Queensland Government entitled 'Sugar: the Way Forward' at pp 31 – 35.

Queensland sugar industry in the past. The ACCC recognises that arrangements which result in inefficient uniformity across supply contracts would be a public detriment in paragraph 169.

ASMC submits that any authorisation to share information to facilitate the adoption of best practice should be limited to sharing of information between growers who supply mills that have the same owner, rather than the sharing of information on a state wide basis.

2. Right to participate not authorised

The ACCC in paragraphs **186** and **187** expresses a view relating to the request by Canegrowers in its letter of 18 November to the Commission seeking authorisation to **participate** in negotiations directly relating to the establishment of the on-supply agreement between the mill owner and the GEI marketer as follows:

> *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.*
>
> *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.*[2]

ASMC believes that the ACCC needs to strengthen its commentary that its authorisation does not extend to conveying a right to any party to participate in a negotiation. ASMC believes that the DRAFT determination could be incorrectly construed as entitling growers to participate in negotiations.

ASMC believes that paragraph **220** of the DRAFT determination should be strengthened to expressly state in the final determination that "the ACCC authorisation does not in any way force a miller to collectively negotiate an On-Supply Agreement with QSL or any other marketing company and the local Canegrowers' company."

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2 QSL Update, *2017 Marketing Choice, p. 218 November 2016.*

3. Clarification of matters in the DRAFT determination

The opening paragraph of the Summary section of the DRAFT determination incorrectly describes the revenue flow in the sugar industry. Milling companies are not paid on the basis of providing a milling service for growers to convert their cane into the saleable commodity of raw sugar.

A more accurate description of the commercial relationship between a grower and a mill to which a grower sells sugarcane follows:

> *Under long standing industry arrangements, growers have sold their sugarcane to a local mill which processes it into raw sugar. Up until 2006 the raw sugar produced was sold to a statutory single desk marketer (QSL or its predecessor organisations) and since then it has either been sold to the former single desk marketer by mills under a voluntary arrangement, or marketed directly by the sugar milling company. In either arrangement, the revenue for the sugar was paid to the mill and the price achieved for the sugar (which can now be predominantly determined through a price hedging choice made by the grower) is factored into the cane payment formula. This formula determines the final amount that mills pay growers for their sugarcane. This has been typically between 60 and 65 percent of the total revenue received for the raw sugar.*

Similarly, the ACCC has identified one of 'The relevant areas of competition' as the supply of milling services in paragraph **117**. To the extent the term 'milling services' implies some form of fee for service with ownership of the sugarcane and raw sugar residing with the growers, it is incorrect. The commercially negotiated cane supply agreements in the industry clearly provide for the sale of sugarcane by a grower to a milling company utilising a historically proven cane payment formula to establish the price for the sugarcane. There is no market for milling services, separate from the market for supply and acquisition of sugar cane.

4. Revenues from by-products are unrelated to the value of GEI sugar

In their letter of 18 November 2016, Canegrowers asserted that:

- *It is important that related agreements are included in the authorisation because the terms of these related agreements have a direct impact on the value of GEI sugar and on how that value is transferred from the GEI marketer to the grower.*

Canegrowers then set out some examples of the related agreements which included the sharing of revenues from by-products of sugarcane (Point 2 (a) (iii) in the Canegrowers letter of 18 November 2016).

However, contrary to Canegrowers' statement, there is no relationship between the value of GEI sugar and the sharing of revenues from by-products of sugarcane or how that value is transferred from the GEI marketer to the grower.

Sugar mills purchase sugarcane from growers under terms and conditions negotiated in various Cane Supply Agreements between mills and growers. While these are different for each mill area, and mill areas may have different contracts with different growers and groups of growers, there are some consistent elements in contemporary commercial arrangements.

The Cane Supply Agreement clearly sets out the terms and conditions for payment by the sugar mill to sugarcane growers for sugarcane. Transfer of legal title of sugarcane passes from growers to mills at the point of delivery by the growers to the mill. There are various physical locations that this occurs depending on specific contractual terms, mill transportation infrastructure, and farm location. It is often at the cane railway siding, or collection point for transport of harvested

sugarcane to the mill. In sugarcane supply contracts, this 'delivery' effectively means that the title and risk in the sugarcane passes to the mill owner at the Point of Delivery.

After arrival at the sugar mill factory, the sugarcane purchased by the mills then undergoes substantial transformation into a range of products and by-products, including raw sugar, molasses, mill-mud and ash, and bagasse (the fibrous material that remains after crushing sugar cane). Ownership of these products unambiguously resides with the milling company that produces them.

There is no right of ownership to growers of the raw sugar or the by-products.

ASMC submits that the last dot point of section **i** in paragraph **218** should be removed from the final determination as the sharing of revenues from by-products has no relationship to the value of GEI sugar or how that value is transferred from the GEI marketer to the grower.

5. No imbalance of bargaining power

The DRAFT determination appears to impliedly accept that there is an imbalance of bargaining power between growers and mill owners.

ASMC's submission referred the ACCC to reports from both Samuel & Dimasi and ACIL Allen where this supposed imbalance was considered. Both concluded that the interdependence of the relationship between growers and their mill meant that the bargaining power between the parties is in fact entirely balanced.

The ACCC does not discuss this alternative view in its DRAFT determination other than a short recognition that it was stated by ASMC, MSF Sugar and Wilmar Sugar. This is particularly important when it appears that the ACCC's view that there would be public benefits arising from the collective bargaining authorisation appears to be predicated on assertions made by Canegrowers, QSL and ACFA in their submissions that there is an imbalance in bargaining power even with the existing collective bargaining arrangements authorised by the Sugar Industry Act in Queensland. There is no evidence that there is an imbalance in bargaining power between growers and mills that is not already addressed through existing collective bargaining arrangements.

Finally, ASMC submits that the ACCC should treat submissions made by QSL with care. Although QSL is a member based organisation with members who are both sugarcane growers and sugar millers and a constitutional requirement to serve the interests of both growers and millers for the long term prosperity of the Queensland Sugar Industry, its submission to the ACCC focuses only on the position of the growers.

For example, in paragraph **144**, large portions of the QSL submission that discuss the negotiation of cane supply agreements are referenced. QSL has no knowledge or experience of negotiating cane supply agreements. Statements by QSL such as the following cannot be relied upon as factual: '*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 a milling company*'. Moreover, if the draft determination proceeds as outlined, growers would have the capacity to access commercially sensitive information from negotiations in other mill areas that other mill companies have put forward. Mill companies, however, would not have access to the same information from their milling and marketing competitors.

In ASMC's view, QSL as a potential marketer competing for the opportunity to market sugar produced in Queensland, could be seen as somewhat conflicted in its views regarding the potential role of Canegrowers in these negotiations with mill companies for on supply agreements.