



PRE-DECISION CONFERENCE

Summary

**Application for authorisation A91558
lodged by Queensland Cane Growers Organisation Ltd (Canegrowers)**

**10 February 2017
1pm (local time)**

**ACCC Office, 400 George Street, Brisbane
(and via video to ACCC offices in Townsville, Canberra, Adelaide and
Melbourne)**

The information and submissions contained in this minute are not intended to be a verbatim record of the pre-decision conference but a summary of the matters raised. A copy of this document will be placed on the ACCC's public register.

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Attendees

Australian Competition and Consumer Commission

- Roger Featherston, Commissioner (Chair of conference)
- Sarah Court, Commissioner (Adelaide)
- David Jones, General Manager, Adjudication Branch
- David Hatfield, Director, Adjudication Branch
- Jaime Martin, Assistant Director, Adjudication Branch
- Emma Gordon, Deputy General Counsel, Mergers and Authorisation Law Unit
- Nick Cooke, Principal Economist, Economic Group (Melbourne)
- Michael Dowers, Regional Director, Townsville (Townsville)
- Andrew Parnell, Senior Project Officer, Agricultural Unit (Melbourne)

The Applicant (Canegrowers)

- Dan Galligan, CEO, Canegrowers
- Warren Males, Head Economist, Canegrowers
- Chris Cooper, CJ Cooper and Associates (Canegrowers)
- Jeff Cantamessa, Director, Herbert River Canegrowers
- Joseph Marano, Chairman, Innisfail Canegrowers
- Stephen Calcagno, Chairman, Cairns Canegrowers
- Kevin Borg, Chairman, Mackay Canegrowers
- Kerry Latter, CEO, Mackay Canegrowers
- Michael Pisano, Chairman, Herbert River Canegrowers (Townsville)
- Chris Bosworth, Director, Herbert River Canegrowers (Townsville)
- Peter Sheedy, Manager, Herbert River Canegrowers (Townsville)
- Philip Marano, Chairman, Burdekin Canegrowers (Townsville)

- Roger Piva, Director, Burdekin Canegrowers (Townsville)
- Wayne Smith, Manager, Burdekin Canegrowers (Townsville)

Interested parties

- MSF Sugar:
 - Mike Barry, CEO
 - Paul Heagney, General Manager, Marketing
 - Kelly Slattery, Company Secretary
 - Sharon Henrick, Partner, King & Wood Mallesons
 - Joe Saunders, Solicitor, King & Wood Mallesons.
- Isis Central Sugar Mill, John Gorringer, CEO.
- Wilmar Sugar:
 - Duncan Glasgow, Legal Counsel and Company Secretary
 - Justin Oliver, Partner, Minter Ellison.
- Australian Sugar Milling Council:
 - Dominic Nolan, CEO
 - Jim Crane, Senior Executive Officer
 - Kathryn Finlayson, Special Counsel, Minter Ellison.
- Queensland Sugar Limited:
 - Robert Hines, Chief Financial Officer
 - Susan Campbell, Company Secretary
 - Jessica Rusten, Allens.
- The Treasury, Vinh Le, Market and Competition Policy Division.

Conference commenced: 1pm (local time)

Introduction

Commissioner Featherston welcomed attendees, introduced ACCC staff present, and outlined the procedures generally followed at conferences. Commissioner Featherston advised that he would first invite the party that requested the conference, MSF Sugar, to address the conference, and then each party would be invited to address the conference.

Issues

The following issues were discussed during the conference:

Mike Barry, MSF Sugar, provided an overview of MSF Sugar's position.

Mr Barry submitted that:

- As well as milling operations, MSF Sugar has sugar cane farms across North Queensland, Atherton Tablelands and Maryborough growing regions. It has been directly marketing raw sugar for some time.
- MSF Sugar is exploring innovative ways at increasing the value it can extract from sugar cane – for example, it is looking to diversify into green energy.
- MSF Sugar is aware of the property value of many sugar cane farms and considers that growers should be paid more per hectare for their cane. MSF Sugar wants to work with growers to help them get better value from their farms.
- MSF Sugar dislikes the recent Marketing Choice Amendments to the *Sugar Industry Act 1999 (SIA)*, but it, and most of the industry, has worked within the new legislative framework. It considers that further intervention in the sugar industry is not required.
- MSF Sugar considers the draft determination contains some ambiguity in relation to the conduct the ACCC proposes to authorise. While the draft determination expressly states that authorisation is proposed not to extend to collective negotiation of a State-wide Cane Supply Agreement, it is proposing to authorise Canegrowers (head office) to share information across growing regions. MSF Sugar considers that information sharing could, in practice, standardise Cane Supply Agreements.
- MSF Sugar is also concerned that under the proposed arrangements its commercially sensitive information will be shared with its milling competitors. It considers its Cane Supply Agreements contain innovative terms and conditions and it does not want to have these details shared. MSF has made a significant investment in developing new contracts and new ways of dealing with growers following the introduction of the new legislation and doesn't want to share that IP with other mills. Each growing region has different issues which are specific to the commercial negotiations between growers and their local mill, including, for example, irrigated versus non-irrigated farming and road versus rail transport. It is critical that MSF Sugar is able to customise Cane Supply Agreements in each of its growing regions. MSF currently has confidentiality clauses in its CSAs and doesn't want other mills finding out the special terms and conditions in MSF contracts.

- MSF has up to 12 different CSAs across its four mills – some collectively with Canegrowers, some with other representative bodies, some with individual growers.
- Overall, MSF Sugar considers the application for authorisation is a step backwards for the industry and the proposed collective bargaining conduct does not add additional value to the industry above what already exists under the SIA.

Paul Heagney, MSF Sugar, noted that MSF Sugar has provided a written submission in response to the draft determination and it did not propose to repeat those issues in detail at the conference. Mr Heagney summarised MSF Sugar's concerns with the draft determination as:

- It would like more clarity in the wording of the scope of the proposed authorisation.
- The ACCC appears to have accepted submissions without testing them.
- 'GEI sugar' has been mischaracterised within the draft determination. MSF Sugar stressed that growers do not have an equity interest in the raw sugar produced by mills. Rather, 'GEI sugar' is simply a term that describes growers receiving a portion of the revenue received for the raw sugar.
- Critically, the proposed authorisation of information sharing across growing regions by Canegrowers could result in a harmonisation of Cane Supply Agreements across the State, which will stifle innovation and will not suit the local circumstances in each growing region.

Commissioner Featherston highlighted that:

- The ACCC's draft determination proposes to authorise voluntary collective bargaining conduct. Authorisation does not oblige millers to participate in collective negotiations, nor does it stipulate what confidentiality regime millers may seek to impose over commercial negotiations.
- ACCC authorisation simply provides protection from legal action under the competition provisions of the *Competition and Consumer Act 2010* (the **CCA**) for parties that wish to engage in the proposed collective bargaining conduct.

Philip Marano, Burdekin Canegrowers, said that:

- Growers in the Burdekin are not interested in seeing what terms and conditions are in Cane Supply Agreements in other regions – they are just interested in being able to undertake fair collective negotiations with their local mill owner, Wilmar Sugar.

Dan Galligan, Canegrowers, submitted that:

- Canegrowers is comfortable with the draft determination. It considers that the ACCC understands what it is seeking to achieve under the proposed conduct.
- Canegrowers is seeking authorisation to allow parties to participate in a collective bargaining process. The application cannot and does not seek to prescribe outcomes of any collective bargaining.
- Authorisation is not sought for Canegrowers to negotiate a State-wide Cane Supply Agreement. A single State-wide agreement has never existed. Indeed, the structure of the Canegrowers organisation, which consists of autonomous local Canegrowers companies in each region, supports the maintenance of regionalised collective bargaining on behalf of its members.
- Under the proposed application, Canegrowers (head office) seeks to assist the local Canegrowers' companies in their collective bargaining processes with mills.
- Canegrowers also wants to see increased innovation in Cane Supply Agreements at the local level and the application seeks to support this.
- Canegrowers reiterated that it seeks authorisation to allow collective bargaining of any agreements relating to the supply of sugar cane to a mill. It is a voluntary process.

Dominic Nolan, on behalf of the Australian Sugar Milling Council (**AMSC**), said that:

- It represents the interests of its member mills.
- It is not opposed to collective bargaining in principle. However, Canegrowers' application significantly expands above and beyond what is currently in place under the SIA.
- While some of its concerns (in its submission prior the draft determination) were addressed in the draft determination, it considers the scope of the proposed authorisation still contains too much ambiguity. In particular, while the draft determination expressly states that the ACCC does not propose to authorise collective negotiation of a State-wide Cane Supply Agreement, it does propose to authorise Canegrowers to share information across regions to facilitate the 'adoption of best practice' in contracts. It believes further information is required about what 'adoption of best practice' means.
- The draft determination is predicated on the proposed collective bargaining process being voluntary. However, further clarity is required to ensure that the proposed authorisation does not force millers to

collectively negotiate and does not provide growers with a right to participate in On-supply Agreement negotiations – or any contract that they are not a party to.

- ASMC considers that clarity in the language of the authorisation is important because uncertainty can cause confusion and increase the costs of negotiations, which is detrimental.
- There are a number of incorrect or ambiguous statements in the draft determination that need to be addressed (as outlined in ASMC's written submission in response to the draft determination). For example:
 - The draft determination refers to the supply of 'milling services' by mills. This is not correct, as title of the sugar cane transfers to the mill owner at the delivery point.
 - The draft determination refers to submissions that there was a tripartite approach to negotiations of sugar marketing agreements. However, Canegrowers' participation was as an observer only and this role concluded after the early discussions.
- The draft determination appears to accept that there is an imbalance of bargaining power between growers and mill owners. However, ASMC submits that growers and millers are mutually dependent, with mill owners having a slight disadvantage. This disadvantage stems from growers being able to use their land for other purposes, while mill owners have no other use for their mill.
- The proposed authorisation (as outlined at paragraph 218 of the draft determination) should only extend to collective bargaining about 'traditional cane supply elements'. For instance, allowing growers to collectively bargain with mill owners to seek to capture the value of by-products of sugar cane is too far. It creates higher risk for millers and will result in higher costs and/or less investment.

Dan Galligan, Canegrowers, noted that until recently molasses gain sharing terms and conditions used to form part of the Cane Supply Agreement. However, Wilmar Sugar has now moved it into a separate agreement. Wilmar Sugar advised Canegrowers that because it was no longer contained in the Cane Supply Agreement they could no longer collectively negotiate on this issue, in accordance with the terms of the statutory authorisation under the SIA. This was a factor which led to Canegrowers lodging the application for authorisation with the ACCC.

Mike Barry, MSF Sugar, asked:

- what does the proposed authorisation allow?
- and what are the public benefits from the proposed conduct?

Commissioner Featherston outlined that:

- If the proposed arrangements are ultimately authorised by the ACCC, it simply allows growers to participate in collective bargaining around terms and conditions of cane supply.
- The ACCC's assessment of the public benefits from the proposed arrangements is set out in its draft determination.

Philip Marano, Burdekin Canegrowers, submitted that he is currently precluded from participating in negotiations of On-Supply Agreements in relation to GEI sugar, but he should not be.

John Gorringe, on behalf of Isis Central Sugar Mill, noted that it provided a written submission to the ACCC in response to the draft determination. In summary, Isis Central Sugar Mill considers that:

- It should be expressly excluded from any authorisation granted by the ACCC.
- It operates in a competitive environment, where growers can supply their sugar cane to alternative mills. Because of this, it considers that the claimed public benefits do not arise and there is likely to be reduced competition between mills.

Phil Heagney, MSF Sugar, provided further information about the issue of the 'tri-partite' On-Supply Agreement between QSL, MSF Sugar and Canegrowers. In particular:

- QSL incorrectly described it as a 'tri-partite' approach in its submission prior to the draft determination.
- While representatives from Canegrowers were present for a small number of early discussions, they attended as observers only.

Warren Males, Canegrowers, provided further clarification about the reference to the 'tri-partite' approach to the negotiation of the On-Supply Agreement between MSF Sugar and QSL. In particular:

- He was present, on behalf of Canegrowers, as an observer during early discussions. These discussions were in relation to the broad framework and approach to On-Supply Agreement negotiations.
- While it is correct that Canegrowers was not involved in the detailed final negotiations between QSL and MSF Sugar, it was constructively involved in the early stages concerning the broad framework of the On-Supply Agreement.

Dan Galligan, Canegrowers, noted that:

- there appears to be some concern about how the draft determination describes the revenue stream from raw sugar and the 'tri-partite' approach to on-supply negotiations with MSF Sugar. However, Canegrowers considers this can be easily addressed by providing further clarification to the ACCC.
- this application for authorisation was prompted by Wilmar Sugar saying that it could not collectively negotiate certain issues which were not covered by the terms of the statutory authorisation provided by the SIA. Canegrowers simply wanted to remove that 'roadblock' to negotiations.

Jim Crane, ASMC, made the following points:

- There is tension in the draft determination between the conduct that the ACCC proposes to authorise and the conduct that the ACCC does not propose to authorise.
- ASMC read paragraph 218(iii) of the draft determination, which states that the ACCC proposes to grant authorisation to Canegrowers 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. ASMC then asked Canegrowers to explain what 'best practice' means.

Warren Males, Canegrowers, responded that there is not a precise definition of 'best practice'. Canegrowers is seeking authorisation to allow it to assist its local Canegrowers companies in negotiations when invited and to avoid having to pay for multiple sets of economic or financial expert advice to provide to grower groups.

Jim Crane, ASMC, noted that Canegrowers' role assisting its local companies, as described by Mr Males, does not raise concerns. However, this only explains the second half of paragraph 218(iii) of the draft determination. Canegrowers has not clarified what 'best practice' means. ASMC is concerned that information sharing about 'best practice' terms and conditions could result in growers 'cherry picking' from Cane Supply Agreements.

Mike Barry, MSF Sugar, considers that there is lots of value and extremely sensitive information on things like strategy and tactics at stake. MSF is concerned that the ACCC hasn't understood the impact of the proposed arrangements on the ground and what consequential damage they might cause or impact they might have.

Warren Males, Canegrowers, highlighted that it does not seek authorisation to start a 'one-size fits all' approach to collective negotiation of Cane Supply Agreements. Cane Supply Agreements are currently, and always have been, negotiated by local Canegrowers companies. Cane Supply Agreements

necessarily reflect regional differences, and it does not seek to change this through the current application for authorisation before the ACCC – that is, ‘best practice’ in providing professional advice to growers by the central representative body. In the past, even when all contracts were made publicly available, they were different. Canegrowers has and will carefully maintain confidentiality of contract information between the various milling groups.

Philip Marano, Burdekin Canegrowers, agreed that all mills have different issues which are reflected in localised collective negotiations. Therefore, growers do not seek a ‘one size fits all’ Cane Supply Agreement.

Michael Pisano, Herbert River Canegrowers, submitted that in his region growers are trying to negotiate with a monopoly miller. This mill owner has complete information about what it is doing in other growing regions. Herbert River Canegrowers does not have access to this information and, as such, negotiations are not conducted on a ‘level playing field’. The mills tell the growers that the front of the contract is the same in all areas and growers are only able to negotiate about provisions contained in the schedules.

Duncan Glasgow, on behalf of Wilmar Sugar, submitted that:

- The statutory authorisation for collective bargaining under the SIA extends to collective bargaining *within* regions, as defined in the Regulations.
- the reality is that molasses gain sharing does not have to form part of Cane Supply Agreements unless you wish it to.
- Underpinning the ACCC’s assessment in the draft determination is the voluntary nature of the proposed collective bargaining arrangements. However, Wilmar Sugar is concerned that this voluntary nature will not be retained during the proposed duration of authorisation. Therefore, the voluntary nature of the proposed collective bargaining arrangements needs to be abundantly clear in any final determination.
- Wilmar Sugar has around 40 Cane Supply Agreements, so there are a number of collective grower groups that it currently deals with. Its Cane Supply Agreements do have some common elements. Specific terms and conditions for each region are contained in some 60 Schedules to its Cane Supply Agreements. Wilmar Sugar would hate to see regional variation in these agreements removed.
- Wilmar Sugar would like to see factual inaccuracies in the draft determination addressed. It would also like clarity around what is actually being authorised.

Robert Hines, on behalf of QSL, submitted that:

- Its members are growers and millers. It is required to act in the best interests of all its members and so takes a whole of industry approach.
- As outlined in its submission after the draft determination, it supports authorisation of the proposed collective bargaining arrangements.
- QSL has successfully negotiated marketing arrangements with Tully and MSF Sugar mills. Wilmar is the only miller that QSL has not yet reached agreement with. Negotiations have been protracted and are currently at an impasse. Marketing arrangements are an important part of the whole puzzle.
- Growers are disadvantaged against some mill owners and some mill owners negotiate differently. It considers that authorisation should not be denied because some growers are already able to negotiate satisfactorily. The proposed collective bargaining is voluntary. Therefore, the proposed arrangements can assist a large number of growers, and will not have a material impact on collective negotiations with other millers.

Dominic Nolan, ASMC, highlighted that:

- All mill owners were opposed to the 2015 amendments to the SIA and all are opposed to Canegrowers' collective bargaining application for authorisation.
- ASMC considers that given the mutual interests of growers and millers, it also takes a whole of industry approach.
- ASMC is not involved in Cane Supply Agreement negotiations itself. Therefore, it does not share information about them to its members.

Stephen Calcagno, Canegrowers Cairns, noted that some parties seemed to be concerned that Canegrowers wants to adopt a 'one-size fits all' approach to collective bargaining. This is not the intent of the application for authorisation. The structure of the Canegrowers organisation would not support a 'one size fits all' approach to bargaining in any event. Local Canegrowers companies represent the interests of their members, their aim being to get the best outcome with their local miller.

Kerry Latter, Canegrowers Mackay, submitted that Wilmar Sugar has previously 'divided and conquered' growers by referencing the regional boundaries defined in the Regulations to the SIA. In that case, certain Wilmar Growers from other regions were asked to leave the negotiations.

Mike Barry, MSF Sugar, submitted that the draft determination does not adequately detail or quantify the detriment likely to arise from the impact on competition between mills. MSF Sugar noted that millers are in competition both in the acquisition of cane from growers and in the supply of raw sugar.

Dominic Nolan, ASMC, noted that Canegrowers' application for authorisation covers the entire industry. However, it appears that the only reason for the application was to address concerns that certain growers were having with one miller, Wilmar Sugar.

Dan Galligan, Canegrowers, submitted that while the problems being experienced with Wilmar Sugar may have initially prompted Canegrowers to consider lodging an application for authorisation with the ACCC, the application is not just about addressing issues specific to Wilmar Sugar. The application seeks immunity for an effective collective bargaining process for growers across a broad range of negotiations which Canegrowers seeks authorisation to collectively negotiate – including, for example, some of the innovative proposals MSF described earlier.

Commissioner Featherston closed the conference by noting that the ACCC would be providing a further opportunity for parties to make written submissions in respect of its draft determination and issues raised at the conference, and that the ACCC would provide participants with a record of the conference, which would also be placed on the ACCC's public register.

Conference closed: 2.45pm (local time).