

10 March 2017

Mr David Hatfield
Director, Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 3131
CANBERRA ACT 2601

By e-mail: adjudication@acc.gov.au

Dear Mr Hatfield

ACCC draft determination – A91558 CANEGROWERS response

CANEGROWERS has reviewed the draft determination, subsequent written submissions of interested parties, participated in the ACCC conference on 10 February, 2017 and reviewed the final written submissions of interested parties.

As contemplated by the Commissioner's letter of 17 February 2017 and request for information, CANEGROWERS now responds to the interested party submissions and the further questions raised by the Commission.

With this interest in mind CANEGROWERS application, consistent with ACCC guidelines, seeks authorisation for CANEGROWERS companies to negotiate terms and conditions on behalf of our present and future members with sugar mills and marketing and associated entities, creating efficiencies, that those members would not be able achieve on their own and to do so without risk of breaching the *Competition and Consumer Act 2010*.

We are aware that the *Sugar Industry Act 1999* makes some provision for growers to engage in collective bargaining.

The reason for this application is that some mills are insisting on a narrow interpretation of the collective bargaining authorisations contained in the *Sugar Industry Act 1999*. They assert growers are only authorised to bargain in relation to a narrow range of matters in cane supply agreements and that the collective bargaining provisions of that Act are not sufficiently wide to enable collective bargaining of the terms of associated agreements.

To be very clear, CANEGROWERS is merely asking the ACCC to authorise:

- collective bargaining in each of the three tiers outlined in our application, in the making of cane supply and related agreements, the suite of agreements that deal with all matters related to the production and supply of cane to a mill;
- all matters, including the calculation of GEI sugar, relating to the flow of revenue to growers from the ultimate sale of cane and GEI sugar, where growers elect to participate in those collective agreements; and
- where separate CANEGROWERS companies are interested, then the ability to share information across and between districts subject to any necessary and reasonable commercial confidentiality arrangements.

CANEGROWERS is not asking the ACCC to rule on the contents or actual provisions of cane supply and related agreements or on the outcome of any matters that will be the subject of the collective negotiations. Importantly, CANEGROWERS' application is predicated on voluntary

arrangements and without any claim for secondary boycott authorisation. The CANEGROWERS application also makes it abundantly clear that it does not seek authorisation for the negotiation of single state-wide agreements. This is acknowledged in the draft determination.

The draft determination illustrates that the ACCC has a good grasp of sugar industry structures, the regulatory framework and the issues CANEGROWERS faces. CANEGROWERS fully supports the proposed authorisations.

We note that many of the issues raised in the interested party submissions, at the pre-decision conference and in subsequent submissions have been dealt with by the ACCC in its draft determination and have little to add.

Key issues raised:

Scope of authorisation / Risk of ambiguity and uncertainty

- In CANEGROWERS view, paragraphs 218 to 221 of the draft determination outline clearly and succinctly what the ACCC proposes to authorise and paragraph 222 outlines equally clearly and succinctly the conduct the proposed authorisation will not cover. It is difficult to see how the extent of the proposed authorisation and the limits imposed could be more clearly expressed.
- CANEGROWERS is not seeking authorisation for the negotiation of a single state-wide cane supply agreement nor is it seeking authorisation for the State office to assume the principal bargaining role in any agreement. The ACCC draft determination makes it clear that the proposed authorisation would not cover such circumstances.
- Under longstanding previous regulatory structures, when a central regulatory authority oversaw the making of Local Board Awards which were openly published, in the Gazette, the predecessor to cane supply agreements, those awards contained different provisions to take account of different circumstances in different mill areas. Even in this completely open regime in which information was shared freely between mill areas and regions regardless of mill ownership structure, cane supply agreements were unique to each area (there was no one-size-fits-all approach) and certainly no single state-wide agreement. This will continue under the proposed authorisation.
- As stated during the pre-decision conference, each district has its own CANEGROWERS company with its own negotiating team and bargaining representatives. Even with the same mill owners with various mills in various districts, there is a separate CANEGROWERS company in each of those districts. The same mill owner has of course the same bargaining representatives on the other side of the table in each case, but there will be a different CANEGROWERS company representatives on the other side of the table in each district. There is no one single CANEGROWERS bargaining representative group, not even in districts with the same mill owner. By way of example only, as there are other milling companies in similar circumstances such as MSF Sugar and Mackay Sugar, Wilmar Sugar has mills in four separate districts.
 - (i) Herbert River – Ingham area
 - (ii) Burdekin – Ayr/Home Hill area
 - (iii) Proserpine – Proserpine area
 - (iv) Plane Creek – South of Mackay area

CANEGROWERS has a separate local company representing growers in each of these districts whilst Wilmar will have essentially the same representatives negotiating. There will be four separate CANEGROWERS negotiating representatives bargaining with the same Wilmar representatives. Without this authorisation those grower representatives cannot negotiate collectively with Wilmar.

Sharing of information

- The proposed authorisation contained in paragraph 218 (iii) will enable growers to gain better access to information. It will enable them to share experiences and the cost of obtaining professional advice within and between regions. Without authorisation, CANEGROWERS ability to fully service its members in different regions would be diminished.
- Perhaps the authorisation could be clarified by renumbering 218 (iii) as (iv) and inserting a new paragraph (iii) to read “who supply cane to any mill regardless of ownership – collectively bargain, and make and give effect to provisions of cane supply and related contracts with those mill owners and with sugar marketers in relation to Cane Supply Terms and Conditions.”
- Mills are free to seek authorisation to share information should they so desire.

Best practice terms and conditions

- The outcome of a cane supply negotiation is a collectively negotiated agreement between the grower and the mill owner. The final document reflects the agreement reached on each of the issues brought to the table by both grower representatives and mill representatives. Cane supply agreements are complex documents containing provisions for the physical production, harvesting and delivery of cane, as well as provisions for the calculation and marketing of GEI sugar. The agreements also relate to and have linkages with a number of other agreements including pricing and pooling agreements, related product agreements and the on-supply agreement between the mill and GEI marketer. Some of the issues arising are common to all mill areas regardless of mill ownership, some are specific to mills with common ownership and others are mill specific. An example of each follows, other examples could be provided if required:
 - An issue common to all mill areas regardless of mill ownership includes, for example, provisions relating to the weighing, sampling, testing and analysis of cane for quality assessment and payment purposes. The procedures and processes used in this part of the supply chain are critical for the calculation of the quantity of GEI sugar produced from each grower’s cane. Growers and their bargaining representatives across the state are vitally interested understanding what best practice is and ensuring best practice terms and conditions are included in cane supply agreements. Despite the sharing of information, even on this important topic, a uniform approach is not adopted across the state.
 - An issue for mills with common ownership includes, for example, information relating to the approach that particular milling company is taking to implementation arrangements for grower choice. Some companies have developed a structure that provides choice of marketing channels to growers with the mill retaining a direct role in passing the proceeds for sale of GEI sugar to the growers. Others have adopted a different model. With the mill stepping back, there will be a more direct relationship between the grower and their GEI marketer in those mill areas. While all grower negotiating groups have an interest in the different models, all growers that supply a particular milling company have a vital interest in understanding the arrangements that company proposes and how the production tonnage and other marketing risks are shared by growers within their mill area or across all areas supplying the company’s mills, how their cane supply agreement interfaces with the associated pricing and pooling agreements and with the on-supply agreement between the mill and GEI marketer.
 - Issues for individual mill areas usually relate to the terms and conditions associated with the physical supply and delivery of cane to that particular mill. This might, for example relate to the harvesting roster and the supply and delivery of collection bins to the mill’s delivery points.

- Given the breadth of issues involved “best practice terms and conditions” is a phrase that refers to the development of terms and conditions that best suit the contract under negotiation, taking into account the relevant learnings and experiences of other growers and tailored to the specific circumstances of the particular negotiation.
 - An example of this is where a particular district may be experiencing crushing capacity constraints and season length issues and the bargaining representatives and the relevant mill may have developed a solution to that problem and implemented provisions in their cane supply agreements to deal with the issue. Subsequently another district in a different mill area might experience similar issues and it would be helpful and efficient if growers could discuss and have access to the principles of how the issue was resolved in the first district.
- The proposed authorisation contained in paragraph 218 (iii) of the draft determination will not result in either the standardisation of contracts or the development of a single state-wide cane supply contract and this will not have any adverse effect on competition between mill owners. There are separate CANEGROWERS negotiating teams in each district and mill owners will continue to be free to offer growers whatever incentives they choose and innovative terms and conditions to attract cane. Parties to the negotiation will need to jointly agree to the terms of a contract and proceed on a voluntary basis. This application does not seek provision for any secondary boycott powers.

Common industry terms and conditions

- There are a number of industry terms that are common to all cane supply agreements, some (not all) include:
 - CCS – commercial cane sugar
 - Condemned cane – cane which a mill owner rejects for reasons contained in the cane supply agreement
 - Season length – the period over which the cane harvest and sugar milling operation occurs.
 - Delivery point – the point to which a grower must deliver the cane
 - Final pool price – the final price for sugar directed to a particular pool for pricing purposes.
 - Pool terms – the terms applicable in each pricing pool
 - Shared pool – the terms applicable to the shared pool. These include, amongst other things, physical sales premiums and costs associated with the sale and delivery of physical sugar.
 - Harvest group – a grower or group of growers who individually or collectively contract for the harvesting of their cane.
 - Cane payment – the payment made for sugarcane
 - Cane analysis program – the program related to the weighing, sampling, testing and analysis of sugar cane

Principal bargaining role

- In each mill area, bargaining representatives from the local CANEGROWERS company are responsible for and take the lead or principal bargaining role in the cane supply agreement negotiation with their mill company counterpart. Representatives from CANEGROWERS state office provide advice to and assist in the negotiations in response to requests from the local negotiating team.
- Under the *Sugar Industry Act 1999*, growers may appoint bargaining representatives. The grower only appoints the local CANEGROWERS company as the bargaining representative for the purposes of the Act. The state company is not authorised or permitted to act as the bargaining representative for growers under current arrangements.

- The information, advice or assistance provided by Representatives from CANEGROWERS can be in relation to the full range of matters associated with the negotiation of the cane supply agreement. This could include advice on negotiating procedures or on specific technical details of the issues at hand. It may also include information on proposals relating to proposed pooling, cane payment or marketing structures.
 - For cost effective and efficiency purposes, CANEGROWERS state office retains expertise in agronomic, economic, technical and legal services. These are available to district offices to assist them in their negotiations if they so choose.

GEI marketing and capturing the value of by-products from sugarcane

- The terms of the on-supply agreement between the mill and GEI marketer will have a direct impact on the way in which the proceeds from the sale of GEI sugar flow from the marketer to the grower. These terms could influence the timing of payments as well as the quantum of costs associated with the transfer of GEI sugar from the mill to the marketer. These could be associated with raw sugar quality as well as with the timing of delivery of that sugar and its storage and handling post-delivery.
 - CSA negotiations can only be finalised when grower bargaining agents are satisfied with the associated OSA terms. To facilitate this process and to ensure consistency between CSA terms and OSA terms, CANEGROWERS is seeking authorisation to be party to the on-supply agreement where the marketer and mill agree this would be helpful, as was the case in the tri-partite meetings between QSL, MSF Sugar and CANEGROWERS representatives when the essential terms of the MSF-QSL OSA were agreed.
- The value of sugarcane and the price the growers might receive for the supply of sugarcane are related to a wide range of potential matters not just the price of sugar the application seeks authorisation for collective bargaining for all potential discussions, negotiations and agreements relating to the value of and payment for the supply of sugarcane.
 - Historically cane supply agreements have included provisions in relation to the sharing of the value of by-products from sugarcane. Since the 2015 amendments to the *Sugar Industry Act 1999*, some mill owners have sought to place these provisions in agreements separate from, but related to, the CSA. In doing so they have asserted that the collective bargaining provisions of the Act do not extend to these agreements. CANEGROWERS is not seeking an ACCC decision on whether the agreements should exist or what terms should be included in such agreements. We are seeking authority to collectively bargain the provisions of such agreements where they presently exist or may exist. The public benefits that would arise from such authorisation are the same as those that would flow from the collective negotiation of the associated cane supply agreements.

Commercially sensitive strategic information

- MSF Sugar has raised concerns about commercially sensitive strategic information being communicated to competing mill companies. CANEGROWERS is unaware of the information to which MSF Sugar may be referring. We note MSF has asked the ACCC to exclude information contained in its confidential attachment A from the public register and are unable to comment on the issues raised.
- MSF Sugar raises concerns about the public detriment of authorising the sharing of information and adoption of “best practice” terms between milling companies, which compete for the acquisition of cane through the terms of their cane supply agreements.
 - As noted, a collective CSA is the product of a negotiation between both the mill and the growers bargaining representatives. Once finalised, each grower who wishes to be party to that agreement must satisfy themselves with the terms of the agreements and

- sign the agreements to signify their acceptance of those terms and to be able to make the elections and exercise their rights in accordance with the agreement.
- With draft agreements circulating widely in each mill area and final agreements signed by more than 200 growers in each mill area, despite confidentiality provisions, the terms of the CSAs are well known in each mill area.
 - In a limited number of cases, growers at the margins of some mill areas have an ability to choose which mill they supply. The terms and conditions offered by the competing mills are important factors influencing the growers' decision. Mills frequently publicly release key information concerning their strategic plans and investment decisions both to inform their growers and to build community confidence in relation to their business direction. MSF Sugar is a frequent user of this promotion technique and has made no secret of its general strategic plans during the pre-decision conference and publicly to the industry in other fora.
 - It is acknowledged and readily accepted that from time-to-time there may be specific commercially sensitive negotiations to be held. As is common industry practice, those negotiations can be adequately protected by confidentiality agreements at the appropriate time. The authorisation will enable the grower representative to enter negotiations on the broad range of issues which are the subject of the negotiations. During discussions, the mill owner's representatives may raise a particular novel matter or approach which they wish to be held in-confidence. The parties to the negotiation can agree to a request for confidentiality at the time. Where this occurs, the relevant information is not shared beyond the negotiating representatives and their advisers in accordance with the terms of the confidentiality agreement.

ISIS Central Sugar Mill (ICSM)

- CANEGROWERS Isis has recently concluded a collectively bargained negotiation with ICSM on behalf of its member growers. The collective agreement covers approximately 200 growers.
- In CANEGROWERS view, ICSM should not be excluded from any collective bargaining authorisation. The issues growers supplying ICSM face in their negotiations are similar to the issues faced by growers in all other regions.
- Some Isis growers may have the ability to supply neighbouring Bundaberg Sugar-owned mills and vice versa. Some growers may have farms supplying both Isis and Bundaberg owned mills.
- The principals behind collective bargaining apply as equally to Isis as they do to all other areas. There is no basis for their exclusion from this authorisation.
- The sharing of information should not lessen competition between mills. It will enable growers to obtain a greater understanding of the terms and conditions different mill owners are offering to secure the supply of cane. The Act currently makes provision for collective bargaining to occur in each mill area across the state, including Isis and its neighbouring mill areas. There is no evidence that these provisions have lessened competition between Isis and Bundaberg in the Southern region or elsewhere in the state where the possibility of similar competition for cane exists.

Ownership of sugar

- The ownership of sugar is a matter for the commercial arrangements between the parties and is not the subject of either the CANEGROWERS application or the proposed authorisation.

Price of cane

- CANEGROWERS is seeking authorisation to collectively negotiate terms of cane supply agreements, where growers elect to participate in those agreements.

- The proposed authorisation does not determine the price of cane, which can be determined in a number of different ways including by sharing the value of sugar and the by-products of sugarcane.
 - This occurs for example in Mackay where there is a mechanism for sharing the value of molasses / fibre. The current Wilmar contract includes provision for sharing the value of molasses.
- The authorisation provides for a collective process to negotiate, bargain and agree how the price of cane will be determined or for any specific terms to potentially be included in the agreements. Those terms are matters for the negotiators to settle.

Imbalance in bargaining power

- Mills attempting to put restrictions on the collective bargaining process is the very reason CANEGROWERS is making application to the ACCC to make the authorisations sought.
 - For example, Wilmar refused to participate in collective-bargaining arrangements in relation to cane payment because its Plane Creek mill is not considered to be in the same region as its other mills.
 - Wilmar also asserts the provisions of the *Sugar Industry Act* do not authorise the collective bargaining of provisions related to the sharing of revenue from molasses. This issue arises as a direct consequence of Wilmar's decision to attempt to remove the molasses provisions from the cane supply agreement and place them in a separate but related agreement.

Bargaining across mill areas

- CANEGROWERS is seeking authorisation for collective-bargaining of cane supply agreements with mills wherever they are located in the state, subject to the restrictions contained in the proposed authorisation.
- In some regions, the one CANEGROWERS company is required to negotiate with two different mill owners. This occurs for example in Mackay where CANEGROWERS Mackay participates in separate negotiations with both Mackay Sugar and Wilmar.
- In some other regions, some growers have an ability to supply their cane to more than one mill owner. This opportunity is limited both by geography and by mill capacity constraints and so is not available to all growers in those mill areas. CANEGROWERS application, made for all CANEGROWERS companies on behalf of all present and future members, is seeking authorisation to negotiate with all relevant mill owners regardless of mill ownership.
- Nonetheless, CANEGROWERS recognises our supplementary submission might not have been as clear as it could have been and there may be scope for clarification, especially in relation to the requested authorisation to negotiate with different mill owners in different mill areas.
- Without this ability, CANEGROWERS Mackay may not be able to negotiate collectively with different mill owners and growers who supply different mill owners may be constrained in collective bargaining.

Public benefit

- The public benefits of collective-bargaining are much wider than enabling a group of growers to collectively negotiate a cane supply agreement with the regional monopoly mill they supply. They include, for example:
 - reducing and/or sharing the time and cost of putting supply arrangements in place
 - creating opportunity to negotiate terms of supply that better reflect the group's own needs rather than simply accepting a standard form contract offered by the mill

- gaining better access to information
- sharing the costs of engaging a professional advice
- creating new competitive marketing opportunities by being more attractive to other potential marketers of raw sugar
- creating supply chain efficiencies, a benefit to both growers and the mill they supply.

Collective Boycott

- CANEGROWERS application clearly does not seek authorisation for a collective boycott and paragraph 184 of the draft determination sufficiently deals with the point. No further clarification is warranted or justified.

Summary section of the DRAFT determination

- ASMC suggested some amendments to the opening paragraph of the Summary section of the DRAFT determination. CANEGROWERS supports the following summary paragraph:

“Under long standing industry arrangements, growers sell 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 been sold to the former single desk marketer by mills under a commercial arrangement. Under this structure, some sugar milling companies marketed a portion of their production directly. In these arrangements, the revenue from the sale of sugar less the associated costs were paid to the mill and the net price achieved for the sugar factored into the cane payment formula. This formula determined the final amount that mills pay growers for their sugarcane. This has been typically between 60 and 65 percent of the net revenue received from the sale of raw sugar. This has become known as the Grower’s Economic Interest (GEI).”

Background section of the Draft Determination

- For completeness, CANEGROWERS suggests there are a small number of facts that could be corrected in the final decision report. We note these are not material to the ACCC’s final decision in relation to CANEGROWERS application. Some of these include:
 - Paragraph 15 – Third sentence before “nine” insert “up to” and after “independent Director” insert “if appointed”.
 - Paragraph 22 – In 2015, according to data released by the International Sugar Organization, Australia was the world’s second largest exporter of raw sugar, after Brazil.
 - Paragraph 26 – suggest it read, “Each of the seven milling companies operate ...
 - Paragraph 34 – Note growers receive a portion of the net revenue from the sale of raw sugar. We also suggest the following words be added to the final sentence “and thus retains a clear economic interest in the raw sugar and the terms of its sale”.

CANEGROWERS would be pleased to respond to any further questions or issues than might arise in your consideration of our application.

Yours faithfully



Dan Galligan
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