



16 March 2017

Submission to the Australian Competition and Consumer Commission

In relation to the application for authorisation lodged
by Queensland Canegrowers

On behalf of Wilmar Sugar

1. Introduction

- 1.1 Wilmar Sugar appreciates the opportunity to provide this further submission to the ACCC following the pre-decision conference held on 10 February 2017.
- 1.2 Wilmar believes two things have emerged from this conference:
- (a) the public benefits which are said to result from the grant of the authorisation are illusory; and
 - (b) it is clear that the scope of the authorisation is wider than necessary, authorising conduct which even the applicants do not wish to engage in and which threaten competition in the marketing of GEI sugar.
- 1.3 We expand on these points below.

2. There is no need to authorise collective bargaining beyond the scope of the authorisation under the *Sugar Industry Act 1999* (Qld) (**SIA**)

- 2.1 In the pre-decision conference, the Applicant insists that the authorisation is intended only to overcome any suggestion that the *Competition and Consumer Act* stands in the way of collective bargaining around certain issues or between certain grower groups. Despite this, other grower representatives claimed that the authorisation was prompted by the refusal of certain mill owners to engage in collective negotiations, implying that the authorisation is needed to compel such an outcome.
- 2.2 It is important to remember that the SIA already authorises collective bargaining for the key terms of cane supply agreements.¹ This statutory authorisation will continue in effect whether or not the ACCC grants the application now before it. The Queensland Parliament, in all of its recent deliberations, did not see fit to widen the scope of authorisation to the extent sought by the applicants. Even more recent attempts to widen the scope of the authorisation through further amendments to the SIA were rejected by the Parliament.
- 2.3 The existing authorisations under the SIA have, in almost all cases, been effective. All mill owners have been able to agree with QSL in relation to on supply terms. Cane supply agreements have been agreed with most mill owners, and even in the case of Wilmar there have been significant numbers of growers who have signed cane supply agreements. Where there has, so far, been a failure to agree, it is not because growers cannot collectively bargain. Rather, it is because the new regime has created an environment where mill owners who wish to market GEI sugar must compete with QSL for the right to do so. We explain this in further detail in section 4 below.
- 2.4 In Canegrowers' most recent submission, it states that the 'very reason' for the authorisation is mills attempting to put restrictions on the collective bargaining process.² It states that Wilmar 'asserts the provisions of the SIA do not authorise the collective bargaining of provision related to the sharing of revenue from molasses.' This is inaccurate. The statutory authorisation permits collective bargaining in relation to the basis on which the price of cane is determined. Where parties cannot agree on the price terms, section 33B provides that the price of cane is determined by reference to the price of the on supply sugar (ie. not other products). However, this is a separate issue to the scope of the authorisation conferred by the SIA.
- 2.5 The effect of granting this authorisation would be to roll back the application of competition laws in circumstances where even the Queensland Parliament thought they should apply. The question is whether there is a net public benefit in widening the scope of collective bargaining beyond that already permitted?
- 2.6 The ACCC needs to approach this question carefully. The application proceeds on the assumption that collective negotiation is essentially harmless, and potentially beneficial. If the ACCC proceeds on this

¹ The statutory authorisations for the purposes of competition legislation are contained in Part 2, Chapter 6 of the SIA (sections 236, 237 and 238) with the statutory authorisation for collective bargaining found in section 237.

² Canegrowers' letter dated 10 March 2017, page 7.

same premise, there is a significant risk that the competition objectives which underpinned the amendments to the SIA in 2015 will be seriously compromised.

3. Expanding collective bargaining threatens competition for the acquisition of cane

- 3.1 As explained by the Australian Sugar Milling Council at the pre-decision conference, all mill owners opposed the amendments to the SIA in 2015 because they believed these amendments would be unworkable. Recent experience suggests those concerns were justified. Nevertheless, mill owners have sought to work under the new legislation. The difficulties in some of these negotiations have been the result of the complexities created by a poorly conceived and formulated regulatory framework, not the existence or use of market power. For similar reasons, mill owners have made clear (and confirmed in the pre-decision conference) their opposition to the application for authorisation now before the ACCC.
- 3.2 As explained by a number of mill owners in the pre-decision conference, the superficial assumption that all mill owners have market power is simply not justified.³ There are numerous regions where there is in fact competition between mill owners for the acquisition of sugar cane, and a history of cane growers switching between mills.⁴ The proposition that there is a need to widen the scope for collective bargaining with mill owners in that position is simply not sustainable. Wilmar supports the submissions of MSF and Isis in this respect.⁵
- 3.3 Further, as numerous submissions to the ACCC have already illustrated, there is a significant public detriment in authorising collective bargaining across the state more broadly.⁶ As explained by MSF and Isis, mill owners risk losing a competitive advantage if the terms they offer to growers are then incorporated into demands by grower groups negotiating with other mill owners.
- 3.4 Whether this outcome results from a formal decision by grower groups to collectively bargain, or some form of pattern bargaining that results from sharing information at a higher level, the effect would be the same, that is, to weaken incentives for mill owners to innovate in terms of their offering to cane growers to win their cane in competition with rival mills. The weakening of such incentives is clearly detrimental to competition and a detriment to the public.
- 3.5 Whether a 'one size fits all' outcome has been observed or not in the past is irrelevant to whether such an outcome would emerge in the future. The heavily regulated process of the past was replaced in 2006 by a regime which was focussed on fostering competition. The 2015 amendments were, according to their authors, introduced for the same reason. Collective bargaining should not be authorised (beyond the extent already permitted) if it threatens to hinder competition between mill owners.

³ See also Wilmar's Submission dated 2 November 2016 (**Wilmar's Submission**), part 8.2; Wilmar's Submission on the Draft Determination dated 3 February 2017 (**Wilmar's Further Submission**), part 4.2(b); MSF Sugar's Submission dated 28 October 2016 (**MSF's Submission**), paragraph [7.13] to [7.22]; ASMC's Submission dated 28 October 2016 (**ASMC's Submission**), pages 3 to 4 and 7; ASMC's Submission on the Draft Determination dated 30 January 2017 (**ASMC's Further Submission**), page 5.

⁴ Isis's mill is less than 40km away from Bundaberg Sugar's Bingera mill, less than 50km away from Bundaberg's Sugar's Millaquin mill and less than 75km away from MSF's Maryborough mill – the proximity of these mills means that there is 'a high degree of contestability' for the supply of cane. In 2015, almost half (49.5%) of the land supplying cane to Isis's mill had previously been supplied to a different mill: Isis's Submission dated 28 October 2016 (**Isis's Submission**), page 2; Isis' Submission on the Draft Determination dated 30 January 2017 (**Isis's Further Submission**), paragraph [6]. Further, at the close of MSF Sugar's Babinda mill in 2012 (because of inadequate cane supply), cane supply in the region was able to be transferred to the adjacent Mulgrave and South Johnstone mills: MSF's Submission, paragraph 7.18.

⁵ Isis's Submission, page 2; Isis's Further Submission, paragraphs [5] to [15].

⁶ ASMC's Further Submission, page 2; Wilmar's Submission, part 8.1; MSF's Submission, part 5; MSF's Further Submission, paragraph [3.8].

4. Expanding collective bargaining threatens competition for the right to market GEI sugar

- 4.1 Those who framed the amendments to the SIA were clear that one of the principal objectives of this legislation was to promote competition, particularly in relation to the right to market GEI sugar.⁷
- 4.2 This proposition is central to the ACCC's assessment of the authorisation insofar as it is intended to facilitate so called 'tripartite negotiations' between growers, mill owners and GEI sugar marketers (GEIMs).
- 4.3 In approaching this question it is vital that the role of QSL is properly understood. The submission by QSL, at the pre-decision conference, that it is required to act only in the interests of the industry as a whole, ignores the conflicting interests which QSL now has as a consequence of the amendments to the SIA.
- 4.4 QSL is now a GEIM, seeking to acquire the right to market GEI sugar from cane growers in competition with Wilmar and other GEIMs. For now, it appears that only certain mill owners are competing with QSL for this right. However, new entrants may appear in the future. For example, a number of mills have already entered into arrangements with third party marketing entities.
- 4.5 The crucial point is that the negotiations between Wilmar and QSL in relation to on supply terms and related agreements (eg. storage and handling agreements) are negotiations between *competitors*. QSL has every incentive to seek a competitive advantage over Wilmar, and other GEIMs, when negotiating on supply terms and related agreements.
- 4.6 While such negotiations are required by the new regime under the SIA, it is hardly surprising that they are, in some cases, protracted. This does not, however, mean there is a case to encourage the intervention of third parties to lend weight to one side over the other. The ACCC must treat with caution claims that the insertion of cane growers into those negotiations would necessarily produce a faster or more efficient outcome. MSF, for example, viewed grower representatives as observers only in its discussions with QSL, and all other mill owners have been able to reach agreement with QSL without any involvement of grower representatives. Far from facilitating timely and efficient outcomes, Wilmar submits that the opposite outcome is more likely.
- 4.7 Various canegrower groups have made no secret of their strong preference for their members to nominate QSL as their GEI sugar marketing entity. It is highly likely that grower representatives who have publicly expressed their fierce support for QSL, if invited to participate in future negotiations over on-supply agreements, would seek to exert further pressure on mill owners to agree to terms which entrench QSL's market position, at the expense of the ability of mill owners and other GEIMs to compete for the right to market GEI sugar. Such an outcome would in fact hinder competition in this nascent market and materially undermine the objectives of the 2015 amendments to the SIA.
- 4.8 It is important to note that Wilmar and QSL have announced that they have reached agreement in principle in relation to the terms of their on-supply agreement, and expect to finalise this agreement in the next few weeks. A significant part of the case for authorisation has, in effect, been removed.

5. The authorisation is wider than even the Applicant intends

- 5.1 Wilmar acknowledges claims by the Applicant that it does not wish to create a regime for state wide bargaining, or to compel other parties to engage in collective bargaining. Yet it seeks authorisation in terms which would permit such conduct to occur.
- 5.2 Wilmar submits that the ACCC cannot grant authorisation on this basis. Where it is apparent that the full range of conduct that could be undertaken, within the boundaries of the authorisation sought, would result in a detriment to the public, the scope of the authorisation granted must necessarily be limited to exclude such conduct.

⁷ Hansard, 2 December 2015, pages 3104 to 3105.

- 5.3 Wilmar notes that the ACCC has confirmed that the authorisation which it proposes to grant is intended to be voluntary. That is, even though collective bargaining may be authorised, no participant in the sugar industry should be compelled, as a consequence of this authorisation, to engage in such a process.
- 5.4 While Wilmar appreciates this confirmation, it is nevertheless important that, in assessing what is likely to happen in the future if this authorisation is granted, the ACCC also considers public positions that have been taken by grower groups.
- 5.5 In Wilmar's submission in response to the draft determination, Wilmar referred the ACCC to public statements by grower representatives, calling for a 'strike' (ie. a collective decision by growers to withhold the supply of cane to Wilmar) should Wilmar not agree to demands made by grower groups and QSL.⁸ In late February 2017, these demands were repeated in connection with public rallies organised by grower groups. If there is any suggestion, in the terms of the ACCC's determination, that such conduct is authorised, it is likely that it will occur under the umbrella of this authorisation. If it is the ACCC's intention that such conduct not be authorised, it must be excluded *explicitly*.
- 5.6 In Canegrowers' most recent submission, it suggests the ACCC 'clarify' the authorisation by an amendment to paragraph 218 of the draft determination.⁹ This amendment, if accepted, would not *clarify* the scope of authorised conduct but in fact significantly *broaden* it to permit Canegrowers to collectively bargain across mills regardless of ownership.
- 5.7 The 'clarification' is consistent with the third tier of Canegrowers' original application for authorisation, which was rejected by the ACCC and narrowed in the draft determination to sharing of information across and within districts to facilitate the adoption of best practice in terms of contracts and related provisions.
- 5.8 That Canegrowers considers a broadening of the authorised conduct simply a 'clarification' suggests that it fundamentally misunderstands the scope of the draft determination and reinforces the Australian Sugar Milling Council, MSF and Wilmar's submissions that the ACCC should clarify precisely the scope of conduct to be authorised and that the arrangements for which authorisation is sought are voluntary in nature.

6. Term of the authorisation

- 6.1 Wilmar notes that the ACCC has proposed to grant authorisation for a period of ten years. Wilmar submits that this period is manifestly excessive.
- 6.2 Once cane supply agreements (and for that matter on supply agreements) are finalised, they are likely to operate, without major modifications, for years to come. QSL's Raw Sugar Supply Agreement, first introduced (albeit under a different name) in 2008, is one such example. Wilmar and QSL have also reached agreement in principle for a lengthy on-supply agreement. The process of bargaining, which is coming to a close, is not something which is likely to be repeated in the foreseeable future. In this context, a ten year authorisation is simply not necessary, and involves assumptions about the duration of public benefits which are unjustified. A shorter authorisation (for example three to five years) would align more closely with industry practice (where three year rolling agreements have been commonly used in the past) and other ACCC authorisation decisions, as well as providing an opportunity for a more timely review, if needed, of the claimed benefits and detriments associated with the authorised conduct.

7. Conclusion

- 7.1 For the reasons set out above, Wilmar believes the ACCC cannot be properly satisfied that the conduct for which authorisation is sought would produce a net public benefit and, as a consequence, the application should be refused.

⁸ Wilmar's Further Submission, Annexure A.

⁹ Canegrowers' letter dated 10 March 2017, page 3, second dot point.

7.2 If the ACCC is not minded to refuse the application, at the very least it should be expressly limited so as to exclude from its scope conduct which threatens to harm competition. Wilmar has attached specific proposals for the ACCC's consideration in this respect.

Annexure - Proposed amendments to the terms of the authorisation

Wilmar submits that, if the ACCC determines that the application should not be refused, the terms in which the authorisation is granted should be amended as set out below. For clarity, Wilmar has used the paragraph numbering in the ACCC's draft determination.

By way of explanation:

1. In relation to the conduct to be authorised (see paragraph 218 of the draft determination), for the reasons outlined above:
 - a. authorisation should not extend to collective bargaining over on supply terms;
 - b. authorisation should not extend to sharing information across negotiations between different mill owners;
 - c. in so far as the remaining conduct would be undertaken between growers supplying a single mill, this conduct is already authorised by the SIA – there is therefore no public in this conduct being authorised by the ACCC.
 2. The term of the authorisation should be three years.
 3. In relation to the conduct not to be authorised (see paragraph 222 of the draft determination), collective boycotts should be expressly excluded.
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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~~ any mill that has the same owner – 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~~ three 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:~~

~~i. Canegrowers collectively negotiating a single state-wide Cane Supply Agreement or related agreements with processors or sugar marketers;~~

~~ii. It also does not extend to Canegrowers (head office) assuming the principal bargaining role in any collective negotiations;~~

~~iii. the making of or giving effect to any contract, arrangement or understanding between individual growers or groups of growers to:~~

~~• withhold or limit the supply of cane to a mill; or~~

~~• refuse to nominate a particular person or class of persons as a GEI sugar marketing entity.~~

~~or to do so in particular circumstances or on particular conditions.~~