



Australian
Competition &
Consumer
Commission

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, mill owners and sugar marketers

Date: 13 April 2017

Authorisation number: A91558

Commissioners: Sims
Rickard
Court
Featherston
Keogh

Summary

The ACCC has decided to grant authorisation to allow the Canegrowers Organisation and its current and future members to collectively bargain in relation to cane supply and related agreements with sugar mill owners and marketers.

The ACCC grants authorisation for ten years until 5 May 2027.

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. The terms and conditions of a grower's cane supply to a local mill are captured in a '**Cane Supply Agreement**'. Within this agreement a cane payment formula has traditionally determined the final amount that mills pay growers for their sugar cane. This has typically been 60 to 65 per cent of the net revenue received from the sale of raw sugar and has become known as the Growers Economic Interest (or '**GEI**').

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. Without the statutory protection for collective bargaining provided by the SIA, growers would have been at risk of breaching competition laws. Up until 2006 the raw sugar produced was sold to a statutory single desk marketer.

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 the sugar in which the grower has a GEI and requiring mill owners to have an agreement (known as an '**On-Supply Agreement**') with each grower-nominated sugar marketing entity to on-supply at least a specified amount of raw sugar.

The Australian Government introduced a mandatory **Sugar Code of Conduct** on 5 April 2017. It regulates the conduct of growers, mill owners and marketers (of GEI sugar) in relation to their negotiation of cane supply and raw sugar on-supply agreements. The Code establishes processes for arbitration in respect of the negotiation of cane supply agreements and raw sugar on-supply agreements upon referral by a negotiating party. It also ensures supply contracts between growers and mill owners guarantee a grower's choice of marketing entity for the GEI sugar manufactured from the cane they supplied.

The ACCC's role in assessing this application is to consider what benefits and detriments are likely to result from the proposed conduct, given the framework within which the industry operates.

Application for ACCC authorisation

The Queensland Cane Growers Organisation Ltd, representing the interests of sugar cane growers in Queensland, seeks authorisation for voluntary collective bargaining with sugar mill owners and marketers. The Canegrowers Organisation is comprised of a head office in Brisbane and 12 separate local offices (or companies). Each regional Canegrowers company represents the interests of growers in their respective region in cane supply negotiations with the local mill owner.

Broadly, Canegrowers lodged the current application because it was 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, 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.

Put simply, Canegrowers submits that it seeks authorisation to be able to collectively negotiate on behalf of growers in relation to all matters that relate to the production and supply of sugar cane to a mill, including negotiations relating to the value and payment for the supply of sugar cane.

The draft decision

On 15 December 2016 the ACCC released a draft determination proposing to grant authorisation to Canegrowers (including current and future members of Canegrowers and local Canegrowers companies) to collectively bargain in relation to cane supply and related agreements with mill owners and marketers. The proposed authorisation was for collective negotiations on behalf of growers that supply cane to the same local mill and growers that supply cane to any mill that has the same owner.

The proposed authorisation also extended to Canegrowers (head office) sharing information in certain circumstances to growers across sugar cane regions in Queensland and providing services to local Canegrowers companies to support their local collective negotiations.

Key issues following the draft decision

A conference was requested to discuss the ACCC's draft determination and further written submissions received from interested parties. Mill owners remained concerned about the scope of the proposed authorisation and were concerned about the practical impact of Canegrowers' (head office) proposed information sharing role.

While acknowledging that Canegrowers does not seek authorisation to collectively negotiate a single State-wide Cane Supply Agreement, mill owners consider sharing information to growers across regions will have the same practical effect – namely, standardising cane supply terms and conditions across the State. Mill owners are also concerned that sharing information to growers across regions will stifle incentives for mill owners to offer innovative terms and conditions to growers in the future, therefore lessening competition between mills for the acquisition of cane through the terms of their Cane Supply Agreements.

In response, Canegrowers reiterated that:

- the proposed arrangements are voluntary, and information sharing simply enables growers to obtain a better understanding of the terms and conditions different mill owners offer to secure the supply of sugar cane to their mill
- there are separate Canegrowers negotiating teams in each district, and mill owners will continue to be free to offer growers whatever incentives and innovative terms and conditions they choose to attract cane supply and

- the proposed collective bargaining conduct does not impact existing industry practices regarding confidentiality agreements – for example, should a mill owner’s bargaining representatives seek to discuss commercially sensitive issues with growers’ representatives during discussions, the parties to the collective negotiations can reach a confidentiality agreement at the time. Where this occurs, the relevant information could only be shared beyond the negotiating representatives and their adviser in accordance with the terms of the confidentiality agreement.

Assessment

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

Where growers have a right to nominate a marketer of 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.

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, mill owners and marketers
- Canegrowers does not seek authorisation to negotiate and enter into a single state-wide Cane Supply Agreement (or related contracts)
- 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
- the proposed arrangements do not affect the ability of parties to implement appropriate confidentiality regimes to protect commercially sensitive information and intellectual property during negotiations and
- current incentives for mill owners to offer different terms and conditions to particular growers within particular regions will remain.

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 grants authorisation for 10 years.

Conduct authorised

The ACCC grants authorisation to the Canegrowers Organisation (and current and future members of the Canegrowers Organisation) to collectively bargain cane supply and related contracts with mill owners and sugar marketers in relation to certain Cane Supply Terms and Conditions. This authorisation covers collective bargaining in respect of the supply of cane to the same mill and any mill that has the same owner. Authorisation also extends to information sharing across and within districts to facilitate the adoption of best practice terms and conditions, subject to any confidentiality agreement implemented by the relevant parties. See the Determination section for further detail.

Conduct outside the scope of authorisation

Authorisation of voluntary collective bargaining does not oblige growers, mill owners or sugar marketers to participate in collective negotiations in relation to specific terms and conditions, regardless of which agreement they fall within. Nor does authorisation confer a right on parties to be included in certain negotiations that they are not a party to.

Canegrowers did not seek, and this authorisation does not provide, immunity to growers to participate in collective boycott activities.

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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
Canegrowers Organisation	Queensland Cane Growers Organisation Ltd and the local Canegrowers companies
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
Sugar Code of Conduct	<i>Competition and Consumer (Industry Code – Sugar) Regulations 2017</i>

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 by Canegrowers and its local Canegrowers companies¹ (collectively referred to as the **Canegrowers Organisation**) and the current and future members of the Canegrowers Organisation.
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.²

The draft determination

3. On 15 December 2016 the ACCC issued a draft determination³ proposing to grant authorisation for Canegrowers (including current and future members of Canegrowers and local Canegrowers companies) to collectively bargain in relation to cane supply and related agreements with sugar processors (mills) and marketers. Authorisation was proposed for ten years.
4. On 20 January 2017 a conference was requested in relation to the draft determination. The conference was held in Brisbane on 10 February 2017. Further public submissions were also received in response to the draft determination.

The conduct

5. 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:⁴
 - 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

¹ The current local Canegrowers companies are listed at paragraph 11.

² 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>.

³ Subsection 90A(1) of the Act requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

⁴ Canegrowers' application for authorisation A91558, 23 September 2016, pp. 3-4.

- 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.
6. Canegrowers also sought authorisation for collective bargaining across three levels:⁵
- 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'**).
7. In response to a request from the ACCC for further information about the proposed conduct, on 18 November 2016 Canegrowers 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.⁶
8. In relation to 'tier 3' collective bargaining, Canegrowers clarified that it seeks authorisation to allow information to be shared across districts.⁷ 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 mill owner (or the same mill owner, in the case of 'tier 2').
9. Following the draft determination, interested parties raised concerns that there was insufficient clarity about the kind of information Canegrowers proposed to share with growers across growing regions under 'tier 3' of the proposed collective bargaining conduct. On 10 March 2017 Canegrowers provided further examples about its proposed information sharing role. Further information about the proposed collective bargaining process, including the information that Canegrowers (head office) seeks to share across growing regions, timing of negotiations and the

⁵ Canegrowers' application for authorisation A91558, 23 September 2016, pp. 10-11.

⁶ Submission from Canegrowers, 18 November 2016, p. 2.

⁷ Submission from Canegrowers, 18 November 2016, p. 4.

types of agreements sought to be collectively bargained is provided in the Background section of this determination (from paragraph 85).

10. The ACCC's assessment of the proposed collective bargaining arrangements is based on the further information that Canegrowers has provided to the ACCC since lodging its application about how the proposed collective bargaining conduct will work in practice.
11. Authorisation is sought for collective bargaining conduct by the Canegrowers Organisation and on behalf of current and future members of the Canegrowers Organisation. Membership of the Canegrowers Organisation 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
 - 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.
12. Authorisation is sought for 10 years.
13. 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 73.

14. 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 it seeking authorisation from the ACCC. It considers that:⁸

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.

15. More specifically, Canegrowers submits that some mills are adopting a 'very narrow and strict interpretation'⁹ 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 and as such are not exempt from the CCA by virtue of the SIA.

The applicants

16. 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.
17. 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 up to nine Directors, made up of one independent Director if appointed and eight grower Directors elected by the Policy Council. Elections are held every three years.¹⁰
18. 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 to act in their role as bargaining representatives for their grower members.¹¹
19. 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,¹² 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).

⁸ Canegrowers' application for authorisation A91558, 23 September 2016, p. 16.

⁹ Submission from Canegrowers, 18 November 2016, p. 10.

¹⁰ Canegrowers' website, http://www.canegrowers.com.au/page/Industry_Centre/About_Us/company-structure/, viewed on 4 November 2016.

¹¹ Canegrowers' application for authorisation A91558, 23 September 2016, p. 10.

¹² Canegrowers' application for authorisation A91558, 23 September 2016, p. 15.

The targets

20. Authorisation is sought for collective bargaining with processors (mills) and sugar marketers. There are currently seven **mill owners**, namely:¹³

- 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.

21. 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 mill owner is provided in Table 1.

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 ¹⁴
Mackay Sugar Limited	Grower owned limited company	Mossman Farleigh Marian Racecourse	No	6.2 mtpa ¹⁵
MSF Sugar Limited	Mitr Phol Sugar Corp (based in Thailand)	Tableland Mulgrave South Johnstone Maryborough	Miller-marketer	4.7 mtpa ¹⁶
Tully Sugar Limited	COFCO (based in China)	Tully	Miller-marketer	2.4 mtpa ¹⁷
Bundaberg Sugar Ltd	Finasucre (based in Belgium)	Bingera	No	1.5 mtpa ¹⁸

¹³ Canegrowers' application for authorisation A91558, 23 September 2016, p. 7.

¹⁴ Wilmar Sugar website: <https://www.wilmarsugarmills.com.au/about-us>, viewed on 10 November 2016.

¹⁵ Mackay Sugar Annual Report 2016, p. 1.

¹⁶ MSF Sugar website: <http://www.msfsugar.com.au/about-us/>, viewed on 10 November 2016.

¹⁷ Tully Sugar website, <http://www.tullysugar.com.au/index.php/products/operationalstatistics>, viewed on 10 November 2016.

Milling company	Mill ownership	Operating mills	Marketing business	Tonnes cane/year
		Millaquin		
Isis Central Sugar Milling Company Limited	Grower owned, shareholder co-operative	Isis	No	1.4 mtpa ¹⁹
Heck & Sons Limited	Family owned and operated	Rocky Point	No	Annual average 300 000 - 350 000 tonnes. ²⁰

22. Wilmar Sugar accounts for around 55-60 per cent of Australia's raw sugar exports. The next three largest mill owners – Mackay Sugar, MSF Sugar and Tully Sugar – together account for approximately 30 per cent of raw sugar exports.²¹

23. Authorisation is also sought for proposed collective bargaining with the following raw sugar **marketers**.²²

- 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 industry²³

24. 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. In 2015, according to data released by the

¹⁸ Bundaberg Sugar website: <http://www.bundysugar.com.au/company/cane>, viewed on 10 November 2016.

¹⁹ Isis Central Sugar Milling Company website: <https://www.isissugar.com.au/>, viewed on 10 November 2016.

²⁰ Heck Group website: <http://www.heckgroup.com.au/rocky-point-sugar-mill/introduction>, viewed on 10 November 2016.

²¹ Queensland Productivity Commission, *Decision Regulatory Impact Statement, Sugar Industry (Real Choice in Marketing) Amendment Bill 2015*, November 2015, p. 18.

²² Canegrowers' application for authorisation A91588, 23 September 2016, p. 7.

²³ 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.

International Sugar Organisation, Australia was the world's second largest exporter of raw sugar, after Brazil.²⁴

25. 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.
26. 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.
27. 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 but QSL continued to market the majority of raw sugar.
28. In addition to operating milling and processing functions, some of the milling companies also have related entities with marketing and trading functions. Currently, QSL markets a significant proportion of the sugar for each of the milling companies who export raw sugar, but some of those milling companies market raw sugar in their own right.²⁵
29. 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.

The supply chain

30. Sugarcane is a low value, high volume perishable product that must be processed soon after harvest. The average 'cut to crush time' is 12 hours.²⁶ Location and transport costs limit which mills can process growers' cane. Growers generally supply cane to the mill closest to their farm. This means that in most cases, growers have no alternative mill to supply their sugarcane.
31. 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.
32. 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.

²⁴ See International Sugar Organisation website, <http://www.isosugar.org/sugarsector/sugar>, viewed on 14 March 2017.

²⁵ Submission from QSL, 28 October 2016, p. 4.

²⁶ 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.

- 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.
33. Three of the seven Queensland milling companies operate mills across regions. Namely:²⁷
- 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.
34. In 2014, the following volumes of sugarcane were produced in each growing region in Queensland:²⁸
- 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.
35. 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)²⁹, with some via road.
36. 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 price the grower receives reflects a portion of the net revenue that the marketer makes on the sale of the raw sugar.
37. The sugar cane is transferred from the grower to the mill at an agreed rail siding or truck pick up point (before the mill). From this point, the mill owner 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.³⁰
38. Until recently, mill owners 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

²⁷ Canegrowers' application for authorisation A91558, 23 September 2016, p. 5.

²⁸ Canegrowers' website, http://www.canegrowers.com.au/page/Industry_Centre/About_Us/statistics-facts-figures/#map-of-sugarcane-areas, viewed on 10 November 2016.

²⁹ 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.

³⁰ Submission from MSF Sugar, 28 October 2016, p. 9.

purchased raw sugar equivalent to their 'Miller Economic Interest' back from QSL for them to market.³¹

39. 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.
40. Under a new operating agreement between QSL and Sugar Terminals Limited commencing in 2017, Sugar Terminals Limited controls the bulk sugar terminals and QSL is sub-contracted as the operator of the terminals. QSL will not be the contractual counterparty to any of the storage and handling arrangements, as these are agreements between terminal users and Sugar Terminals Limited.³²

Figure 1: map of Queensland sugar industry³³



³¹ Queensland Productivity Commission, *Decision Regulatory Impact Statement, Sugar Industry (Real Choice in Marketing) Amendment Bill 2016*, November 2015, p. 41-42.

³² Submission from QSL, 30 January 2017, p. 3.

³³ Queensland Productivity Commission, *Decision Regulatory Impact Statement, Sugar Industry (Real Choice in Marketing) Amendment Bill 2015*, November 2015, p. 14.

Cane supply and payment

41. 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.³⁴ Further detail about the relevant Queensland sugar industry legislation is provided later in the Background section of this determination.
42. 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.³⁵
43. As previously mentioned, most growers can only supply their sugar cane to their local mill. 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 alternatives³⁶

Milling company	Mills	Growers	Alternative
Wilmar Sugar	Macknade Victoria Invicta Pioneer Kalamia Inkerman Proserpine Plane Creek	Approx. 1500 growers supply Wilmar Mills ³⁷	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. ³⁸	n/a
MSF Sugar	Tableland Mulgrave South Johnstone Maryborough	Sources cane from its own property holdings and around 630 independent growers. ³⁹	Some Tableland and Mulgrave growers could supply Mackay Sugar (at the Mossman mill). Maryborough growers could supply Isis Central Sugar (at the Isis mill).

³⁴ Section 31 of the *Sugar Industry Act 1999*.

³⁵ Canegrowers' application for authorisation A91558, 23 September 2016, p. 11.

³⁶ 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.

³⁷ Canegrowers application for authorisation A91558, 23 September 2016, p. 4.

³⁸ Mackay Sugar Limited, Annual Report 2016, p. C, see:

<http://www.mkysugar.com.au/news/Pages/Reports.aspx>

³⁹ MSF Sugar website: <http://www.msfsugar.com.au/>, viewed on 10 November 2016.

Milling company	Mills	Growers	Alternative
Tully Sugar	Tully	Approx. 325 growers supply the Tully mill. ⁴⁰	n/a
Bundaberg Sugar	Bingera Millaquin	Approx. 236 growers supply Bundaberg Sugar mills. ⁴¹	Some growers could supply Isis Central (at the Isis mill in Childers).
Isis Central Sugar Mill	Isis	Approx 300 growers supply the Isis mill. ⁴²	Isis growers can also supply Bundaberg Sugar and MSF Sugar mills – its mill is <40km from Bundaberg Sugar’s Bingera mill, <50km from Bundaberg Sugar’s Millaquin mill and <75 km from MSF Sugar’s Maryborough mill. ⁴³
Heck & Sons	Rocky Point	Approx. 50 growers supply the Rocky Point mill. ⁴⁴	In rare circumstances, some limited tonnes of cane could be transported to mills in northern NSW. ⁴⁵

44. The price growers receive for their cane under Cane Supply Agreements is linked to the price of raw sugar. A **Cane Payment Formula** (as shown below) was developed by the industry, and the ACCC understands it has used variants of this formula for around 100 years. It is one method for calculating how the returns from the raw sugar produced by mill owners are allocated between growers and mill owners.⁴⁶

$$\text{Cane Price} = \text{Net Sugar Price} \times (0.009^{47}) \times (\text{CCS}-4) + \text{Constant}$$

45. 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.’⁴⁸
46. 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 mill owner. The revenue to

⁴⁰ Tully Sugar website, <http://www.tullysugar.com.au/index.php/about-us/early-days>, viewed on 10 November 2016.

⁴¹ Bundaberg Canegrowers Ltd Annual Report, 2014/15, p. 23.

⁴² Isis Central Sugar Milling Company website: <https://www.isissugar.com.au/Public/History.aspx>, viewed on 10 November 2016.

⁴³ Submission from ISIS Central Sugar Mill, 30 January 2017, p. 2.

⁴⁴ 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.

⁴⁵ Canegrowers’ application for authorisation A91558, 23 September 2016, p. 4.

⁴⁶ Queensland Productivity Commission, *Decision Regulatory Impact Statement, Sugar Industry (Real Choice in Marketing) Amendment Bill 2015*, November 2015, p. 19.

⁴⁷ Represents ‘milling recovery efficiency’.

⁴⁸ Submission from Wilmar Sugar, 2 November 2016, p. 7.

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.⁴⁹

47. Growers and mill owners may negotiate variations to the Cane Payment Formula or other methods of payment for sugar cane in their Cane Supply Agreements. However, the ACCC understands cane price is generally based on:⁵⁰
- 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 Price⁵¹

48. The Net Sugar Price equals:

Raw sugar futures contract price

plus marketing premiums

less marketing costs

49. The raw sugar futures contract price is the globally traded 'Intercontinental Exchange No. 11 raw sugar futures contract price' (ICE11). The ICE11 price 'contributes more than 95 per cent of the net sugar price, although this has recently been close to 99 per cent.'
50. 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.⁵²

⁴⁹ Submission from MSF Sugar, 28 October 2016, p. 9.

⁵⁰ Queensland Productivity Commission, *Decision Regulatory Impact Statement, Sugar Industry (Real Choice in Marketing) Amendment Bill 2015*, November 2015, p. 20.

⁵¹ Unless otherwise stated, 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.

⁵² Dimasi and Samuel, *An assessment of Australian Sugar Marketing Commercial Arrangements*, 28 April 2015, p. 2.

51. Marketing costs are those costs incurred by a 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.
52. 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.⁵³
53. The ACCC understands that in recent years most mill owners, at their discretion, 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.⁵⁴ Wilmar Sugar advises that its mills will not offer forward pricing to growers from the 2017 season and beyond, but the Wilmar GEI sugar marketing entity will offer forward pricing to those growers that nominate it under the Marketing Choice Amendment.⁵⁵
54. 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 between the mill owner and marketer.⁵⁶
55. 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.

⁵³ Queensland Productivity Commission, *Decision Regulatory Impact Statement, Sugar Industry (Real Choice in Marketing) Amendment Bill 2015*, November 2015, p. 20.

⁵⁴ Submission from Wilmar Sugar, 2 November 2016, p. 8.

⁵⁵ Submission from Wilmar Sugar, 3 February 2017, p. 7.

⁵⁶ Submission from Canegrowers, 18 November 2016, p. 9.

Raw sugar marketing arrangements⁵⁷

Brief history

56. 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 mill owners.
57. 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, mill owners supplied 100 per cent of their raw sugar production intended for bulk export to QSL. However, many mill owners 'buy back' their Miller Economic Interest sugar to market themselves. Growers are not a party to RSSAs.

The role of QSL

58. 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.⁵⁸
59. 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.
60. QSL sells raw sugar directly to overseas refineries. Proceeds are pooled for payment purposes and distributed back to mill owners 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.
61. 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 mill owner has the remaining one-third interest.

⁵⁷ 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.

⁵⁸ Submission from QSL, 28 October 2016, p. 2.

Recent developments

62. 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.
63. 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.⁵⁹
64. In December 2015, the Queensland Parliament passed the *Sugar Industry (Real Choice in Marketing) Amendment Act 2015 (the Marketing Choice Amendment)*.
65. The Revised Explanatory Notes for the Sugar Industry (Real Choice in Marketing) Amendment Bill 2015 states that:⁶⁰
- 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.
66. The subsequent amendments to the SIA regarding GEI sugar include:⁶¹
- a right for growers to nominate the entity to undertake marketing of GEI sugar⁶²
 - 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.⁶³
67. Canegrowers advises that in nominating a GEI marketer, growers are restricted to choose from those GEI marketers with which the mill owner has an On-Supply Agreement for raw sugar.⁶⁴
68. QSL advised in the early stages of the ACCC's consultation process that it had 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.⁶⁵ 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

⁵⁹ Queensland Productivity Commission, *Decision Regulatory Impact Statement, Sugar Industry (Real Choice in Marketing) Amendment Bill 2015, November 2015*, p. 25.

⁶⁰ Sugar Industry (Real Choice in Marketing) Amendment Bill 2015 – Revised Explanatory Notes, p. 2.

⁶¹ Insertion of new section 33B of the *Sugar Industry Act 1999*.

⁶² Section 33B(2)(d)(ii) of the SIA.

⁶³ Section 33B(2)(d)(i) of the SIA.

⁶⁴ Submission from Canegrowers, 18 November 2016, p. 7.

⁶⁵ Submission from QSL, 28 October 2016, p. 4.

that at each of its four mills, from 2017 onwards growers will have the choice of MSF Sugar or QSL marketing systems.⁶⁶

69. Further, QSL advised 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 mill owner's choice, which in the case of Wilmar Sugar, MSF Sugar and Tully Sugar, is each of their related marketing entities.⁶⁷
70. Similarly, Canegrowers advised at the time of its application that in the Cane Supply Agreements that have been negotiated since the Marketing Choice Amendment, the default GEI sugar marketer is nominated by the mill owner.
71. On 15 December 2016 Tully Sugar and QSL signed an On-Supply Agreement. This agreement means that growers who have a valid Cane Supply Agreement with Tully Sugar may access QSL marketing and pricing services for the 2017 season and beyond.⁶⁸
72. On 16 March 2017 Wilmar Sugar advised that it had reached an in-principle agreement with QSL in relation to the terms of their On-Supply Agreement, and it expects to finalise this agreement in the 'next few weeks'.⁶⁹

Queensland sugar industry legislation

73. 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.
74. 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))

⁶⁶ Submission from MSF Sugar, 28 October 2016, p. 10.

⁶⁷ Ibid.

⁶⁸ Queensland Sugar Limited media release, *Marketing Choice delivered for Tully Sugar growers*, viewed at <http://www.qsl.com.au/news-media/marketing-choice-delivered-tully-sugar-growers> on 21 March 2017.

⁶⁹ Submission from Wilmar Sugar, 16 March 2017, p. 4.

- the supply contract must contain a term regarding the payment for 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 mill owner
 - if the supply contract contains a GEI sugar price exposure term, the mill owner 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)).
75. 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.
76. 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.
77. 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.

Sugar Code of Conduct

78. The Australian Government introduced a mandatory Sugar Code of Conduct on 5 April 2017. The purposes of the Code are:

- to regulate the conduct of growers, mill owners and marketers of sugar in relation to agreements for the supply of cane or the on-supply of sugar (including an obligation to negotiate in good faith)
- to ensure that supply contracts between growers and mill owners have the effect of guaranteeing a grower's choice of the marketing entity for the GEI sugar manufactured from the cane the grower supplies and
- to require and provide for pre-contractual arbitration of the terms of agreements for the supply of cane or the on-supply of sugar if the parties fail to agree to those terms.

79. The Sugar Code of Conduct outlines that cane supply agreements may be the result of individual or collective negotiations.

The proposed collective bargaining processes and timing

Timing

80. 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 2017.⁷⁰

81. Canegrowers advises that Cane Supply Agreements are typically rolling agreements,⁷¹ 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 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.

82. Regarding the 2017 season, at the time of lodging the application Canegrowers advised that Cane Supply Agreements had been settled for all mills except those mills owned by Wilmar Sugar and Tully Sugar. Canegrowers submitted that without Cane Supply Agreements, growers supplying cane to mills owned by these companies would be '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'.⁷²

83. In terms of the timing of grower decisions, Canegrowers submits that growers are restricted to choose those GEI marketers with which the mill owner has an On-

⁷⁰ Submission from Canegrowers, 18 November 2016, p. 9.

⁷¹ Canegrowers' application for authorisation A91558, 23 September 2016, p. 6.

⁷² Ibid.

Supply Agreement.⁷³ 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.⁷⁴ 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. In December 2016, QSL and Tully Sugar announced that they had finalised an On-Supply Agreement. In early March 2017, QSL and Wilmar Sugar announced an in-principle agreement in relation to the terms of their On-Supply Agreement.

84. Wilmar Sugar advises that GEI sugar marketers may or may not provide pooling and forward pricing services as part of their offering to growers. It notes that there are a range of options available to growers who wish to manage their sugar price exposure. These may include, but are not limited to, pooling and forward pricing through their nominated GEI sugar marketer. Wilmar Sugar submits that growers can also forward price GEI sugar through financial institutions outside the grower-miller-marketer contractual relationship. These arrangements are voluntary.⁷⁵

Collective bargaining process

85. Canegrowers seeks authorisation for growers to collectively bargain with processors (mill owners) 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.

86. 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

⁷³ Submission from Canegrowers, 18 November 2016, p. 7.

⁷⁴ Submission from Canegrowers, 18 November 2016, p. 7.

⁷⁵ Submission from Wilmar Sugar, 3 February 2017, pp. 7-8.

- 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.

87. 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.⁷⁶ 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.’⁷⁷

88. 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.⁷⁸ Canegrowers submits that this information sharing occurs in an environment where individual growers remain free to negotiate individual contracts with the mill owner.⁷⁹

89. In response to interested party concerns that there was insufficient detail about what sharing information across growing regions about ‘best practice’ in contracts and related agreements actually means in practice, on 10 March 2017 Canegrowers provided additional information to the ACCC. In particular, it submitted that a collectively negotiated Cane Supply Agreement is a complex document, which reflects the agreement reached on each issue by both the grower representatives and mill representatives. It considers that Cane Supply Agreements contain provisions for the physical production, harvesting and delivery of cane, as well as provisions for the calculation and marketing of GEI sugar. Canegrowers also maintains that their agreements relate to and have linkages with a number of other agreements including pricing and pooling agreements, related products agreements and the On-Supply Agreement between the mill and the GEI sugar 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. Canegrowers provided an example of each type of issue, as follows.⁸⁰

- An issue *common to all mill areas, regardless of mill ownership* includes provisions relating to the weighing, sampling, testing and analysis of sugar cane for quality assessment and payment purposes. The procedures and processes used in this part of the supply chain are important for the calculation of the quantity of GEI sugar produced from each grower’s cane. Growers and their bargaining representatives across the State are interested in understanding what best practice is and ensuring that best practice terms and conditions are included in Cane Supply Agreements. Canegrowers submits that despite sharing information about this topic, a uniform approach will not be adopted across the State.

⁷⁶ Submission from Canegrowers, 18 November 2016, p. 3.

⁷⁷ Ibid, p. 3.

⁷⁸ Ibid, p.4.

⁷⁹ Ibid.

⁸⁰ Submission from Canegrowers, 10 March 2017, p. 3.

- An issue for *mills with common mill ownership* includes information relating to the approach that the particular mill owner is taking to implementing grower choice. Some mill owners 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 growers. Other mill owners have adopted a different model, where there is a more direct relationship between the grower and their GEI marketer. Canegrowers advises that while all grower negotiating groups have an interest in the different models, all growers that supply a particular mill owner have an important interest in understanding the arrangements that mill owner proposes and how the production tonnage and other marketing risks are shared by growers within their mill area or across all areas supplying the mill owner's mills, how their cane supply agreement interfaces with the associated pricing and pooling agreements and with the On-Supply Agreement between the mill owners and the GEI sugar marketer.
 - Issues *specific to a single mill area* usually relate to the terms and conditions associated with the physical supply and delivery of cane to that particular mill. This could relate to the harvesting roster and the supply and delivery of collection bins to the mill's delivery points.
90. Given the breadth of issues potentially involved, Canegrowers submits that the phrase 'best practice terms and conditions' 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.'⁸¹ For example, Canegrowers submits that a particular district may be experiencing crushing capacity constraints and season length issues and the bargaining representatives and the relevant mill may have developed and implemented a solution to that problem, including through provisions in their Cane Supply Agreement. 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 this issue was resolved in the first district.⁸²
91. 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. On 10 March 2017 Canegrowers clarified that 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 owner's representatives. Representatives from Canegrowers (head office) provide advice to and assist in the negotiations in response to requests from the local negotiating team.⁸³
92. In addition, Canegrowers is **not** seeking authorisation to negotiate single State-wide cane supply and related agreements. In particular, it submits that:⁸⁴
- in most instances the collective negotiations are conducted by the local Canegrowers company and the mill owner (unless Canegrowers' head office is invited to sit in on negotiations, as discussed below)

⁸¹ Ibid, p. 4.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Submission from Canegrowers, 18 November 2016, p. 2.

- 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. For cost effectiveness and efficiency purposes, Canegrowers’ head office retains expertise in agronomic, economic, technical and legal services. This expertise is available to local Canegrowers companies if they choose.⁸⁵
93. 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.
94. Canegrowers submits that the proposed terms and conditions of supply and related agreements are similar in each mill area throughout Queensland. The following issues are proposed to be collectively negotiated within Cane Supply Agreements:⁸⁶
- 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.
95. 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 to collectively bargain.⁸⁷
- The supply of GEI sugar from the mill owner to the GEI marketing entity. While the parties to the On-Supply Agreement are the mill owner 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 from the sale of GEI sugar. It is open to the growers to collectively

⁸⁵ Submission from Canegrowers, 10 March 2017, p. 5.

⁸⁶ Submission from Canegrowers, 18 November 2016, p. 3.

⁸⁷ Submission from Canegrowers, 18 November 2016, pp. 4-5.

negotiate essential GEI marketing provisions in a Cane Supply Agreement that the grower enters into with the mill owner, which then guides the mill owner in entering 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.
- pricing, pooling and payment contracts between the growers and the GEI marketer. The GEI sugar marketer could be either the mill owner’s related entity 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.

96. 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:⁸⁸

- 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-

⁸⁸ Submission from Canegrowers, 18 November 2016, pp. 5-6.

Supply Agreement should not be a tripartite agreement between the mill owner, GEI marketer and the local Canegrowers companies.⁸⁹

97. In its submission following the draft determination, Canegrowers confirmed that 'it 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 [On-Supply Agreement] were agreed.'⁹⁰
98. Canegrowers submits the essential terms of the On-Supply Agreement can affect the value of GEI sugar and include terms relating to:⁹¹
- the duration of the contract and its termination provisions
 - delivery and receival 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 mill owner to the GEI marketers
 - pricing provisions
 - flow of moneys between the GEI marketers, mill owners and growers
 - variations in tonnages and
 - failure to deliver committed sugar.
99. 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:⁹²
- 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.
100. 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.⁹³

⁸⁹ Submission from Canegrowers, 18 November 2016, p. 6.

⁹⁰ Submission from Canegrowers, 10 March 2017, p. 5.

⁹¹ Submission from Canegrowers, 18 November 2016, p. 6.

⁹² Submission from Canegrowers, 18 November 2016, p. 6.

101. 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 mill owners insist in these forward pricing terms and conditions being captured in separate agreement between the grower and the mill owner. Therefore, Canegrowers seeks to collectively negotiate these issues whether they form part of a Cane Supply Agreement or separate, but related pricing agreement.⁹⁴
102. In particular, forward pricing terms and conditions may include:⁹⁵
- the duration of the contract and its termination provisions
 - management fees and conditions
 - payment provisions
 - nomination dates and
 - pooling options.

Submissions received by the ACCC

103. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process.
104. 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.
105. A summary 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 determination.
106. Copies of public submissions may be obtained from the [Public register](#) on the ACCC's website.

Prior to the draft determination

107. 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, supported authorisation.

Canegrowers

108. Broadly, Canegrowers submitted 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

⁹³ Ibid.

⁹⁴ Submission from Canegrowers, 18 November 2016, p. 7.

⁹⁵ Ibid.

related contract issues.⁹⁶ However, in recent times some mill owners had questioned the coverage of the statutory exemption for collective bargaining provided by the SIA.

109. In particular, Canegrowers advised that some mill owners 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.

110. Canegrowers provided the following examples of where mill owners 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 noted:

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 bargaining authorisations contained in the Act do not extend to the negotiation of the Molasses Gain Sharing Agreement.⁹⁷

- Regarding forward pricing terms, Canegrowers submitted:

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.⁹⁸

111. Canegrowers considered 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.⁹⁹

112. Importantly, Canegrowers submitted 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'.¹⁰⁰

⁹⁶ Canegrowers' application for authorisation A91558, 23 September 2016, p. 12.

⁹⁷ Submission from Canegrowers, 18 November 2016, p. 5.

⁹⁸ Ibid, p. 7.

⁹⁹ Ibid, p. 1.

¹⁰⁰ Ibid.

Interested parties

Grower groups

113. Prior to its draft determination, 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 submitted that recent changes to the SIA have allowed the mill owner 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 considered that it is in the growers' interests and is not unduly detrimental to the mill owner's interests for collective bargaining to be authorised in relation to all matters between growers and a mill owner.¹⁰¹
- **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 mill owner and the grower's choice of marketer. It advised 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.

Burdekin District Cane Growers Limited submitted 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 mill owner, including determination of terms of cane payment, is essential for the Burdekin region.¹⁰²

- **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 considered that when supplying a monopoly mill owner, 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.¹⁰³

¹⁰¹ Submission from Kalamia Cane Growers Organisation Ltd, 27 October 2016, p. 1.

¹⁰² Submission from Burdekin District Cane Growers Limited, 3 November 2016, p. 2.

¹⁰³ Submission from Australian Cane Farmers Association, 28 October 2016, p. 1.

Mill owners and marketers

114. Before the draft determination 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 considered 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 considered that collective bargaining is the most effective way for growers to correct the significant imbalance of bargaining power between growers and mill owners and their vertically integrated marketers.¹⁰⁴

115. Prior to the draft determination the ACCC received submissions from the following mill owners 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 submitted that 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 was 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 submitted 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.’¹⁰⁵

- **Isis Central Sugar Mill** – operates the grower-owned cooperative mill near Childers. It submitted 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 noted 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’.¹⁰⁶ It submitted 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).¹⁰⁷
- **MSF Sugar** – is a ‘miller-marketer’ and does not support authorisation. Overall, it submitted that the collective bargaining arrangements proposed by Canegrowers represent a substantial change on current provisions

¹⁰⁴ Submission from QSL, 28 October 2016, p. 1.

¹⁰⁵ Submission from Wilmar Sugar, 2 November 2016, p. 4.

¹⁰⁶ Submission from Isis Central Sugar Mill, 28 October 2016, p. 1

¹⁰⁷ Ibid, p. 2.

authorised for competition legislation under the SIA. If authorisation was granted by the ACCC, MSF Sugar considered it 'would move the industry back into a regulated environment.'¹⁰⁸ Among other things it submitted that:¹⁰⁹

- 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 submitted that the ACCC should deny authorisation to the proposed arrangements. The members of ASMC include each of the mill owner 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 considered that the proposed arrangements represent a 'significant expansion on the growers' current ability to collectively bargain authorised by...the SIA'.¹¹⁰ It submitted that 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 considered Canegrowers did not identify any additional public benefits which would arise from any authorisation granted by the ACCC, as opposed to the collective bargaining currently authorised under the SIA.

Following the draft determination

116. A pre-decision conference was requested by MSF Sugar to discuss the draft determination. The conference was held in Brisbane (and various other locations via video) on 10 February 2017. A summary of the issues discussed at the conference may be obtained from the ACCC's website www.accc.gov.au/authorisationsregister.
117. Many of the submissions at the conference focused on the scope of the proposed authorisation, including seeking further clarity that any authorisation would not extend to collective boycott activities. In addition, interested parties raised concerns about the practical impact of Canegrowers' (head office) proposed

¹⁰⁸ Submission from MSF Sugar, 28 October 2016, p. 4.

¹⁰⁹ Ibid, pp. 4-8.

¹¹⁰ Submission from ASMC, 28 October 2016, pp. 2-3.

information sharing role, as well as the breadth of the terms and conditions that local Canegrowers representatives are seeking to collectively negotiate.

118. More specifically, the key issues raised and views expressed by interested parties at the conference included:

- While authorisation is not proposed to extend to collective negotiation of a State-wide Cane Supply Agreement, authorisation is proposed to extend to Canegrowers (head office) sharing certain information across growing regions. This is likely to result in standardisation of Cane Supply Agreements in practice and will stifle innovation in cane supply negotiations.
- The draft determination proposes to grant authorisation to allow 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.' It is unclear what 'adoption of best practice' means in practice.
- Collective bargaining will result in commercially sensitive and strategic information being shared among milling competitors. For example, MSF Sugar noted it 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 that intellectual property to be given to other mills (via information sharing between growers).
- The final determination should clarify that any authorisation from the ACCC does not compel parties to participate in collective negotiations and does not provide growers a right to participate in negotiations for any contract they are not a party to.
- Any authorisation should be limited to 'traditional cane supply elements' only (as outlined at paragraph 218 of the draft determination). For example, it was submitted that authorisation should not extend to growers collectively negotiating in relation to capturing the value of by-products and related products from sugar cane.
- It was stressed that growers do not have an equity interest in the raw sugar produced by mills. 'GEI sugar' is a term that has developed to describe growers receiving a portion of the revenue received from raw sugar.

119. At the conference Canegrowers noted that its application for voluntary collective bargaining of cane supply issues seeks to support innovation in Cane Supply Agreements. It also reiterated that it does not seek authorisation for the collective negotiation of a single State-wide Cane Supply Agreement or a 'one-size fits all' approach to collective negotiations. 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.

120. The ACCC received public written submissions in response to the draft determination from:

- **Dr John Williams (Australian Commodity Research Institute)** – submits that the ACCC is forcing the industry to collectively bargain about ill-defined issues and has not indicated how it assists sugar cane industries. Dr Williams is concerned that requiring a standard Cane Supply Agreement does not cater for individual and regional differences.
- **MSF Sugar** – submits that proposing to authorise Canegrowers to share information on best practice terms of cane supply agreements and to assist local Canegrowers companies in local collective negotiations, is likely to result in standardisation of Cane Supply Agreements, which is a public detriment. While a single State-wide approach to collective negotiations is not proposed to be authorised, MSF Sugar is concerned that information sharing across growing regions is likely to have a similar effect. It submits that any authorisation should be limited to collective negotiations by Canegrowers members who supply cane to mills with common ownership (and then, in relation to those commonly owned mills only).

MSF Sugar also submits that authorisation should not extend to collective negotiation of essential terms governing the supply of GEI sugar or capturing the value of the by-products from sugar cane.

- **Wilmar Sugar** – considers the scope of the proposed authorisation requires further clarification. That is, any final determination should make it more explicit that there is no immunity for growers to engage in collective boycotts, and authorisation of collective bargaining does not oblige parties to enter into any agreement unless mutually beneficial.
- **ASMC** – considers there is still a degree of ambiguity around what conduct is proposed to be authorised in the draft determination, and what conduct is not proposed to be authorised. It considers that authorising Canegrowers (head office) to share information about 'best practice' contract terms and conditions across growing regions will have the same practical effect as negotiating a single State-wide Cane Supply Agreement.

The ASMC submits that it is aware that new arrangements have been recently included in contracts in order 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. It considers that 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.

Therefore, 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.

- **Isis Central Sugar Mill** – considers the claimed public benefits of collective bargaining do not arise in its region because it operates in a competitive environment, whereby its growers have the option to supply sugar cane to alternative mills – namely, Bundaberg Sugar and MSF Sugar mills. In this

context, it also considers that the proposed arrangements are likely to lessen competition between mills as a result of growers being able to share commercially sensitive information obtained during negotiation. It reiterated its request to be excluded from any authorisation.

- **QSL** – supports the draft determination proposing to grant authorisation to the collective bargaining arrangements. In particular, it considers the proposed arrangements are the most effective way to correct the significant imbalance of bargaining power between sugar cane growers and sugar cane processors (and their vertically integrated marketers). It also considers that the proposal facilitates the introduction of ‘greater competition in the market for sugar export marketing services to growers as intended by the Marketing Choice amendments to the *Sugar Industry Act 1999* (Qld).¹¹¹

QSL submits that there is no public detriment from the proposed collective bargaining arrangements as all negotiations are voluntary for the parties involved, there will be no State-wide agreement and the agreements will continue to be primarily negotiated at a local level.

121. Following the pre-decision conference the ACCC received three further written submissions from interested parties:

- **MSF Sugar** – submits that the ACCC should ‘not finalise the authorisation as proposed in the draft determination’ because:
 - the application for authorisation stems from a dispute between growers and Wilmar Sugar, rather than any objective need for collective bargaining across the industry
 - insufficient weight has been given to the public detriments resulting from the proposed information sharing about ‘best practice’ terms and conditions across sugar cane regions – that is, harmonisation of key contractual terms will reduce innovation and competition between mill owners, which compete for the acquisition of cane through the terms of their Cane Supply Agreements. MSF Sugar is also opposed to sharing information between growers across growing regions, even with common mill ownership, as there are differences between Cane Supply Agreements and
 - there is a lack of clarity among industry participants about what conduct the ACCC is proposing to authorise.
- **ASMC** – considers that Canegrowers’ (head office) sharing information across growing regions is likely to result in a public detriment by weakening the incentives for mill owners to innovate and differentiate the terms they offer growers. As such, it submits that the ACCC should not authorise sharing of information across mill areas with different mill owners. In addition, it submits that any final decision should clearly state that authorisation does not ‘grant a right of participation in, nor mandate access to, negotiations by third parties.’¹¹²

¹¹¹ Submission from QSL, 30 January 2017, p. 1.

¹¹² Submission from ASMC, 24 February 2017, p. 2.

- **Wilmar Sugar** – reiterates its view that authorisation should be denied. It considers that sharing information across growing regions will reduce incentives for mill owners to innovate in terms of their offerings to cane growers. Wilmar Sugar also submits that inserting cane growers into negotiations of On-Supply Agreements for raw sugar is likely to result in lengthier and less efficient negotiations. It also considers that should authorisation ultimately be granted by the ACCC, a shorter authorisation (for example, three years to five years) would be appropriate.

122. In response to the draft determination and issues raised by interested parties, Canegrowers submits that:

- It lodged this collective bargaining application for authorisation because some mills are insisting on a narrow interpretation of the collective bargaining authorisations contained in the SIA. Those mill owners assert that growers are only authorised to collectively bargain in relation to a narrow range of matters in cane supply agreements and that the collective bargaining authorisations contained in the SIA are not sufficiently wide to allow collective bargaining of the terms of associated agreements.
- It seeks authorisation 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 agreements. Those terms are matters for the negotiators to settle.
- The application involves voluntary collective bargaining conduct and does not seek authorisation of collective boycott activities.
- It supports the proposed authorisation in the draft determination and considers the scope of the proposed authorisation was sufficiently clear.
- The proposed authorisation of Canegrowers sharing information across and within districts (as outlined at 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 Agreement, and will not have an 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 supply.
- As is common industry practice, collective negotiations can be protected by confidentiality agreements at the appropriate time. Under the proposed conduct, mill owners' 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 that time. Where this occurs, the relevant information will not be shared beyond the negotiating representatives and their advisers in accordance with the terms of the confidentiality agreement.

123. On 27 March 2017 the **ASMC** provided a response to Canegrowers' submission – namely, that it 'opposes the application in full.'¹¹³ It expressed concern that the ACCC's final determination will be used as a tool to 'force collective bargaining,

¹¹³ Submission from ASMC, 27 March 2017, p. 1.

rather than the stated intention of removing a potential barrier – if both negotiating parties wish to voluntarily participate.¹¹⁴

ACCC assessment

124. The ACCC's evaluation of the proposed collective bargaining arrangements is in accordance with the relevant net public benefit tests¹¹⁵ contained in the Act.
125. 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.
126. 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.
127. 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.
128. 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.
129. 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

130. **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 mill. 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 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.¹¹⁶

¹¹⁴ Ibid.

¹¹⁵ Subsections 90(5A), 90(5B), 90(6) and 90(7) of the Act. The relevant tests are set out in Attachment A of this determination.

¹¹⁶ Canegrowers' application for authorisation A91558, 23 September 2016, p. 15.

131. **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:¹¹⁷

- 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 mill owners, 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.

132. 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 mill owner. 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 mill owner on an economically sustainable basis.¹¹⁸

133. 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.¹¹⁹

134. Following the draft determination, **ASMC** submits that there is no separate market for the supply of milling services to growers, separate to the market for the supply and acquisition of cane. It submits that to the extent the phrase the ‘supply of milling services’ (used within the ACCC’s draft determination) implies some form of fee for service, this is incorrect. Cane Supply Agreements provide for the sale of sugar cane by growers to mill owners.

¹¹⁷ Submission from Wilmar Sugar, 2 November 2016, pp. 15-16.

¹¹⁸ Submission from QSL, 28 October 2016, p. 3.

¹¹⁹ Submission from QSL, 28 October 2016, p. 4.

ACCC view

135. 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. As such, precise identification of the relevant areas of competition is not required for the purpose of assessing Canegrowers' proposed collective bargaining arrangements.
136. 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 acquisition of sugar cane by sugar mill owners in those growing regions and
 - the supply of sugar marketing services, including for GEI marketing services, in Queensland (and potentially Northern NSW).
137. Given the perishability of cane, which needs to be crushed soon after harvest¹²⁰, and transport costs, the supply and acquisition of sugar cane occurs in localised areas around a mill. The majority of growers only have one option to supply cane to their local mill. There is generally only limited competition between growers in neighbouring cane growing districts, as well as between neighbouring mills when acquiring sugar cane from growers. An example of competition for cane supply between neighbouring mills is raised by the Isis Central Sugar Mill. It advises that almost half of the land supplying cane to its mill in 2015 had previously supplied cane to a different mill. Both Isis Central Sugar Mill and Bundaberg Sugar consider themselves to be competitors in the acquisition of sugar cane.
138. Regarding the supply and acquisition of sugar cane, the ACCC also notes that cane growers tend to be small businesses while mill owners are typically large, often multi-national, companies.
139. Regarding the supply of GEI sugar marketing services, the ACCC notes that this area of competition is still developing and is affected by a number of factors:
- 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 compulsorily 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 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.

¹²⁰ Queensland Productivity Commission, *Decision Regulatory Impact Statement, Sugar Industry (Real Choice in Marketing) Amendment Bill 2105*, p. 14.

- The ACCC is advised that grower choice of GEI sugar marketer is restricted to those GEI sugar marketers with which their mill owner has an On-Supply Agreement.¹²¹
- 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 mill owner. A ‘default GEI marketer’ is used when a grower does not nominate a GEI sugar marketer within a Cane Supply Agreement.¹²²

The future with and without

140. 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.

Submissions prior the draft determination

141. **Canegrowers** submitted 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.¹²³

142. **Kalamia Cane Growers Organisation** also submitted that Wilmar Sugar (which 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.¹²⁴

143. **QSL** submitted 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.¹²⁵

¹²¹ Submission from Canegrowers, 18 November 2016, p. 7.

¹²² Submission from Canegrowers, 18 November 2016, p. 8.

¹²³ Submission from Canegrowers, 18 November 2016, p. 10.

¹²⁴ Submission from Kalamia Cane Growers Organisation Ltd, 27 October 2016, p. 1.

¹²⁵ Submission from QSL, 28 October 2016, p. 2.

144. 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.¹²⁶
145. **Wilmar Sugar** submitted that without authorisation of the proposed collective bargaining conduct, growers will continue to be able to collectively negotiate Cane 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.¹²⁷
146. Further, in the absence of authorisation, Wilmar Sugar also submitted 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.¹²⁸
147. 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.
148. The **ASMC** noted that under the SIA and associated Sugar Industry Regulation, growers have had the express right to collectively bargain sugarcane supply agreements with mill owners 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.¹²⁹

Submissions after the draft determination

149. **Wilmar Sugar** notes that the SIA already authorises collective bargaining for the key terms of cane supply agreements. It submits that this statutory authorisation will continue in effect whether or not the ACCC grants authorisation to Canegrowers' proposed collective bargaining arrangements. It also submits that the Queensland Parliament, in its recent deliberations, did not see fit to widen the scope of the statutory authorisation to the extent sought by Canegrowers.¹³⁰

ACCC view

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

¹²⁶ Submission from QSL, 28 October 2016, p. 2.

¹²⁷ Submission from Wilmar Sugar, 2 November 2016, p. 16.

¹²⁸ Submission from Wilmar Sugar, 2 November 2016, p. 17.

¹²⁹ Submission from ASMC, 28 October 2016, p. 4.

¹³⁰ Submission from Wilmar Sugar, 16 March 2017, p. 2.

151. 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.
152. The ACCC understands that some mill owners consider collective bargaining in certain circumstances currently falls outside the scope of the statutory exemption under the SIA. The impact of this is that they have advised Canegrowers groups that they are not permitted to collectively negotiate in these circumstances.
153. 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 mill owners 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).¹³¹
154. 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.
155. 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 mill owners and marketers. Under the current application, participation in the collective bargaining would be voluntary for growers, mill owners and marketers. Accordingly, authorisation of proposed collective bargaining conduct would not oblige parties to negotiate on specified terms and conditions. It would simply permit them to do so without risk of contravening the CCA.

Public benefits

156. 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 principal elements ... the achievement of the economic goals of efficiency and progress.¹³²

¹³¹ Submission from Burdekin District Cane Growers Limited, 3 November 2016, p. 2.

¹³² *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.

157. In its draft determination of 15 December 2016, the ACCC concluded that the proposed collective bargaining conduct was likely to result in public benefits from:

- transaction cost savings
- facilitating growers having more effective and timely input into negotiations with mill owners and marketers and
- in circumstances where growers have a right to nominate a marketer for GEI sugar, facilitating grower choice, and therefore competition, in the provision of GEI sugar marketing services.

Submissions prior to the draft determination

158. **Canegrowers** submitted 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.¹³³

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

160. Canegrowers also submitted 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. Canegrowers submitted that 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 mill owners 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.

161. **The Australian Sugar Milling Council** submitted 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.

¹³³ Canegrowers application for authorisation A91558, 23 September 2016, pp 11-12.

- 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.¹³⁴

162. **MSF Sugar** submitted that aspects of the application ‘are too broad and uncertain to allow the Commission to ascertain and weigh the public benefits.’¹³⁵

163. It also submitted that there is no significant imbalance in bargaining power due to a very close symbiotic relationship between cane growers and mill owners. ‘MSF Sugar cannot afford to treat growers poorly as it will have insufficient cane to profitably operate a sugar mill.’¹³⁶

164. **Wilmar Sugar** submitted 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.
- 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.¹³⁷

¹³⁴ Submission from the Australian Sugar Milling Council, 28 October 2016, p. 5.

¹³⁵ Submission from MSF Sugar, 28 October 2016, p. 5.

¹³⁶ Submission from MSF Sugar, 28 October 2016, p. 10.

¹³⁷ Submission from Wilmar Sugar, 2 November 2016, pp. 18-24.

165. **Queensland Sugar Limited** submitted 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 mill owners. 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. 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 mill owners 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.¹³⁸

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

- the current interpretation of the statutory exemptions by certain mill owners 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).

¹³⁸ Submission from QSL, 28 October 2016, pp. 3-6.

- Mill owners 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.¹³⁹ Following the draft determination, Canegrowers clarified that its representatives observed negotiations with QSL and MSF Sugar when the essential terms of their On Supply Agreement were agreed, and acknowledged that Canegrowers was not present for the detailed negotiations that followed.¹⁴⁰

Submissions following the draft determination

167. **QSL** submits that it agrees with the ACCC's conclusion in the draft determination that, in circumstances where growers have a right to nominate a marketer of GEI sugar, there are public benefits in allowing growers to collectively bargain with mill owners and marketers over terms relating to cane supply and the marketing of GEI sugar. It also agrees that collective negotiations are likely to facilitate grower choice, and therefore competition, in the provision of GEI marketing services to growers.¹⁴¹
168. **Isis Central Sugar Mill** submits that, given it does not offer marketing services, it is not clear to it how the proposed collective bargaining conduct facilitates grower choice and increased competition for the provision of GEI marketing services in its case. It also considers that the public benefits identified by the ACCC in its draft determination do not materialise in circumstances where growers have a choice about which mill owner they sell their cane to, as occurs in its mill area.¹⁴²
169. **Wilmar Sugar** submits that there was insufficient detail in the draft determination about how transaction cost savings would result from the collective negotiation of On-Supply Agreements and related contracts, as well as how the proposed conduct would result in growers having more effective input into contract negotiations. In this regard, Wilmar Sugar referred to recent conclusions by the Queensland Productivity Commission 'that there is no lack of transparency on the part of mill owners during negotiations and that the information provided is comprehensive.'¹⁴³ It also notes that 'independent third party reports have found that the co-dependency of growers and mill owners results in an evenness of bargaining power.'¹⁴⁴

¹³⁹ Submission from Canegrowers, 18 November 2016, pp. 11-12.

¹⁴⁰ Submission from Canegrowers, 10 March 2017, p. 5 and *Pre-decision conference summary, Application for authorisation A91558 lodged by Queensland Cane Growers Organisation Ltd, 10 February 2017*, p. 7.

¹⁴¹ Submission from QSL, 30 January 2017, p. 2.

¹⁴² Submission from Isis Central Sugar Mill, 30 January 2017, p. 3.

¹⁴³ Submission from Wilmar Sugar, 3 February 2017, p. 3.

¹⁴⁴ Ibid.

170. In response, **Canegrowers** submits that the public benefits of the proposed conduct are much wider than enabling a group of growers to collectively negotiate a cane supply agreement with a mill owner. They include:

- 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
- growers gaining better access to information
- sharing the costs of engaging professional advice
- creating new competitive marketing opportunities by being more attractive to other potential marketers of raw sugar and
- creating supply chain efficiencies, a benefit to both growers and the mill they supply.¹⁴⁵

171. Further, Canegrowers considers that while some growers that supply sugar cane to the Isis Central Sugar Mill may also have the ability to supply the neighbouring Bundaberg Sugar-owned mills, and vice versa, the benefits of collective bargaining apply equally to Isis Central Sugar Mill. It notes that Canegrowers Isis has recently concluded collective negotiations with Isis Central Sugar Mill. The collective agreement covers approximately 200 growers.¹⁴⁶

ACCC view

172. The ACCC considers the proposed conduct is likely to result in public benefits from transaction cost savings and better input into contracts on potentially a broader range of issues related to the supply of cane, compared to a scenario where growers individually negotiate their own supply agreements. The proposed collective bargaining conduct allows the parties to save time and money compared to individual negotiations (to the extent that collective bargaining would not otherwise be allowed by the SIA). These savings can be shared between negotiating parties. The proposed conduct is also likely to increase the amount of information available to growers, which could result in more complete and efficient contracts. The ACCC considers the public benefits from transaction cost savings and better input into contracts are likely to result regardless of the level of competition between mills in securing cane supply from growers in a particular region.

173. 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

¹⁴⁵ Submission from Canegrowers, 10 March 2017, pp. 7-8.

¹⁴⁶ Ibid, p. 6.

Cane Supply Agreements that relate to mill owners' On-Supply Agreements with sugar marketers and any agreements growers may wish to enter into with sugar marketers.

174. The ACCC considers that the proposed conduct is likely to reduce growers' bargaining disadvantage. While some mill owners submit that growers and mills are co-dependent, and therefore have equal bargaining strength, the ACCC considers that individual growers generally do not have access to the same resources and information that mill owners have, including those with related marketing businesses. As a result, collective bargaining is likely to result in public benefits by allowing for more effective negotiation, providing negotiating parties a greater opportunity to identify and achieve efficiencies that better reflect the circumstances of growers and mill owners.
175. The proposed collective bargaining arrangements are 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 mill owners to achieve more efficient outcomes. In addition, as mill owners look to develop new and innovative ways to use sugar cane and/or by-products – such as fuel production or power generation – it is likely that mill owners will seek to negotiate new types of Cane Supply Agreements with growers. The ACCC considers that collective bargaining arrangements can increase the efficiency of negotiations with growers about such innovations, which benefits all parties involved.
176. The ACCC considers that collective bargaining by growers about terms of Cane Supply Agreements that relate to mill owners 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

177. 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.¹⁴⁷
178. **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.
179. 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.

¹⁴⁷ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

180. Canegrowers submits that with or without the proposed collective bargaining conduct, growers and mill owners 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
 - 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.
181. 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 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
 - reducing the attractiveness of the Queensland sugar industry for investment.
182. In its draft determination, the ACCC concluded that the proposed arrangements are not likely to result in significant public detriment given that collective negotiations are voluntary for growers, mill owners and marketers. The primary collective negotiations will remain at the local mill level and cater for regional differences, with Canegrowers (head office) proposing to only facilitate the exchange of information in relation to common industry issues.
183. Following the draft determination, the concerns raised by mill owners have centred on Canegrowers' (head office) proposed information sharing role. While acknowledging that Canegrowers does not seek authorisation to collectively negotiate a single State-wide cane supply agreement, mill owners consider sharing information to growers across regions will have the same practical effect – namely, standardising terms and conditions across the State. Mill owners also expressed concern that sharing information to growers across regions will reduce incentives for mill owners to offer innovative terms and conditions, therefore lessening competition between mills, which compete for the acquisition of cane through the terms of their Cane Supply Agreements.
184. The ACCC's assessment of the likely public detriments from the proposed conduct follows.

Potential for increased costs and delays in negotiations

185. **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 considers 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.¹⁴⁸

186. 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.¹⁴⁹

ACCC view

187. The ACCC notes that Canegrowers has expressly stated that it does not intend to negotiate state-wide Cane Supply Agreements or related agreements. It has stated that 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.
188. 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.
189. 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.
190. 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. As outlined at paragraph 172, the ACCC considers the proposed arrangements are likely to result in transaction cost savings. Any additional delays or increase in the cost of negotiations will negatively impact growers as well as mill owners. The ACCC notes that each region has its own Canegrowers organisation, which is obliged to seek the best deal it can for its members based on their local circumstances, rather than 'holding out' to benefit growers in another region. In any event, the proposed arrangements are voluntary, and growers remain able to sign individual agreements. This means

¹⁴⁸ Submission from Wilmar Sugar, 2 November 2016, p. 24.

¹⁴⁹ Ibid.

that no grower is prevented from signing an agreement because bargaining positions have not been reached in other regions.

191. Further, 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.'¹⁵⁰

Potential to increase contract uniformity

Submissions prior to the draft determination

192. **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 mill owner 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.¹⁵¹

193. 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'.¹⁵²

194. Further, **Wilmar Sugar** submitted that proposed collective bargaining across regions may result in less differentiation in the terms offered to growers by different mill owners.¹⁵³

195. Conversely, **Australian Cane Farmers** submitted that in order to maintain a competitive position when supplying a monopoly mill owner, 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.¹⁵⁴

196. **QSL** submitted that allowing growers from different regions to negotiate with each other would not impact competition. In particular, it submitted 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.¹⁵⁵

¹⁵⁰ Submission from Wilmar Sugar, 2 November 2016, p. 16.

¹⁵¹ Submission from MSF Sugar, 28 October 2016, p. 8.

¹⁵² Submission from ASMC, 28 October 2016, p. 6.

¹⁵³ Submission from Wilmar Sugar, 2 November 2016, p. 16.

¹⁵⁴ Submission from Australian Cane Farmers, 28 October 2016, p. 1.

¹⁵⁵ Submission from QSL, 28 October 2016, p. 6.

197. Further, QSL noted 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.¹⁵⁶

Submissions after the draft determination

198. In response to the draft determination, submissions from mill owner representatives focused on Canegrowers’ (head office) proposal 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.’ Mill owners consider Canegrowers’ proposed information sharing role lacks clarity, and is likely to have a similar effect to authorising Canegrowers to collectively negotiate a single State-wide Cane Supply Agreement. Mill owners consider sharing information about cane supply agreement negotiations across regions will reduce incentives for mill owners to offer innovative contract terms and conditions to secure cane supply from growers and, thereby, lessen competition between mill owners.

199. In particular, **MSF Sugar** submits:

...where the Applicant and its members are authorised to share information on the terms of cane supply agreements, and where Canegrowers’ head office is authorised to assist local member organisations in their contract negotiations, it seems highly likely that standardisation will occur...this particular issue could be remedied by specifically limiting authorisation to Canegrowers members who supply cane to mills with common ownership (and then, in relation to those commonly owned mills only).¹⁵⁷

200. In addition, MSF Sugar considers the proposed information sharing conduct could have a ‘chilling effect on innovative commercial arrangements’ being offered in the future.¹⁵⁸ In particular, MSF Sugar considers its cane supply agreement terms to be ‘best practice’. It has serious concerns about allowing its terms to be shared in collective bargaining negotiations with other mill owners. In particular, it submits that:

MSF Sugar has worked hard to distinguish itself in the market, and...has terms in its Cane Supply Agreements that reflect the strategies and tactics that it uses to out-compete other mills in the acquisition of cane and in building its positive relationships with growers...For growers to have collective access to those terms, and use them in collectively bargaining with MSF Sugar’s competitors...eliminates advantages that MSF Sugar has worked to achieve...¹⁵⁹

201. The **ASMC** considers it is difficult to see how Canegrowers’ proposed information sharing role ‘will encourage anything other than the proliferation of almost identical terms and conditions across multiple contracts and related provisions’.¹⁶⁰

¹⁵⁶ Submission from QSL, 28 October 2016, p. 3.

¹⁵⁷ Submission from MSF Sugar, 30 January 2017, p. 3.

¹⁵⁸ Submission from MSF Sugar, 24 February 2017, p. 1.

¹⁵⁹ Submission from MSF Sugar, 24 February 2017, p. 3.

¹⁶⁰ Submission from the ASMC, 30 January 2017, p. 2.

202. The ASMC considers that Canegrowers will have oversight of potentially all cane supply agreements and 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 new terms proposed by one mill will be shared by Canegrowers across and within districts.¹⁶¹

203. By way of example, the ASMC submits 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.¹⁶²

204. Therefore, the ASMC considers that the proposal for Canegrowers 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.'¹⁶³

205. **Isis Central Sugar Mill** considers that the proposed conduct will lessen competition between mill owners in its cane supply region. In particular, it submits that:

...it would enable canegrowers to access and use commercially sensitive information obtained during negotiation in other mill regions or with other milling companies. ICSM [Isis Central Sugar Mill] would not have access to such information placing it a disadvantage and potentially lessening competition in that region.¹⁶⁴

206. Similarly, **Wilmar Sugar** submits under the proposed conduct, 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.

207. In particular, Wilmar Sugar submits that:

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.¹⁶⁵

208. In response to concerns about its proposed information sharing role, **Canegrowers** submits that it is merely seeking authorisation for '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.'¹⁶⁶

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Submission from the ASMC, 30 January 2017, p. 3.

¹⁶⁴ Submission from Isis Central Sugar Mill, p. 3.

¹⁶⁵ Submission from Wilmar Sugar, 16 March 2017, p. 3.

¹⁶⁶ Submission from Canegrowers, 10 March 2017, p. 1.

209. In addition, it submits that under the proposed arrangements, bargaining representatives from the local Canegrowers in each mill area are responsible for and take the lead bargaining role in Cane Supply Agreement negotiations. Representatives from Canegrowers (head office) provide advice to and assist in the negotiations in response to requests from the local negotiating team.¹⁶⁷

210. Further, Canegrowers submits that, 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' decisions. Canegrowers submits that:

Mills frequently publicly release key information concerning their strategic plans and investment decisions both to inform growers and to build community confidence in relation to their business direction.¹⁶⁸

211. Canegrowers also submits that it is currently common industry practice to protect specific commercially sensitive negotiations by confidentiality agreements at the appropriate time. It advises that under the proposed collective bargaining conduct:

...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 that 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.¹⁶⁹

ACCC view

212. Generally, the ACCC considers that collective bargaining arrangements which result in inefficient uniformity across supply contracts would be a public detriment. In addition, competitors sharing information can also lead to public detriments in certain circumstances. However, the ACCC considers that any such detriment is unlikely from the proposed conduct, 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.

213. The ACCC notes that authorisation of the proposed conduct simply permits parties to engage in that conduct without risk of contravening the CCA. Any authorisation does not affect the ability of parties to implement appropriate confidentiality regimes to protect commercially sensitive information or intellectual property during and following negotiations. As such, the ACCC does not consider that the proposed conduct will reduce a mill owner's incentive to offer innovative, or more attractive, terms and conditions to growers to secure cane supply, or

¹⁶⁷ Ibid, p. 4.

¹⁶⁸ Ibid, p. 6.

¹⁶⁹ Ibid.

change current industry practices regarding protection of commercially sensitive information, particularly in districts where there is competition between neighbouring mill owners.

214. The ACCC considers it likely that a subset of growers are already offered better terms and conditions by their local mill owner than other growers due to cost-based factors – for example, some growers may have land that has a higher value alternative land use. In those circumstances, it may be efficient for a mill to agree to pay those growers more for their sugar cane to prevent loss of supply. Another example may be that a mill is willing to pay a grower more if they are able to reduce costs associated with the acquisition and/or delivery/receival of their cane.
215. The ACCC considers that, if collective bargaining discouraged efficient price differentiation by mills, this would be a public detriment. However, the ACCC considers the current application is unlikely to produce this outcome. To the extent that growers are not currently aware of cane payment arrangements in different mill areas, the likely impact of growers receiving information about any price differentiation by mills between growers is that mill owners may need to be more transparent about why some growers are paid more than others. This is not a public detriment. With or without authorisation, the ACCC notes the same incentives will exist for mill owners.
216. It is possible that some mills currently pay some growers more than others in the absence of an efficient cost-based reason. If this is the case, the information sharing proposals may lead to less well paid growers seeking higher prices or better terms and conditions. To the extent that mills in such circumstances end up paying some growers more or some growers less – or both – the ACCC considers this would have little or no impact on overall investment decisions or efficiency, and is just a transfer between the various parties. As such, it would not constitute a public detriment.

Reduced competition in the provision of GEI marketing services

Submissions before the draft determination

217. **Canegrowers** submitted 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.'¹⁷⁰

¹⁷⁰ Submission from Canegrowers, 18 November 2016, p. 1.

218. **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.¹⁷¹

219. 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.¹⁷²

220. 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.'

221. Similarly, the **ASMC** submitted 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.¹⁷³

222. In response, **Canegrowers** submitted 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.¹⁷⁴

223. **MSF Sugar** noted 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.'¹⁷⁵

224. 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.

225. Conversely, **Burdekin District Cane Growers Limited** submitted that following the Marketing Choice Amendment, growers have a statutory interest in the sugar

¹⁷¹ Submission from Wilmar Sugar, 2 November 2016, p. 2.

¹⁷² Submission from Wilmar Sugar, 2 November 2016, p. 25.

¹⁷³ Submission from the ASMC, 28 October 2016, p. 6.

¹⁷⁴ Submission from Canegrowers, 18 November 2016, p. 11.

¹⁷⁵ Submission from MSF Sugar, 28 October 2016, pp. 4-5.

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.¹⁷⁶

226. **QSL** considered 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.'¹⁷⁷
227. QSL further submitted 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 mill owner. 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.¹⁷⁸
228. Further, QSL submitted that allowing growers to collectively negotiate terms related to their GEI sugar and On-Supply Agreements between their mill owner and nominated GEI marketer, redresses the imbalance of negotiating power between mill owners and growers. QSL believes this is particularly the case given it is growers who benefit from On-Supply Agreements, and mill owners 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.¹⁷⁹

Submissions after the draft determination

229. The **ASMC** considers that any authorisation granted by the ACCC must be more explicit that 'authorisation does not extend to conveying a right to any party to participate in a negotiation.' In particular, the ACCC's final decision should state:

...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.¹⁸⁰

ACCC view

230. 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.
231. Importantly, authorisation is not sought for a collective boycott, and as such, any authorisation granted by the ACCC would not provide immunity to local

¹⁷⁶ Submission from Burdekin District Cane Growers Limited, 3 November 2016, p. 2.

¹⁷⁷ Submission from QSL, 28 October 2016, p. 2.

¹⁷⁸ Submission from QSL, 28 October 2016, p.5.

¹⁷⁹ Submission from QSL, 28 October 2016, p. 5.

¹⁸⁰ Submission from the ASMC, 30 January 2017, p. 3.

Canegrowers companies to collectively decide not to deal with or exclude particular GEI marketers.

232. 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 mill owner. In circumstances where growers do not, or are unable to, nominate an alternative marketer, the right to market their GEI sugar defaults to the mill owner's nominated marketer (often a related entity). The ACCC considers the proposed collective bargaining arrangements could facilitate parties reaching On-Supply Agreements that are acceptable to growers, and therefore enable growers to have a choice of GEI marketer, which would result in increased competition in the provision of GEI marketing services to those growers.
233. The ACCC notes that Canegrowers still seeks 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 mill owner, GEI marketer and the local growers.
234. The ACCC notes that any authorisation of proposed voluntary collective bargaining arrangements cannot force the various parties to negotiate with each other, or create a right for third parties to be involved in collective negotiations of contracts they are not currently a party to. In this case, an ACCC authorisation cannot force the mill owner to collectively negotiate an On-Supply Agreement with QSL and the local Canegrowers' company.
235. Given the voluntary nature of the proposed collective bargaining arrangements the ACCC considers that, to the extent parties within the sugar industry consider greater grower involvement in the negotiation of On-Supply Agreements could lead to mutually beneficial outcomes, any such negotiations are unlikely to result in public detriment.

Breadth and uncertainty of proposed conduct

236. **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 mill owners about the coverage of any ACCC authorisation, producing inefficient outcomes for the industry.

237. 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.¹⁸¹

238. **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 mill owners 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).¹⁸²

ACCC view

239. 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:¹⁸³

- pricing, pooling and payment contracts between the grower and GEI marketer. The GEI marketer could be either the local mill owner 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.

240. 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 mill owners 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.

241. Given that the proposed arrangements are voluntary (for growers, mill owners 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.'

¹⁸¹ Submission from MSF Sugar, 28 October 2016, p. 5.

¹⁸² Submission from Canegrowers, 18 November 2016, p. 11.

¹⁸³ Submission from Canegrowers, 18 November 2016, p.5.

Balance of public benefits and detriments

242. 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.
243. 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, without risk of contravening the CCA, regardless of which agreement they ultimately fall within.
244. 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.
245. 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.
246. 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, mill owners and marketers
 - Canegrowers does not intend to negotiate and enter into a single state-wide Cane Supply Agreement (or related contracts)
 - 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
 - the proposed conduct does not affect the ability of parties to implement appropriate confidentiality regimes to protect commercially sensitive information and intellectual property during negotiations and
 - current incentives for mill owners to offer different terms and conditions to particular growers within particular regions will remain.
247. 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.

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

Length of authorisation

249. The Act allows the ACCC to grant authorisation for a limited period of time.¹⁸⁴ 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.
250. 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.¹⁸⁵
251. 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 mill owner 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 structured in a way that, for sugar not yet committed, growers can update their pricing and marketing elections annually should they so wish.
252. In its draft determination, the ACCC proposed to grant authorisation for ten years. Following the draft determination, the following interested parties provided submissions in relation to the proposed period of authorisation:
- **QSL** – considers ten years is an appropriate period of authorisation.¹⁸⁶
 - **Wilmar Sugar** – considers ten years is ‘manifestly excessive’. It submits that once Cane Supply Agreements (and On-Supply Agreements) are finalised they are likely to operate, without major modifications, for years to come. For example, Wilmar Sugar and QSL have reached in-principle agreement on ‘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, it believes a ten year authorisation is simply not necessary. It considers that 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).
253. The ACCC maintains its view that given the voluntary nature of the proposed arrangements, and its conclusions that the arrangements are likely to result in public benefits and no significant public detriments, ten years is an appropriate length of authorisation. The ACCC notes that there is scope to revisit on an annual basis, and possibly negotiate, variations to rolling Cane Supply Agreements. The ACCC considers that different growing regions are likely to have different contracting timetables and region-specific issues may develop over

¹⁸⁴ Subsection 91(1).

¹⁸⁵ Canegrowers’ application for authorisation A91558, 23 September 2016, p. 6.

¹⁸⁶ Submission from QSL, 30 January 2017, p. 3.

that time. Similarly, the statutory exemption provided by the SIA also covers variations to a cane supply agreement, recognising they are not the result of a once-off negotiation.

254. 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.

Determination

The application

255. 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.
256. 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 (mill owners) and sugar marketers.
257. 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.

258. 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 negotiate collectively with any and all mill owners and sugar marketers (**'tier 3'**).
259. 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'.
260. On 10 March 2017 Canegrowers provided further information about the kind of industry issues it seeks to share with growers across and within cane growing regions. Also, Canegrowers reiterated that it seeks authorisation to 'be party to the 'on-supply agreement where the marketer and mill agree this would be helpful.'
261. Canegrowers seeks authorisation of these proposed 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.

The net public benefit test

262. For the reasons outlined in this 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 authorises

263. The ACCC grants authorisation to the Canegrowers Organisation and current and future members of the Canegrowers Organisation:

- i. in respect of the supply of cane by growers to the same mill – to 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:
 - 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, including the duration of the contract and its termination provisions, management fees and conditions, payment provisions, nomination dates and pooling options
 - essential terms governing the supply of Grower Economic Interest (GEI) sugar to the GEI sugar marketers, including terms of the kind described in paragraphs 98 to 99 and
 - capturing the value of the by-products and related products from sugar cane (collectively ‘ **Cane Supply Terms and Conditions**’);
- ii. in respect of the supply of cane by growers to 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 mill owner and with sugar marketers in relation to Cane Supply Terms and Conditions; and
- iii. to share information, subject to any confidentiality agreement implemented by the relevant parties, across and within districts to facilitate the adoption of best practice terms and conditions¹⁸⁷ where they choose to do so, including information:
 - about provisions relating to the weighing, sampling, testing and analysis of sugar cane for quality and payment purposes
 - about the particular model a mill owner is adopting to implement grower choice of GEI sugar marketer
 - about provisions relating to the physical supply and delivery of cane to a particular mill such as the harvesting roster and supply and delivery of collection bins to the mill’s delivery points and

¹⁸⁷ Being 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.

- provided by Canegrowers (head office) to local Canegrowers companies as part of its support of local collective negotiations, including in relation to drafting contracts and dispute resolution procedures.

264. The ACCC's authorisation of collective bargaining of Cane Supply Terms and Conditions does not compel parties to participate in collective negotiations about any specific Cane Supply Terms and Conditions, regardless of whether those Cane Supply Terms and Conditions fall within a Cane Supply Agreement or related contract.

265. Authorisation A91558 is granted for ten years, until 5 May 2027.

Conduct not authorised

266. The authorisation does not extend to Canegrowers collectively negotiating a single State-wide Cane Supply Agreement (or some other related contract) with processors or sugar marketers. It also does not extend to Canegrowers (head office) assuming the principal bargaining role in any collective negotiations.

267. Canegrowers did not seek authorisation to engage in collective boycott activities. The ACCC's authorisation does not provide immunity to growers to participate in collective boycott activities.

268. Further, authorisation of the collective bargaining conduct does not provide a right for growers to participate in On Supply Agreement negotiations between mill owners and marketers where those parties do not agree to the growers' participation. Similarly, authorisation does not impose an obligation on mill owners and marketers to include grower representatives in On-Supply Agreement negotiations.

Date authorisation comes into effect

269. This determination is made on 13 April 2017. If no application for review is made to the Australian Competition Tribunal, it will come into effect on 5 May 2017.

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.