Australian Sugar

A review of current and future arrangements for the pricing and marketing of Australian sugar

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Introduction

This report provides an analysis of the current legal and regulatory framework for Australia's sugar industry and provides advice on a series of matters arising out of the terms of reference for an inquiry to be conducted by the Senate Rural and Regional Affairs and Transport References Committee into current and future arrangements for the marketing of Australian raw sugar. The terms of reference for this inquiry are attached as **Annexure A**. Minter Ellison has prepared this report for Wilmar Sugar Australia (**Wilmar**).

1. The impact of proposed changes on the local sugar industry

1.1 Overview

This section of this report:

(a) identifies the critical steps in the processing of sugar cane and the manufacture of raw sugar;

(b) explains past arrangements for the manufacture and ownership of raw sugar;

(c) explains the effect of reforms to complete the deregulation of the sugar industry and export sugar marketing in particular; and

(d) sets out the legal position on the ownership of raw sugar and comments on the concept of what is sometimes described as 'Grower Economic Interest' sugar.

The critical point, which we explain below, is that raw sugar is the property of the miller that creates it. Cane growers do not have a proprietary interest in the raw sugar produced by mills. Cane growers have a *commercial* interest in the price paid for raw sugar, as this affects the price they are paid for sugar cane under cane supply agreements with millers. However, the concept of 'grower economic interest' sugar, as something that growers own or control, is illusory. The effect of deregulation in 2006 was to give millers, who produce raw sugar, the ability to determine how that sugar is to be best marketed and sold.

1.2 Manufacture and ownership of raw sugar

Cane growers produce sugar cane and supply it to mills pursuant to a cane supply agreement. These arrangements are made in accordance with Part 2 of Chapter 2 of the *Sugar Industry Act 1999* (Qld) (**Sugar Industry Act**). The purpose of Chapter 2 of this Act is to ensure that the supply by growers of cane to a mill, and the payment to growers in return, is governed by written cane supply agreements between growers and mill owners.

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 that season.[1] The Sugar Industry Act provides for individual or collective contracts with millers,[2] and authorises collective negotiation by cane growers for the purposes of competition legislation.[3]

[1] Sugar Industry Act, section 31.

[2] Sugar Industry Act, sections 31(3), 32, 33.

[3] Sugar Industry Act, sections 236, 237.

The raw sugar that is the product of the manufacturing process is the property of the mill, which produces it, and the mill owner is entitled to determine how that raw sugar will be marketed. Millers have not always been entitled to determine how their sugar production was marketed: from 1923 until the deregulation of sugar marketing in 2006, all sugar was vested automatically in QSL (and its predecessors) following its manufacture by millers. QSL had, by virtue of legislation regulating the sugar industry, a monopoly on the export of raw sugar. However, even prior to marketing deregulation in 2006 it was clear that mills, not growers, had undisputed title to the sugar that they produced. Vesting was the statutory mechanism by which title to sugar was transferred from the miller to QSL upon manufacture. But for this regime, title would have remained with the miller.

The following sections explain the position before and after deregulation in more detail.

1.3 Title to sugar prior to deregulation

Prior to the commencement of the *Sugar Industry Amendment Act 2005* (Qld) (**2005 Act**), the Sugar Industry Act vested title to raw sugar in QSL, and gave QSL a monopoly on the marketing of sugar on both domestic and export markets, subject to limited exemptions.[4]

Under Chapter 3 of the Sugar Industry Act all sugar, upon manufacture, became the absolute property of QSL free from all encumbrances.[5] To the extent that a contract or other document, whether made before or after the Sugar Industry Act commenced, was contrary to section 100, it was of no effect.[6] Section 104 provided that all sugar vested in QSL was to be delivered to QSL in accordance with QSL's directions. The payment provisions in Chapter 3 required mill owners[7] to supply QSL with sugar, in return for which they would receive payments under payment schemes.[8]

Under the Act, payment was always made by QSL to mill owners; at no time was QSL required to pay growers. The only input from growers into the payment scheme process was as required by section 102(6): prior to establishing or amending a payment scheme, QSL was required to consult with organisations representing mill owners and growers.

It is clear from the terms of the Sugar Industry Act prior to 2006 that, but for the compulsory vesting of sugar in QSL under section 100 of the Act, title to raw sugar would have remained with the miller that produced it.

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[4] Exemptions from the automatic vesting of sugar in QSL applied where (a) mill owners were entitled to retain 'local consumption' sugar (up to .25% of the total quantity of sugar vested in QSL) which was divested from QSL under the Act; and (b) sugar which had been exempted under Chapter 3, Part 2 of the Sugar Industry Act.

[5] section 100(1).

[6] section 100(4).

[7] The Dictionary to the Sugar Industry Act provided that a 'mill' was defined to be works which were equipped, or proposed to be equipped, for the manufacture of sugar from cane. 'Mill owner' was defined as an entity owning or having the control of a mill including the manager, the managing director or other person controlling the business of a mill.

[8] In particular:

(a) section 101 required QSL to market the sugar that was vested in it and to make payments to mill owners as provided under a payment scheme; and

(b) section 102(1) provided that payment to mill owners for sugar vested in QSL must be calculated and made under payment schemes, and by reference to the raw sugar equivalent of sugar that each mill owner delivered to the corporation that was the product of cane harvested in each crushing season and manufactured in the year of harvest and the next year following.

Immediately prior to its amendment in 2006, Section 100(3) of the Sugar Industry Act provided that:

> *'Property divested from any person because of this section is changed to a right to receive payments under this Act.'*

Sections 101 and 102 dealt with payments by QSL *to mill owners* for the sugar vested in QSL under section 100. It is clear that the property that was divested under section 100 of the Sugar Industry Act (ie. the raw sugar vested in QSL) was the property of the mill owner.

1.4 Title to sugar following deregulation

The 2005 Act, which commenced operation on 1 January 2006, gave effect to major reforms to the marketing of sugar under the Sugar Industry Act by removing the vesting and single desk arrangements.

The clear intention of Queensland Government in enacting the 2005 Act was to:

> *'remove regulatory encumbrances from the sugar industry...[and] support an orderly transition from legislative to contractually-based marketing arrangements for bulk export sales.'* [9]

This was achieved through the repeal of Chapter 3 of the Act, which had vested all raw sugar in QSL upon manufacture, and related provisions allowing exemption from vesting. Provisions of the Act relating to the Sugar Authority, the Sugar Industry Commissioner, and controls over QSL, were also repealed.

Since these amendments, the Act regulates only the 'front end' of sugar production – that is, supply of sugar cane by growers to mills, and does so in a more limited fashion compared to the legislation in its earlier form. In particular, Chapter 2 of the Act provides that cane supply by growers to millers must be governed by supply contracts (as noted above) but does not prescribe the form or content of those arrangements.

With the removal of the vesting provisions, and in the absence of any contractual arrangement to the contrary, the ownership of sugar manufactured by a miller is governed by usual legal principles: it belongs to the miller who manufactures it.

While deregulation has given Wilmar the ability to determine how its raw sugar would be marketed, Wilmar has voluntarily elected to enter into arrangements whereby QSL has continued to manage the marketing and export of Wilmar's raw sugar in accordance with a raw sugar supply agreement (**RSSA**) between Wilmar and QSL. This agreement documents the terms and conditions on which Wilmar supplies raw sugar to QSL for sale in export markets.

1.5 Cane Supply Agreements

Wilmar is party to a series of cane supply agreements (**CSAs**) with growers, made in accordance with section 31 of the Sugar Industry Act. The CSAs document terms and conditions for the harvesting, delivery, transport, crushing of, and payment for, sugar cane that is produced by growers and supplied to Wilmar.

The terms and conditions of CSAs are negotiated with several grower collectives (who are authorised to collectively bargain with Wilmar under section 237 of the Sugar Industry Act), as well as a number of individual growers.

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[9] Explanatory Note, *Sugar Industry Amendment Bill 2005,* page 2.

Under the CSAs, growers agree to supply cane and deliver it to a Delivery Point, which is usually a cane railway siding or another specified location. The CSAs expressly provide that title and risk in the cane passes to Wilmar immediately upon delivery at the Delivery Point. Wilmar has the right to reject delivery on specified grounds including unsatisfactory quality.

The provisions of the CSAs do not create any form of co-ownership over, or give growers any form of proprietary interest in, the product of the relevant mill. Nor do they give growers control over the cane once it is delivered, or the sugar produced by the miller.

1.6 Pricing for cane supplied under CSAs

Wilmar's CSAs provide for Wilmar to make regular payments to growers for cane. For each delivery supplied by a grower, a payment is determined using a formula set out in the CSA. The formula, which is a function of the tonnes of cane delivered and the commercial cane sugar (**CCS**) content of the cane, as well as the Sugar Value received by Wilmar from the sale of sugar, can be summarised as follows:

$/tonne cane = 0.009 × 'Sugar Value' × (CCS - 4) + 'Constant'

Wilmar measures the amount and CCS of a given delivery of cane in accordance with the CSA and Wilmar's Cane Analysis Program. The Sugar Value is determined by reference to the net price which QSL pays to Wilmar in accordance with the RSSA in respect of each pricing pool, and is a function of the world sugar price and any additional premiums achieved by QSL, less QSL’s marketing costs. This means that growers and millers have a shared commercial interest in maximising the price paid for the raw sugar produced and sold by millers.

The basic structure of the pricing formula used in CSAs has existed for almost a century. Prior to its amendment in 2004,[10] the Sugar Industry Act required all collective agreements to include payment arrangements linking the price of cane to the selling price of sugar, unless the negotiating team decided otherwise. The fundamental link between cane price and sugar price and the structure of the cane price formula in Wilmar’s CSAs has not changed since deregulation. However, the pricing formula is now given force only as a matter agreed under contract.

The critical point in relation to the formula is that it is (and has only ever been) a mechanism for determining the price for sugar cane. Under this mechanism, price is determined, in part, by reference to world sugar prices. This means that growers are exposed to the risks (and rewards) associated with fluctuations in world sugar prices. However, the cane price formula is not, and has never been, a tool for sharing control over the marketing and sale of raw sugar. Those matters have always been dealt with separately, initially by compulsory vesting of raw sugar under statute and, since deregulation, by the commercial arrangements agreed between the manufacturers of raw sugar (ie. the millers) and marketing firms such as QSL.

1.7 'Grower economic interest'

The RSSA[11] includes a recital that states:

> *'The Supplier will disperse part of the proceeds from the sale of Grower Export Economic Interest Sugar to QSL under this Agreement to the*

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[10] *Sugar Industry Reform Act 2004* (Qld)

[11] Raw Sugar Supply Agreement between Wilmar Sugar Australia Ltd and QSL dated December 2013.

> *Growers pursuant to Agreements between the Supplier and each Grower and, to that extent, the Growers have an interest in the application of this Agreement.'*

Changes were made to the RSSA in 2013 to introduce into the contract a formal mechanism for QSL to supply part of Wilmar's raw sugar production back to Wilmar, in order to permit Wilmar to undertake its own marketing.[12] The amendments to the RSSA introduced the concepts of 'Supplier Economic Interest' sugar and 'Grower Economic Interest' sugar, in order to draw a distinction between that part of Wilmar's raw sugar production that would be supplied back to Wilmar, and that part which would not. Nothing in these amendments to the RSSA created, or was intended to create, any form of grower control over Wilmar's raw sugar production.

'Grower Economic Interest Sugar' is defined in the RSSA as:

> *'Raw Sugar for which Growers, excluding those Growers who are Related Bodies Corporate of the Supplier, bear the price exposure under the cane supply or other agreements between the Supplier and the Grower.'*

As noted above, the payments that Wilmar makes to growers for cane are calculated by reference, in part, to the price at which Wilmar's raw sugar is sold on world markets. Growers are affected by the price for raw sugar since, under the terms of existing CSAs; this affects the price they are paid for sugar cane. In a commercial sense, they have an 'interest' in the operation of any arrangement for the sale and marketing of raw sugar, since this has an influence on the price payable for their cane under the terms of the CSAs. This is the 'price exposure' referred to in the definition of 'Grower Economic Interest Sugar' in the RSSA or, more accurately, the growers' 'Nominal Sugar Exposure' (discussed below).

However, this does not translate to an interest in the raw sugar itself. Clause 8.2 of the RSSA goes so far as to state:

> *'The Supplier* [ie. Wilmar] *warrants that it has the title to the Raw Sugar sold pursuant to this Agreement, free of all encumbrances and adverse claims that would prevent unencumbered title to the raw sugar passing to QSL.'*

This clause reflects the legal and commercial reality that resulted from deregulation in 2006. Raw sugar produced by millers is the property of the miller. In the absence of any agreement to the contrary, it is the miller that it is entitled to determine how that sugar will be sold and marketed. This assumption underpins the RSSA.

To the extent that growers are exposed to sugar price, this is only a consequence of:

(a) agreements between growers and millers as to the method by which the price for sugar cane will be determined; and

(b) agreements between millers and QSL as to how raw sugar will be priced and marketed for export, which determine the sugar price on which the price of cane is based.

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[12] These amendments took effect for the 2014 season. For the 2012 and 2013 seasons, Wilmar had a separate arrangement with QSL to sell back a portion of Wilmar's raw sugar production using the long term contract (LTC) provisions of the RSSA then in effect.

However the suggestion that growers control the sale or marketing of any part of the output of a mill finds no support in law, or in the commercial arrangements that underpin the production and sale of sugar cane or raw sugar. In short, the concept of 'Grower Economic Interest sugar', as a thing that growers own or control, does not exist.

This is consistent with legal advice previously obtained by growers themselves. Following the insolvency and sale of the South Johnstone Mill to Bundaberg Sugar in 2001, CANEGROWERS lobbied, unsuccessfully, for the creation of a charge over the proceeds of sale of raw sugar. CANEGROWERS produced, and provided to the Queensland Government, legal advice from Mr R W Gotterson QC, which confirmed that:

> *'growers do not have any right or interest over or in respect of sugar payments received by a mill which would entitle them to payment for cane from such sugar payments ahead of a secured or unsecured creditor.'*

In a broad sense, cane growers are clearly interested in the price at which raw sugar is sold, since this influences the price they receive for raw sugar. However, this must not be confused with any form of legal or proprietary interest in the output of a sugar mill. Furthermore, the deregulation of the sugar industry in 2006 removed the provisions vesting raw sugar in QSL, and gave millers the ability to determine how best to market their raw sugar.

1.8 Nominal Sugar Exposure

As noted in section 1.6 above, the CSAs that have been negotiated between Wilmar and growers for the supply of sugar cane provide for the price of that cane to be determined under a formula which has, as its major component, the price paid by QSL to Wilmar for its raw sugar production. In this sense, growers are exposed to fluctuations in world sugar prices. Since the introduction of forward pricing by Wilmar in 2008, Wilmar has referred to this as the growers' Nominal Sugar Exposure.

There are a range of mechanisms available to growers to manage their Nominal Sugar Exposure, including:

(a) the system of different pricing 'pools' operated and managed by QSL under existing arrangements; and

(b) the ability of growers to enter into agreements with Wilmar to individually manage forward pricing.

Sections 4.2 and 4.3 below explain in more detail the means by which growers are able to manage the risk associated with their Nominal Sugar Exposure, both under existing arrangements with QSL and the proposals announced by Wilmar.

Recognising the exposure that growers have to world sugar prices as a result of the CSAs, and how this exposure is managed, is crucial to understanding the operation of mechanisms for pricing and marketing raw sugar in export markets. This is discussed in further detail below. However, these arrangements, which exist as a consequence of contracts negotiated and agreed between growers and millers, and between millers and QSL, do not change the legal principles that have underpinned sugar production in Australia since deregulation, and which ultimately give millers the ability to determine how raw sugar production is to be marketed and sold.

2. Access to infrastructure

2.1 Sugar Terminals Limited (STL)

Sugar Terminals Limited (**STL**) is an Australian listed public company, owned by the sugar industry, which was established in 1999. It owns the six bulk sugar terminals located at the ports of Cairns, Mourilyan, Lucinda, Townsville, Mackay, and Bundaberg.

The major activities currently conducted by STL are ownership of bulk sugar terminal assets; protecting the bulk sugar terminals; managing development and financing of bulk sugar terminals; and managing the sub-lease of the terminals to QSL.[13]

The sugar terminals were constructed and financed by growers and milling companies. Ownership of the terminals was originally vested in the Queensland Government through the respective Port Authorities (then Harbour Boards) and they were managed by the Queensland Sugar Corporation (the predecessor to QSL).

Table 1: Terminals and Usage

Terminal	User and Usage % (2014 season estimate)
Cairns	MSF 53%; Mackay 47%
Mourilyan	Tully 58%; MSF 42%
Lucinda	Wilmar 100%
Townsville	Wilmar 100%
Mackay	Mackay 59%; Wilmar 41%
Bundaberg	Isis 48%; BSL 35%; MSF 17%

Under the Sugar Industry Act, ownership of the terminals was transferred in August 2000 to growers and millers through share allocations in STL.

2.2 Shareholding in STL

STL has two types of shares: grower shares (**G class shares**), the acquisition of which is restricted to active cane growers, and miller shares (**M class shares**) which are restricted to active Queensland mill owners.

There are 229,348,203 G class shares and 130,651,797 M class shares. M class shares are unlisted, whereas G class shares are listed on the National Stock Exchange. Trading in all shares is restricted to industry participants.

Table 2: STL shareholdings as at 30 June 2014

Shareholder	No. of Shares	% of Class	% of Total
Top 10 G class shareholders			
Anthoan Pty Ltd	11,515,155	5.0%	3.2%
MSF Investments Pty Ltd	11,494,226	5.0%	3.2%

[13] STL Annual report 2014, page 3.

Shareholder	No. of Shares	% of Class	% of Total
QSL Investments (No 1) Pty Ltd	11,467,410	5.0%	3.2%
QSL Investments (No 2) Pty Ltd	11,467,410	5.0%	3.2%
MSF Sugar Limited	11,446,455	5.0%	3.2%
Queensland Sugar Limited	10,437,145	4.6%	2.9%
MP Australia Investments Pty Ltd	2,470,525	1.1%	0.7%
Jaswel Pty Ltd <The Jaswel Family A/C>	2,005,541	0.9%	0.6%
Wilmar Sugar Australia Investments Pty Ltd	1,111,343	0.5%	0.3%
Tully Sugar Limited	652,538	0.3%	0.2%
Other	155,280,455	67.7%	43.1%
Total G class shares	229,348,203	100.0%	63.7%
All M class shareholders			
Wilmar Sugar Australia Investments Pty Ltd:	65,810,955	50.4%	18.3%
Mackay Sugar Limited	32,730,150	25.1%	9.1%
MSF Sugar Limited	16,568,672	12.7%	4.6%
The Mulgrave Central Mill Company Limited	9,505,841	7.3%	2.6%
Tully Sugar Limited	6,016,179	4.6%	1.7%
Isis Central Sugar Mill Co Ltd	20,000	0.0%	0.0%
Total M Class shares	130,651,797	100.0%	36.3%
Total shares	**360,000,000**		**100.0%**

Wilmar is an M-class shareholder with 65.8 million shares and, to a very minor extent, a G-class shareholder with 1.1 million shares. These shareholdings represent 50.4% and 0.5% of M class and G class shares respectively, and 18.6% of total shares.

2.3 Directorship of STL

STL's board comprises two miller-appointed directors and two grower-appointed directors, plus one independent director.

Given Wilmar's miller shareholding, Wilmar could theoretically appoint the two miller directors (although it had currently appointed one only).

Grower directors are appointed through a majority voting process overseen by canegrower organisations. A grower director may only be removed by passing an ordinary resolution at a G class shareholder meeting.

2.4 Control of STL

A special resolution for the modification of the Constitution or a proposal for the disposal of a substantial portion of assets require a 75% majority of G Class voters and a 75% majority of M class voters.

Ordinary resolutions of importance, as determined by the directors, must be passed by a simple majority of M class shareholders and simple majority of G class shareholders; otherwise a simple majority of all votes will suffice.

Given the composition of STL's shareholders and board of directors, together with its voting rules, it is clear that Wilmar is not able to control STL's decisions.

Wilmar has only a very limited shareholding among G class shareholders, and Mackay Sugar (whether voting alone or with others) has a sufficient number of M class shares to prevent M class shareholders endorsing any resolution of importance.

2.5 Leasing arrangements

STL's six bulk sugar terminals are managed by QSL under a leasing arrangement. The term of the current arrangement is 5 years (1 January 2014 – 31 December 2018).

Under arrangements commencing in January 2014, QSL pays a fixed annual rental fee of $44.86 million (escalating at 2.5% per annum) to sublease the bulk sugar terminal facilities from STL.[14] STL receives the lease fee from QSL, deducts its own costs, then distributes the remainder to its shareholders, following its stated policy of paying from the net profit each financial year as high a dividend as possible to shareholders, having regard to the company's cash position.

There are two termination / exclusion clauses in the lease agreement:[15]

(a) Termination for Diminution of Exports (cl. 33) – STL may terminate the sub-lease with QSL:

   (i) If QSL's Proportion is less than 75%; or

   (ii) If in STL's opinion it is reasonably expected that QSL's Proportion will be less than 75% for the following season.

(b) Exclusion of bulk sugar terminals (cl. 34). A terminal can be excluded from the lease if:

   (i) If QSL's Volume for any terminal is less than 20% of Total Volume for that terminal; or

   (ii) If QSL's Volume for any terminal is in the sole opinion of STL reasonably expected to be less than 20% of the Total Volume for that terminal in the next season.

Where:

QSL's Proportion = QSL's Volume / Total Volume

QSL's Volume = amount of sugar which is stored, handled and marketed by QSL for mills with a supply agreement

Total Volume = total sugar which is stored and handled that season.

2.6 Impact of Wilmar's decision on STL

Wilmar's decision to exercise its right to cease acquiring marketing services from QSL will not affect the ability of users to access STL's terminals.

Wilmar's exit from QSL will cause a reduction in overall QSL volumes and, consequently, is likely to enliven STL's right to terminate QSL's lease of the bulk sugar terminals. Whether STL exercises that right is a matter for STL. While STL is not obliged to terminate QSL's lease, STL will have a number of options available to it in the event that it does so. For example, STL may deal directly with exporters and/or negotiate new leasing arrangements with QSL or a third party.

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[14] STL statement to the National Stock Exchange, 28 June 2013.

[15] *'Suppliers Meeting – Wilmar Termination Notice'* QSL presentation dated 8 April 2014.

2.7 Wilmar's FIRB undertaking

On 9 July 2010, Wilmar notified the Foreign Investment Review Board (**FIRB**) of its proposal to acquire 100% of the ordinary shares in Sucrogen Limited. On 15 November 2010, FIRB confirmed that it had no objection to the proposal subject to Wilmar's compliance with certain undertakings given in November 2010, which are set out in full at **Annexure B.** In particular, Wilmar undertook that:

> *'if, contrary to its existing intention, Wilmar does, through Sucrogen or otherwise, seek to operate STL's sugar terminal infrastructure, either through a lease, direct ownership or other means, then Wilmar will provide the same open access arrangements to STL's sugar terminal infrastructure that are currently provided by QSL.'*

Wilmar continues to be bound by that undertaking. Accordingly, even if Wilmar were to operate any bulk sugar terminals pursuant to a lease with STL or otherwise, Wilmar must provide open access arrangements as QSL does currently. If Wilmar breached that obligation, it would be in breach of the undertaking, which can be enforced by the Treasurer.

3. Foreign ownership

3.1 Foreign investment in the Australian sugar industry

Since 2010 there has been extensive foreign investment in the Australian sugar industry, specifically, the acquisition of:

- Sucrogen by Wilmar in 2010;
- Tully Sugar by COFCO in 2011; and
- MSF Sugar by Mitr Phol, which was completed in 2012.

These acquisitions have brought more than $2 billion of investment into the Australian sugar industry.

The *Foreign Acquisitions and Takeovers Act 1975* (Cth) (the **Foreign Acquisitions and Takeovers Act**) gives the Federal Treasurer the power to block the foreign acquisition of Australian business if such an acquisition is found to be contrary to the national interest.

Each of the acquisitions noted above has been reviewed by the Foreign Investment Review Board under the Foreign Acquisitions and Takeovers Act, with none being found to be contrary to the national interest.

In the case of Wilmar's acquisition of Sucrogen in 2010, undertakings were given by Wilmar to the Australian Government in relation to access to terminals (see above) as a condition of approval. These undertakings are discussed in section 2.7 above and reproduced in **Annexure B** below.

3.2 Transfer pricing rules

Foreign firms investing in the Australian sugar industry are subject to Australian tax laws relating to transfer pricing. New rules governing transfer pricing, which commenced from July 2013, are designed to ensure that foreign companies operating in Australia cannot use related party transactions to artificially reduce their taxable income in this country.

Australia's transfer pricing rules require firms to ensure that cross border transactions involving related parties are priced by reference to what independent parties, dealing at arms length, would be reasonably expected to do in the same situation. Pricing must reflect a fair return for activities undertaken in Australia, taking into account the Australian assets used and the risks involved in the relevant activities.

Firms engaged in cross border transactions with related parties are expected to consider assess pricing when transactions are undertaken to ensure they satisfy the arms length principal, and to maintain records to explain and substantiate the basis on which pricing decisions were reached.

In the context of the Australian sugar industry, a foreign investor would risk contravening Australian tax laws if it was to attempt to reduce its tax liability in Australia by compensating its Australian arm for raw sugar produced in this country on terms that are not consistent with those that would be negotiated on an arms length basis. Transfer pricing rules, while not directed towards the regulation of the sugar industry as such, provide a safeguard against the risk of profits being removed from Australia through related party dealings.

4. Competition and consumer laws

4.1 Overview

The terms of reference ask whether there is a need *'for formal powers under Commonwealth competition and consumer laws, in particular, whether there are adequate protections for grower-producers against market imbalances'*.

This question appears to be based on an assumption that recent changes to arrangements for the marketing of raw sugar announced by Wilmar will have an adverse impact on competition in the sugar industry. In our opinion such assumptions are without foundation. Indeed, there is an irony in such claims, in that Wilmar's announcement seeks to give effect to one of the key planks of the deregulation of the sugar industry in 2006 – the abolition of QSL's monopoly on the marketing of raw sugar and the end of 'single desk' export arrangements.

When competition in the sugar industry is properly understood, it is clear that existing laws are more than adequate to protect competition in the sugar industry and safeguard the interests of growers.

We explain this in more detail below.

4.2 Competition in the sugar industry

There are three propositions that are central to understanding competition in the sugar industry in Australia.

First, there is no imbalance of bargaining power between cane growers and millers.

As noted above, Wilmar negotiates CSAs with several cane grower collectives. Collective negotiation by cane growers is specifically authorised, for the purposes of competition laws, under the Sugar Industry Act. This is discussed in more detail in section 4.4 below.

The effect of collective negotiation by cane growers is to balance the bargaining power of millers and growers. In short, millers and growers are dependent on each other.

Operating a sugar mill involves high fixed costs. Most of the sugar production from a mill in a given season will be devoted to covering the fixed costs of owning and operating the mill. Only by achieving high levels of cane throughput in a season can a miller hope to be profitable. Further, investment in sugar mills is largely sunk. A sugar mill is designed and constructed for the purpose of crushing sugar cane. It can be put to no other use. As the ACCC observed in 2001:

> *'without a steady supply of sugarcane, mills have no value.'* [16]

This means that millers have a vested interest in developing and sustaining a productive and profitable sugar cane industry. Millers cannot impose on growers unreasonable terms that threaten the viability of growers without, in turn, threatening their own profitability.

It is of course true that a farmer who has planted cane depends on a nearby mill to take and crush that cane. But over the longer term farmers have options that are not available to millers. There have been instances of cane farmers in Queensland switching to other crops, plantation timber or cattle. The decision to move out of sugar cane production may not be an easy one, but it is an option available to growers that is not available to a miller. Millers negotiate with grower collectives in the knowledge that growers have other options, and that even modest reductions in cane supply can have material impacts on the profitability of their sugar production.[17]

In this environment, the proposition that there is an imbalance of bargaining power, favouring millers over cane farmers, is incorrect. Collective bargaining by growers, together with their alternative options, gives them ample bargaining power to promote and protect their commercial interests in their dealings with sugar mills.

The commercial arrangements that have operated between growers and millers since deregulation demonstrate the effectiveness of collective bargaining. As noted above, the price of cane is still determined by a cane price formula that is linked to sugar price and therefore permits growers to benefit from increased returns from upswings in the world price of sugar. Since 2005, this formula has continued only by agreement between millers and growers. A miller which enjoyed unequal bargaining power over growers, and an incentive to capture the returns from higher sugar prices for itself, would have had the ability to abandon the cane price formula. Yet, since deregulation, there has been no proposal to abandon the cane price formula, and Wilmar makes no such proposal now. Rather, Wilmar has, since deregulation, introduced measures to help growers more directly manage the risks associated with their exposure to fluctuating sugar prices including benefiting in the returns from higher sugar prices (these are discussed in further detail below). These are not the actions of a firm that enjoys unequal bargaining power in dealing with growers or is commercially incentivised to the delink cane prices from the sugar price.

Secondly, raw sugar is sold into a highly competitive global market.

Sugar is traded in an intensely competitive global market. There are seven major trading firms in this global market (ie. Wilmar, Cargill, Sucden, EDF Man, Louis Dreyfus, Bunge and Copersucar). In this market, QSL is not a major trader, with annual volumes only approximately half of that traded by Wilmar.

The single largest component of the price paid for raw sugar in these global markets is the price determined under the ICE 11 futures contract, traded on the Intercontinental

[16] *Application for Authorisation by CSR Ltd* (A90733), ACCC Final Determination, 11 July 2001, paragraph 2.12.

[17] This point is explained in greater detail in a briefing paper prepared for Wilmar by the Centre for International Economics (*Current and future arrangements for the marketing of Australian sugar: Senate Inquiry*) at pages 14-15.

Exchange. After conversion into Australian dollars, this accounts for approximately 99% of the net sugar price on which the price of sugar cane paid to farmers is based.

Other factors affecting the price ultimately paid to millers and growers include:

- marketing premiums; and
- marketing costs.

Marketing premiums are generated by the trader who is responsible for marketing the raw sugar, and reflect a price premium over and above the price paid under the relevant ICE 11 futures contract. They include a premium for physical sugar, which is a reflection of the supply/demand balance at any point in time, and the consequent freight differentials between the different supply origins into Asia. A polarisation premium also captures the value for sucrose content in the raw sugar relative to a standard benchmark stipulated under the ICE 11 futures contract. Marketing costs are incurred by the trader in storing and handling sugar, providing payment advances to sugar suppliers ahead of sugar sales to end customers and managing the futures price risk management and physical sales. For producers of Queensland sugar, marketing premiums and costs vary from year to year with global market conditions and local production levels but, under the QSL system, have historically been approximately 8% and 7% of net sugar price respectively, and have therefore tended to offset each other.

The vigorous competition between the major global sugar traders, as well as supply and regional demand, affects both future commodity prices under ICE 11 contracts and the marketing premiums that can be achieved from year to year.

Wilmar Sugar Pte Ltd (known as Wilmar Sugar Trading) is an effective competitor in this market because of:

- the volumes and different sources of raw sugar it trades on global markets;
- its expertise in managing prices and financial risk; and
- its access to efficient and cost effective shipping.

One of the benefits of the changes announced by Wilmar will be the ability of Wilmar Sugar Trading to use its scale and expertise to generate higher marketing premiums. Under the changes announced by Wilmar, it is proposed that any increased marketing premiums will be returned to growers, together with a share of any net trading value generated from arbitrage opportunities arising from the synergy between that 'book' of sugar supplied by Wilmar and Wilmar Sugar Trading’s other-origin 'book'.

Thirdly, sugar 'marketing' is more about managing pricing and risk than it is the physical handling and export of sugar.

Understanding pricing and risk is critical to understanding competition in the production of sugar cane and raw sugar.

Under existing arrangements, QSL manages its bulk raw sugar export program as a pooling system, where suppliers may elect to ‘pool’ their raw sugar together to be priced and sold.[18] Millers that supply QSL can elect to sell their raw sugar through one of a number of different pricing pools (with different features and different risk profiles) managed by QSL, or manage their own price exposure directly. Millers also contract

[18] *RSSA Marketing Guide, 2013 Season Edition*, QSL, 21 January 2013.

with growers for QSL to manage the price risk management of growers' Nominal Sugar Exposure in various pools at the election of the grower.

In addition Wilmar has, since 2008, contracted with growers to enable them to 'forward price' an agreed percentage of the Nominal Sugar Exposure associated with the cane that they are contracted to supply to Wilmar. Forward pricing is undertaken chiefly as a way of providing a grower with the opportunity to manage their price risk in a way that is suitable for their business (ie. taking into account such factors as cost of production, income stability, debt level and risk appetite), and is ultimately aimed at maximising the cane supply to Wilmar's mills.

Wilmar does not contract with growers to forward price their cane for more than three years in advance, and the proportion of a grower's cane that can be forward priced reduces in the further forward seasons. These limits are, in part, a consequence of limits imposed by QSL under the RSSA, and partly to manage the risk (to both Wilmar and growers) of an inability to deliver the contracted cane volumes in later years.

As can be seen from the above, growers have a number of different choices about how they manage the price risk associated with their Nominal Sugar Exposure. Importantly, it should be recognised that they can do this independently of the pricing management decisions of their miller. Furthermore, as the underlying ICE 11 futures price accounts for 99% of the Australian dollar net sugar price on which the price of their sugar cane is based, growers may exercise a large degree of choice in price risk management for the cane they supply to the miller.

Managing price and risk in the global sugar market is a complex undertaking and is fraught with challenges. This became apparent in the 2010 season, when QSL suffered losses of approximately $106 million on its sugar trading due to extreme weather events preventing around 30% of the 2010 crop being harvested, forcing QSL to cancel sales contracts and buy back of previously priced futures positions.[19]

The upshot of these arrangements is that growers have the ability to manage up to 99% of their exposure to world sugar prices, either through their use of pricing pools or forward pricing, independently of Wilmar's own pricing decisions. As noted below, this will continue under the arrangements announced by Wilmar.

4.3 Impact of the changes announced by Wilmar

Once competition in the sugar industry is properly understood, three things become clear:

(a) Millers do not have market power in the acquisition of cane or the production or marketing of raw sugar. Millers acquire cane by negotiating with grower collectives, and sell raw sugar into a highly competitive global market.

(b) Any suggestion that Wilmar's proposal is somehow aimed, in a competitive sense, at QSL is without any foundation. Wilmar's focus is to maintain and improve the performance of its global sugar business and to simply market its own sugar production as it is entitled to do. There is no logical reason for Wilmar to target QSL, which is not a major trader in the global sugar market.

(c) The arrangements announced by Wilmar will not adversely affect competition in any market:

[19] see http://www.qsl.com.au/2010-season-qa (accessed 25 September 2014).

(i) in which sugar cane is produced and sold;

(ii) in which raw sugar is sold (either locally or for export);

(iii) for providing sugar handling and storage; or

(iv) in which 'pricing' or 'marketing' services are provided.

In relation to this last point, Wilmar has proposed arrangements by which it will facilitate the price risk for growers' Nominal Sugar Exposure being managed by another party if growers so desire, with Wilmar:

(a) simply executing futures trades as directed by the relevant third party pricing manager; or

(b) alternatively, accepting a transfer of futures contracts from the third party pricing manager as part of the close-out mechanisms associated with the physical sale of the sugar.

This introduces a further degree of contestability in managing pricing and risk (above that which Wilmar currently makes available to growers in relation to the existing forward pricing system) but will also extend to other generic pricing mechanism types in the future. Growers already have the ability to manage up to 99% of the sugar price used in the cane price formula, independently of Wilmar's own sugar pricing decisions. This will continue under the new arrangements announced by Wilmar. Competition in managing risk in sugar pricing will be undiminished, and in fact is likely to be enhanced.

In terms of physical storage, handling and export of raw sugar, Wilmar will assume responsibility for these activities, and proposes to contract with whomever is the operator of the relevant bulk sugar terminals that service its sugar mills to provide those storage and handling and ship loading services. However, this is simply the exercise of a choice that was given to sugar millers with deregulation. Competition in the delivery of such services is not affected.

4.4 Adequacy of existing laws

There are four sets of laws that protect competition in the sugar industry and safeguard the interests of growers:

(a) the authorisation of collective bargaining under Sugar Industry Act;

(b) laws prohibiting anti-competitive conduct under Part IV of the *Competition and Consumer Act 2010* (Cth) (**CCA**);

(c) laws prohibiting unfair business practices under the *Australian Consumer Law* (**ACL**); and

(d) Commonwealth and Queensland laws providing for third party access to essential facilities.

We discuss each of these in turn.

Collective Bargaining

Under section 237 of the Sugar Industry Act, growers are authorised to engage in collective bargaining in relation to CSAs with millers. The effect of this authorisation is to take collective action by growers in dealing with millers outside of the scope of Part IV of the CCA.[20]

A statutory authorisation for collective bargaining under Queensland legislation is much more advantageous to growers than the mechanisms to permit collective bargaining under the CCA.

Division 2 of Part VII of the CCA permits parties to gain protection for collective bargaining by submitting a notification to the ACCC.[21] However, there are financial limits on the size of the transactions that can be protected in this way which render this option unsuitable for cane supply agreements.[22]

The only other way to gain protection for collective bargaining is to obtain authorisation from the ACCC on net public benefit grounds under Division 1 of Part VII of the CCA. While this has been done in the past,[23] such authorisations are typically limited as to time, and are subject to periodic review.

By contrast, a standing authorisation under Queensland legislation provides clear and ongoing protection for growers to collectively bargaining with millers. Wilmar supports the continuation of this protection under the Sugar Industry Act.

The importance of collective bargaining in the sugar industry cannot be overstated. Experience demonstrates that this has produced a situation where growers and millers are dependant on each other, and are invested in each others viability. While other laws regulating such matters as competition, business practices, access to infrastructure, and even taxation,[24] provide additional safeguards, it is the ability to collectively bargain that produces a market structure in which there is vigorous and effective commercial negotiation between growers and millers.

The 2005 Act repealed provisions in the Sugar Industry Act which allowed for the compulsory arbitration of disputes relating to the terms and conditions on which growers would supply sugar cane to millers.

This reform followed a series of reviews which highlighted the costs to the industry of compulsory arbitration. For example, the 2002 Hildebrand Report observed:

> *'Arbitration is an issue. It is not desirable that arbitration becomes a customary way to avoid the responsibility that should accompany local leadership in genuine negotiation at the mill area level, for the good of participants in that mill area.*
>
> ...
>
> *It appears likely to the Assessment that resort to habitual ('traditional') non-cooperative attitudes locally is the most likely cause of parties proceeding to default legislative mechanisms. In a mill area where*

[20] CCA, section 51(1)(b).

[21] CCA, section 93AB (while the legislation refers to 'corporations', the protection is also available to individual suppliers by virtue of the provisions of the CCA that provide for Part IV to apply as a law of the States (see section 150C)).

[22] currently $3 million per annum (see section 93AB(4)).

[23] see footnote 16 above.

[24] Australia's transfer pricing laws (discussed in section 3.2 above) impose additional safeguards for the Australian industry by ensuring that foreign investors in Australia's sugar industry are not able to use transfer pricing to shift profits from sugar production out of Australia.

> *negotiating parties act with genuine joint concern for their mill area's interest, it is likely that arbitration under the Act will never, or rarely, be used.'* [25]

A further report, produced by the Centre for International Economics (**CIE**) for the Queensland Government in 2002, canvassed the costs and benefits of the statutory bargaining system then in place and noted:

> *'The literature on the efficiency of various models of arbitrated outcomes is extensive but inconclusive. Here it needs only to be said that the 'final offer' requirement of arbitration in the default process imposes a degree of inflexibility that could limit incentives to pursue negotiated optimising outcomes. Having no legislated default fallback, which characterises other agricultural industries where many producers supply to processors with limited capacity, could itself contribute to a more responsive negotiation framework.'* [26]

A further report prepared by CIE for Wilmar in 2014 highlights the potential risks of re-introducing a heavy handed regulatory regime, noting that, before deregulation of the sugar industry:

> *'the industry operated in a regulatory straight-jacket that allowed little room for competition for resources or markets and little room to find meaningful negotiated changes.'* [27]

In 2004, with the agreement of CANEGROWERS and the Australian Sugar Milling Council, the Queensland Government announced reforms that would:

(a) retain compulsory arbitration until the end of 2005 (while prohibiting 'final offer' arbitration); and

(b) from 1 January 2006, provide for commercial arbitration only by agreement.[28]

These reforms aligned the sugar industry with most other sectors of the Australian economy. *Compulsory* arbitration between parties negotiating the terms and conditions of a supply contract, such as a CSA, is not common in Australia. In the vast majority of cases, parties are expected to negotiate the terms and conditions of contract, subject to laws regulating anti-competitive conduct and unfair business practices. Only in exceptional cases do we see legislation providing for compulsory arbitration in the contract negotiation phase.[29]

Collective bargaining, by balancing the bargaining power of growers and millers, has removed the need for compulsory arbitration and created the conditions where commercial negotiation can be relied upon to safeguard the interests of all parties and produce outcomes that promote innovation and efficiency.

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[25] Hilderbrand C, *Independent Assessment of the Sugar Industry 2002, Report to the Hon Warren Truss MP, Minister for Agriculture*, 2002, paragraph 4.3.

[26] Centre for International Economics, *Cleaning up the Act: The Impacts of Changes to the Sugar Industry Act 1999*, 2002, page 94.

[27] Centre for International Economics, *Current and future arrangements for the marketing of Australian sugar: Senate Inquiry*, 2014, page 21.

[28] *Heads Of Agreement: Reform of the Queensland Sugar Industry*, 1 March 2004.

[29] Arbitration is, of course, an extremely common means of resolving disputes arising under contracts *once they have been entered into*, but is rarely imposed during the negotiation of such agreements.

Anti-competitive conduct

The provisions of the CCA that are relevant for present purposes are:

(a) the prohibition in section 45 on contracts, arrangements or understandings that have the purpose, effect or likely effect of substantially lessening competition; and

(b) the prohibition in section 46 on the misuse of market power.

The ACCC has extensive powers to investigate possible contraventions of either of these provisions, and can seek sizable penalties and other remedies in the Federal Court if it believes they have been contravened.

For the reasons set out above, nothing that Wilmar has announced could be said to lessen competition. Further, when competition in the sugar industry is properly understood, it is apparent that Wilmar (a) does not have substantial market power, and (b) could not be said to be acting for any anti-competitive purpose.

The High Court has observed on more than one occasion that competition laws exist to protect *competition*, not the interests of individual market participants.[30] With collective bargaining firmly established under Queensland legislation, competition in the sugar industry will drive innovation and efficiency, as intended when the industry was deregulated. The role of competition laws in this market is not to hinder or interfere with proposals that enhance innovation and improve efficiency, but to protect the competitive process that drives these outcomes. Existing laws are perfectly adequate for this purpose.

Unfair business practices

The ACL contains several provisions, relating to specified unfair business practices, that regulate trade or commerce in Australia. Chief among these are:

(a) the prohibition under section 18 on misleading or deceptive conduct; and

(b) the prohibition under section 21 on unconscionable conduct.

As with Part IV of the CCA, the ACCC is empowered to investigate and enforce compliance with these laws.

The prohibition against unconscionable conduct is aimed at behaviour that is not merely perceived as unfair or unreasonable, but which could be viewed as unethical or involving a high level of moral obloquy, deserving of a pejorative moral judgement from the court.[31]

Section 22 of the ACL lists a series of factors to which the court may have regard in determining whether conduct is unconscionable. These are not factors to be applied in a strict or formulaic manner, but rather exist to guide the court in its deliberations. It is, however, noteworthy that none of these factors would point towards any finding of unconscionable conduct in the present circumstances. It should be readily apparent that the changes Wilmar has announced are motivated by a desire to improve the profitability of the Australian sugar industry, to the mutual benefit of its own business

[30] *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* [1989] HCA 6 at [23]-[24]; *Boral Besser Masonry Ltd v ACCC* [2003] HCA 5 at [87].

[31] eg. see *ASIC v National Exchange Pty Ltd* [2005] FCAFC 226 at [43]; *Hurley v McDonalds* [1999] FCA 1728.

and the growers who supply cane to Wilmar's mills. Nevertheless, the provisions of the ACL relating to unfair business conduct provide a further safeguard to protect the interests of cane growers and other participants in the sugar industry.

Third party access

Part IIIA of the CCA creates an access regime, under which a person can apply for the declaration of services provided by means of essential facilities. If a service is declared, an access seeker can go to arbitration in the event that it is unable to agree on terms and conditions of access. Similar provisions are to be found in Part 5 of the *Queensland Competition Authority Act 1995* (Qld).

This legislation is chiefly relevant to the question of access to the bulk sugar terminals operated by STL. As noted above, STL's response to Wilmar's decision to market its own sugar is not known, and will not be determined by Wilmar. There is no reason to believe that any upstream or downstream participant in the sugar industry will have the ability or incentive to foreclose access to, or use of, STL's bulk sugar terminals on reasonable terms and conditions. Nevertheless, the third party access regimes under State and Commonwealth laws provide a further safeguard to ensure that the industry will be able to continue to utilise the facilities that are essential to the export of raw sugar.

4.5 Conclusion

As outlined above, the statutory authorisation for collective bargaining under the Sugar Industry Act has produced a market structure where there is a balance of bargaining power between growers and millers, and vigorous competition for the marketing and sale of raw sugar and the management of price exposure and risk.

In this market, existing laws regulating competition, unfair business practices and access to infrastructure are perfectly adequate to protect competition and safeguard the interests of growers and other industry participants. Where there is foreign investment in the Australian sugar industry, laws relating to transfer pricing (discussed in section 3.2 above) provide a further safeguard against the possibility of profits from the Australian sugar industry being shifted abroad using related party transactions.

Against this background, there is a compelling basis for concluding that there are adequate protections for participants in the sugar industry, and no emerging need for formal powers under competition and consumer laws.

5. Other issues

5.1 Australia’s commitments under its Free Trade Agreements

Australia has entered into free trade agreements with several of its major trading partners, to encourage and protect Australian investments abroad and foreign investment in Australia.

Wilmar invested $1.75 billion (AUD) in the Australian sugar industry when it acquired Sucrogen in 2010. It has since invested more than $650 million[32] (AUD) in the Australian industry, mostly to maintain and improve its milling assets.

[32] This includes the $120 million acquisition cost of Proserpine Sugar Mill, and budgeted capital expenditure in current financial year ending December 2014.

Wilmar made this investment in a deregulated sugar industry, where it would negotiate with growers (bargaining collectively) to acquire sugar cane, and would have the ability to determine how its raw sugar, produced in its mills, would be sold.

As a Singaporean listed company, Wilmar's investment in the Australian sugar industry is protected by the commitments entered into under the 2003 Singapore-Australia Free Trade Agreement (**SAFTA**). Under the terms of this agreement, Australia has entered into a series of commitments to promote and protect foreign investment in Australia, including commitments to guard against the expropriation of Singaporean-owned property in Australia except on a non-discriminatory basis, for a public purpose, in accordance with due process of law, and with prompt, adequate and effective compensation. These commitments apply to measures imposed by the Commonwealth, as well as States and Territories.[33]

Calls for the 're-regulation' of the Australian sugar industry raise the possibility of measures, at either the Commonwealth or State level, that could seriously interfere with Wilmar's use of its mills or the sale and marketing of its raw sugar. If such measures were to be put in place, there is a risk that they may constitute measures tantamount to the expropriation of Wilmar's property, invoking the commitments under Article 11 of Chapter 8 of the SAFTA.[34] Similar commitments have been made by Australia in other free trade agreements, including Australia's free trade agreement with Thailand.

The legality of any measures to re-regulate the sugar industry, as well as the compensation to which foreign-owned investors may be entitled, would depend upon the precise nature of the measures imposed and their financial impact on those investors. Article 16 of Chapter 8 of the SAFTA makes provision for the resolution of disputes through negotiation and, if necessary, arbitration between the investor and the relevant state party, in cases where an investor alleges a breach of an obligation under Chapter 8 which causes loss or damage to the investor or its investment.

MINTER ELLISON

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10 October 2014

[33] See SAFTA, Chapter 8, Article 1.1(e) (definition of 'measure')

[34] While the SAFTA includes certain reservations relating to marketing boards (see Annex 4-II(A)), these reservations do not affect the application of the expropriation commitments in Article 11 of Chapter 8.

Annexure A: Senate Inquiry Terms of Reference

Current and future arrangements for the marketing of Australian sugar, including:

(a) the impact of proposed changes on the local sugar industry, including the effect on grower economic interest sugar;

(b) equitable access to essential infrastructure;

(c) foreign ownership levels in the industry and the potential to impact on the interests of the Australian sugar industry;

(d) whether there is an emerging need for formal powers under Commonwealth competition and consumer laws, in particular, whether there are adequate protections for grower-producers against market imbalances; and

(e) any related matters.

Annexure B: Wilmar's FIRB undertaking

Undertakings by Wilmar International Imposed as Approval Conditions Under the Foreign Acquisitions and Takeovers Act 1975, dated 8 November 2010[35]

1. WHEREAS,

   i. Sucrogen Limited is a mill owner member of Queensland Sugar Limited, ACN 090 152 211, (QSL) and currently holds a majority of the voting power of the mill owner members;

   ii. QSL currently undertakes certain marketing activities on behalf of its members in relation to raw sugar in the Asia-Pacific region; and

   iii. Sucrogen Limited and QSL have entered into a Deed, whereby Sucrogen agrees that it will vote in favour of any resolution put to a general meeting of QSL's members which proposes to amend the Constitution in accordance with Schedule 1 of that Deed, and that if any such resolution is not passed due to being opposed by other members of QSL, Sucrogen will meet with QSL to discuss in good faith amending the resolution to resolve that opposition while achieving a materially fair outcome,

   Wilmar agrees that Sucrogen is bound by the terms of the Deed with QSL, and Wilmar will support Sucrogen acting in accordance with its obligations under the Deed; AND

2. WHEREAS,

   i. Sugar Terminals Limited, ACN 084 059 601, (STL) has beneficial ownership of certain sugar terminal infrastructure in Queensland, being the six bulk sugar terminals located at the ports of Cairns, Mourilyan, Lucinda, Townsville, Mackay, and Bundaberg;

   ii. as at 30 June 2010, Sucrogen holds, through Sucrogen Investments Pty Ltd, 1, 111, 343 of the Grower (G) class shares in STL; representing around 0.48 per cent of the G class shares; and 59, 824, 003 of the Miller (M) class shares in STL, representing around 45.8 per cent of the M class shares in STL;

   iii. STL's sugar terminal infrastructure is currently operated by QSL pursuant to a Sublease, commencing with effect as of 1 January 2009 and for an initial period of 5 years with an additional period of 5 years provided both STL and QSL notify renewal of the Sublease by 30 June 2013;

   iv. QSL currently operates the sugar terminals infrastructure on an 'open-access' basis; and

   v. Wilmar does not currently have any intention, whether itself or through Sucrogen, to seek to acquire from STL a lease of any of STL's sugar terminal infrastructure;

   if, contrary to its existing intention, Wilmar does, through Sucrogen or otherwise, seek to operate STL's sugar terminal infrastructure, either through a lease, direct ownership or other means, then Wilmar will provide the same open access arrangements to STL's sugar terminal infrastructure that are currently provided by QSL.

These conditions, imposed under section 25 (1A) of the Foreign Acquisitions and Takeovers Act 1975, are subject to any revocation or amendment by the Treasurer.

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[35] Available at: http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2010/078.htm&pageID=003&min=wms&Year=&Doc (note that Wilmar increased its shareholding in STL, with FIRB's approval, when it acquired the Proserpine Mill).