

BURDEKIN DISTRICT CANE GROWERS LIMITED

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SUBMISSION TO SENATE INQUIRY

CURRENT AND FUTURE ARRANGEMENTS FOR THE MARKETING OF AUSTRALIAN SUGAR

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A. EXECUTIVE SUMMARY

Objectives:

1. Recognition that Wilmar Sugar Australia Ltd (**Wilmar Sugar**) functions as a monopsony;
2. Balance the inequity in bargaining power between growers and Wilmar Sugar;
3. Achieve a fair and balanced commercial relationship between growers and Wilmar Sugar.

Summary:

4. Wilmar Sugar is altering existing conventions regarding the marketing and sale of growers' notional sugar that is utilised for payment purposes.



5. A commercial compromise would be a growers' choice model, as first propositioned by Wilmar Sugar on 23 May 2013 and it is difficult to comprehend why a version of growers' choice is no longer palatable to Wilmar Sugar.
6. A growers' choice model provides the safe guard of competition and access to the growers' notional sugar is the incentive to both Wilmar Sugar and QSL (or any other marketer) to ensure that growers receive the best net sugar price for their cane.
7. Wilmar Sugar has unilaterally (i.e. without the growers' consent) determined to cease its commercial relationship with QSL. The impetus for Wilmar Sugar's actions is improving its return on its investment.
8. Wilmar Sugar will be the sole determinant of the net sugar price and this raises issues of conflict and bias.
9. There is currently no statutory or mandatory dispute resolution process within the Queensland sugar industry to assist growers and millers resolve commercial disputes in a mutually beneficial manner when negotiating the terms of the cane supply contract (CSA).
10. Due to the effective monopsony Wilmar Sugar will have along the whole of the supply chain, BDCG is concerned that the inequality of bargaining power will result in a commercial arrangement that is neither fair nor reasonable.
11. BDCG considers that the interests of both growers and Wilmar Sugar would be advanced by giving stakeholders in the sugar industry access to enforceable and mandatory dispute resolution frameworks to assist in resolving a wide range of business to business disputes.
12. The devastating long term economic implications to the Burdekin region, and many other regional towns in Queensland, should there be a complete breakdown in the structure and security of the sugar industry resulting from loss of grower confidence in the industry, should be the impetus for the Federal Government to balance the bargaining power between growers and millers.

13. A similar regulatory process may also be required to regulate access to bulk sugar terminals to ensure fair and reasonable port access.
14. BDCG is of the view that the current disharmony between growers and Wilmar Sugar has more to do with the imbalance of bargaining power between growers and Wilmar Sugar, than it does to Wilmar Sugar being a foreign owned company. BDCG acknowledges the importance of Wilmar Sugar's investment in the sugar industry, however, growers also have a large investment in the sugar industry and as a result are entitled to have a choice of marketer or a commercial relationship with Wilmar Sugar that balances the interests of growers and Wilmar Sugar.
15. BDCG submits that the Rural and Regional Affairs Transport References Committee should recommend the implementation of a streamlined dispute resolution process in the sugar industry through either:
 - (a) A mandatory industry code under the *Competition and Consumer Act 2010* (Cth) (CCA) which includes the mechanisms to provide an effective, fair and equitable dispute resolution process for growers to raise complaints and resolve disputes from the commercial dealings between growers and millers in negotiating supply contracts;
or
 - (b) Encourage the development of a voluntary industry code under the CCA which similarly includes the mechanisms to provide an effective, fair and equitable dispute resolution process for growers to raise complaints and resolve disputes from the commercial dealings between growers and millers in negotiating supply contracts.

B. BACKGROUND

BDCG

16. Burdekin District Cane Growers Limited (BDCG) has three member organisations:
 - (a) Pioneer Cane Growers Organisation Limited (PCGO);
 - (b) Kalamia Cane Growers Organisation Limited (KCGO); and
 - (c) Invicta Cane Growers Organisation Limited (ICGO).

17. By way of clarification, BDCG has no affiliation with CANEGROWERS Queensland.
18. BDCG was created to enable the three organisations to bargain collectively for their respective members pursuant to section 33(3) of the *Sugar Industry Act 1999 (Act)*.
19. BDCG represents approximately 5 to 6 million tonnes, or 65%, of sugar cane grown in the Burdekin and supplied to all 4 mills. BDCG is in a unique position in that it only represents growers in the Burdekin, who only supply to Wilmar Sugar.

Summary of BDCG's position

20. The current dispute regarding marketing arrangements of the growers' notional sugar utilised for payment purposes (that is, the unilateral decision by Wilmar Sugar to terminate its contractual relationship with QSL), highlights a fundamental flaw of deregulation; that is, a commercial arrangement without rules to balance the inequity in bargaining power between millers and growers.
21. This was perhaps inevitable and foreseeable and has been replicated in other rural industries, most notably wheat, where rapid deregulation has produced unintended consequences.
22. BDCG acknowledges that:
 - (a) The Queensland sugar industry is deregulated;
 - (b) Growers do not have legal title to the notional sugar utilised for payment purposes;
and
 - (c) Wilmar Sugar had the legal right to terminate its voluntary contractual arrangements with QSL.
23. However, prior conduct had established a convention; that is, that QSL would act as the marketer of the millers' sugar (given that two-thirds of the sugar was utilised to pay growers) and Wilmar Sugar has unilaterally terminated this convention prior to negotiating an outcome with growers.

Monopsony

24. Most important, is the fact that **there is no competitive market for cane**. Further, cane is a perishable commodity and the vast majority of growers must sell their cane to a single miller. This is the situation for all growers in the Burdekin. Wilmar Sugar functions as a monopsony and exercises monopsony power.
25. The argument that a grower does not have to produce sugar cane but can grow multiple alternative crops is simplistic.
26. Mr Tom Mullins (Tom Mullins Consulting and formerly an agri-financial advisor for the Qld Department of Primary Industries) advised on 26 September 2014 that an average size farm producing 10,000 tonnes of cane in the Burdekin has a debt of \$60/tonne of cane or \$600,000, being serviced by interest only financial products. Mr Mullins opined that the value of the growers' land is commensurate with the revenue generated from sugar cane and widespread transitioning in and out of crops would likely halve the land value.
27. The Burdekin has approximately 90,000 hectares under sugar cane, thus even a modest change from the production of cane to alternate crops (for example, 20% or 18,000 hectares to small crops such as pumpkins, rockmelons, watermelons, capsicums etc.) would flood the domestic market and have a negative impact on the price of such produce.
28. The local branch of the ANZ Bank has also advised that the bank meets with its grower/customers biannually and reviews the grower's ability to service the debt. Thus the bank reviews the income the farm purportedly will generate and the grower will not be able to grower alternate crops unless the bank is satisfied that the alternate crop will generate sufficient income.
29. Thus the reality is that the majority of growers are committed to growing sugar cane, reinforcing Wilmar Sugar as a monopsonist.

Wilmar Sugar's prior conduct and Consequences of misuse of bargaining power

30. Wilmar Sugar has demonstrated, by its prior conduct, it is prepared to act unilaterally, present a standard contract as a *fait accompli* to all suppliers and refuse to negotiate the terms of the contract, reliant upon its monopsonistic powers. This is best demonstrated by the following example:

Example:

- (a) On 16 August 2012 Wilmar Sugar presented as a *fait accompli* a contractual document (variation of an existing Forward Price Agreement) which affected, amongst other things, the manner in which the net sugar value was calculated and grower representative groups were informed that Wilmar Sugar was “***not proposing to “negotiate” the new FPPA with the various grower organisations because we consider it essential to have a consistent, single document applicable for all growers***”.
- (b) By way of response Wilmar Sugar was advised that its behaviour was surprising, particularly having regard to sections 21, 22 and 23 of Schedule 2 Australian Consumer Law of the *Competition and Consumer Act 2010* (Cth). Begrudgingly Wilmar Sugar “allowed” a response. However, it was only after persistent requests that Wilmar Sugar was prepared to discuss the new Forward Price Agreement and agreed to only minimal and peripheral changes. We remain in dispute, both in relation to the manner in which Wilmar Sugar conducted itself and the terms and conditions of this Forward Price Agreement.

31. Growers have legitimate concerns regarding the manner in which Wilmar Sugar may choose to act, and the long term implications for growers. Again, this is best demonstrated by the following list of grower concerns:

Examples:

- (a) The legal relationship (post 2016) between the growers and Wilmar Sugar is undefined and Wilmar Sugar has not, to date and despite several requests, produced the legal contracts that would demonstrate Wilmar Sugar's commitment to a fair and balanced commercial arrangement.

- (b) The obvious conflict of interest and bias of Wilmar Sugar acting as the marketer and sole determinant of the net sugar value – for example:
- (i) Wilmar Sugar selling sugar to a related entity and the difficulties that ensue in “untangling” the actual revenue derived from the growers’ notional sugar and Wilmar Sugar’s other business interests;
 - (ii) How will Wilmar Sugar and Wilmar Sugar Trading determine a charge for marketing services that will be deducted from the gross sugar price?;
 - (iii) How will Wilmar Sugar determine the freight rate (cost deducted from the gross sugar price) in circumstances where Wilmar Sugar has utilised its own ships?;
 - (iv) Which contracts will Wilmar Sugar hedge utilising the growers’ notional sugar and its other origin sugar?;
 - (v) In the physical sale of sugar will Wilmar Sugar favour utilising its sugar when it is a lucrative commercial deal rather than the growers’ notional sugar?; and
 - (vi) Will Wilmar Sugar alter/remove/restrict the grower’s access to forward pricing the ICE 11 component of the sugar price?
- (c) Issues of transparency – for example, what trading documents will be disclosed by Wilmar Sugar; how will growers ascertain what premiums were achieved or what marketing costs have been deducted from the gross sugar price?
- (d) The ability of growers to prevent Wilmar Sugar unilaterally altering the CSA (for example, altering the cane payment formula)?
- (e) Wilmar Sugar’s capacity to fund advance payments to growers and at what cost to growers?
- (f) Security of payment for growers.

32. Wilmar Sugar has attempted to alleviate growers’ concerns by stating that the growers, by choosing the ICE 11 component of the sugar price (via forward pricing or a pricing pool), will themselves determine approximately 95% of the sugar price. However, the remaining 5% - 10% of the sugar price (determined by premiums less costs) may equate to \$5 a tonne of cane which often reflects growers’ profit margin. Consequently, the frivolous manner in which Wilmar Sugar seeks to respond to this issue is a matter of consternation to growers.

33. As stated above, Wilmar Sugar has not to date produced the proposed legal documents that will define its relationship with the growers under this new regime of Wilmar Sugar acting as the marketer of the growers' notional sugar.

Why does Wilmar Sugar seek to market all (2 million tonnes) of its sugar?

34. Wilmar Sugar has already negotiated with QSL to access, for marketing purposes, one-third of its sugar (referred to as Wilmar Sugar's economic interest sugar). Growers then have sought to understand, and Wilmar Sugar appears hesitant to state, the reasons behind it seeking access to the other two-thirds of its sugar which is utilised to pay the growers.

35. BDCG is of the view that Wilmar Sugar is seeking to improve its revenue and return from its investment and increase its opportunities by:

- (a) increasing its market size;
- (b) increasing the number of trades in sugar it can make;
- (c) broadening its shipping scales;
- (d) accessing more Australian origin sugar;
- (e) executing more physical sales of sugar.

36. BDCG is not seeking to prevent Wilmar Sugar from utilising opportunities and improving the return on its investment, however, given growers' investment in their businesses (which historically has been recognised as one-third:two-thirds, miller and growers respectively), it also cannot be to the growers' detriment. A balance must be achieved between the two competing interests.

"A Growers' Choice" Model

37. Wilmar Sugar first indicated its intentions to alter existing marketing arrangements and market the two-thirds of the sugar (referred to as the growers' notional sugar) utilised to pay growers on 23 May 2013. Wilmar Sugar first offered growers the ability to choose between Wilmar Sugar and QSL to market all or a portion of the growers' notional sugar.

38. At that stage, Wilmar Sugar was seeking this change within the exiting arrangements with QSL (i.e. Wilmar Sugar was not proposing to terminate being a party to the RSSA). However, the growers' choice model was rejected by CANEGROWERS (relying upon

the Green Pool Report's recommendation that growers obtain legal title to their notional sugar); it was allegedly re-offered to CANEGROWERS in December 2013 and again rejected. Despite requests to both CANEGROWERS and Wilmar Sugar for PCGO, KCGO and ICGO (as BDCG was not yet incorporated) to be included in these meetings, we were excluded from these discussions. BDCG is therefore unable to proffer any explanation as to why negotiations failed. Whilst PCGO, KCGO and ICGO did not accept Wilmar Sugar's original offer, we extracted from Wilmar Sugar a willingness to negotiate.

39. Despite several requests, as late as 18 September 2014, to Wilmar Sugar inviting it to reconsider a growers choice model (BDCG had no preconceived notion of a "growers' choice" model and BDCG was open to negotiating an outcome with Wilmar Sugar), Wilmar Sugar has declined BDCG's invitation and reaffirmed its decision to exit voluntary marketing arrangements with QSL and directly market its own sugar.

40. BDCG has reached the view that Wilmar Sugar is unlikely to reconsider its position in relation to re-offering a "growers' choice" model. Thus, Wilmar Sugar has removed the obvious safe guards provided by competition and growers having a choice of marketer.

C. THE IMPACT OF PROPOSED CHANGES ON THE LOCAL SUGAR INDUSTRY, INCLUDING THE EFFECT ON GROWER ECONOMIC INTEREST SUGAR

41. Following the announcement earlier this year by Wilmar Sugar that it will commence marketing all the sugar from its mills from 2017, growers in the Burdekin will shortly commence negotiations with Wilmar Sugar regarding the manner in which the net sugar price will be determined – that is, matters pertaining to marketing, financing, forward pricing options (pricing and pooling) etcetera. Due to the effective monopsony Wilmar Sugar has in the Burdekin, BDCG is concerned that the potential inequality of bargaining power may negatively impact contractual negotiations resulting in a commercial relationship that is neither fair nor reasonable to growers.

42. The implication of Wilmar Sugar's decision to terminate its contractual relationship with QSL is that **Wilmar Sugar will become the sole determinant of the net sugar price**; that is, **Wilmar Sugar will have significant influence over determining what growers are paid for their cane**. Further, Wilmar Sugar has a conflict of interest and bias in determining the net sugar price.

Legal Title to the sugar

43. There has been discussion within the growing sector that "grower economic interest" (GEI) be recognised by millers in the CSA. It can be argued that the existing cane payment formula recognises GEI (that is, it reflects payment based upon a one-third:two-thirds ratio of sugar produced from cane). As GEI is not a legal concept, the questions to be answered are:

- (a) What is the objective of GEI being recognised in supply agreements?
- (b) Is it to attain the rights of ownership?
- (c) Is it merely to allow growers the ability to choose between QSL and Wilmar Sugar as marketer?

44. Ownership of the sugar certainly allows the grower to determine who markets the sugar, however, the cane would still be milled by Wilmar Sugar and growers would still need to negotiate a commercial relationship with Wilmar Sugar. Growers' interest in ownership of the sugar is because it opens up, and provides, long term, real competition for marketers of the sugar and has a significant impact on determining the net sugar price.

45. BDCG is of the opinion ownership of the sugar will not necessarily guarantee a higher net sugar value (net sugar value = ICE 11 + premiums – costs) that is utilised in the cane payment formula $(0.009 \times \text{net sugar value} \times (\text{CCS} - 4) + 0.662)$. For example, would there be a loss of economies of scale so that the costs along the whole supply chain exceed the current costs (i.e. would transport, milling, storage and handling, financing and marketing costs equal or be greater than the current charge to growers)?

46. Thus, if the purpose of ownership of the sugar is merely to allow the grower the ability to chose between QSL (or any other marketer) and Wilmar Sugar and growers are of the opinion that ownership is imperative, BDCG recommends that first a report be

commissioned by growers to investigate resultant consequences along the **whole supply chain**, particularly whether there would be any negative impact on the net sugar value.

47. However, growers are focused on ensuring that the commercial relationship between growers/millers/marketers is fair and balanced and maximises returns to growers (i.e. achieves the best net sugar price).
48. The advantage of ownership of sugar is the resulting competition for the growers' sugar; that is, QSL (or any other marketer) and Wilmar Sugar focusing on performance to ensure that growers receive superior marketing services, including the best net sugar price, the best payment options, multiple pricing options etcetera. Many of the concerns of growers would be alleviated by the existence of competition.

D. EQUITABLE ACCESS TO ESSENTIAL INFRASTRUCTURE

49. Essential infrastructure for the sugar industry is access to bulk sugar terminals at sugar ports, specifically (in relation to growers of the three member organisations of BDCG), access to the Townsville Port.
50. Sugar Terminals Limited (**STL**) owns the terminal assets which are currently managed by Queensland Sugar Limited (**QSL**) pursuant to a sublease by STL to QSL.
51. STL has previously advised that the terms of the sublease to QSL include the ability to terminate the sublease if QSL's control of sugar falls below a certain volume. We anticipate that as only sugar owned by Wilmar Sugar is delivered to the Townsville Port (i.e. QSL will lose control of 100% of the sugar delivered to the Port), the sublease to the Townsville Port is likely to be terminated, though STL's likely response is unknown.
52. As the income utilised to pay growers for their cane is generated totally by earnings from export sales, accessibility and reliability to the Townsville Port is equally important to growers, as it most likely is to Wilmar Sugar.

53. It is noted that the Department of Agriculture (Federal) has, in relation to Australian bulk wheat shipments, recently announced that from 1 October 2014 a mandatory industry code of conduct prescribed under the *Competition and Consumer Act 2010* (Cth) will govern port access. A similar regulatory process may also be required to regulate access to bulk sugar terminals to ensure:
- (a) Terminal operators do not discriminate or hinder access in the provision of port terminal services;
 - (b) Protocols for managing demand for port terminal services;
 - (c) A process to determine disputes regarding access, should there be a dispute.

E. FOREIGN OWNERSHIP LEVELS IN THE INDUSTRY AND THE POTENTIAL TO IMPACT ON THE INTERESTS OF THE AUSTRALIAN SUGAR INDUSTRY

54. In December 2010 Wilmar Sugar's parent company purchased from CSR Ltd its interests in the Australian sugar industry, which included 4 mills at the Burdekin, 2 mills at the Herbert and one mill at Plane Creek. Wilmar Sugar has subsequently purchased a mill at Proserpine. Wilmar Sugar has, since it purchased the mills in the Burdekin, spent considerable money (capital and maintenance) improving the mills' reliability and performance.
55. BDCG acknowledges that agriculture in Australia relies heavily on foreign investment. BDCG acknowledges the importance of the investment Wilmar Sugar has made improving the mills' reliability and performance and growers rely upon Wilmar Sugar's preparedness to continue such investment.
56. It is BDCG's position that the friction in the grower/miller relationship has little correlation to foreign ownership and more to do with the fact that Wilmar Sugar is owned by a large, well resourced company that functions as a monopsony and exercises monopsony power.
57. History would appear to verify that whether the mills are owned and operated by a foreign company or by an Australian company (for example, when the mills were under

the control of CSR Ltd), would appear to be irrelevant; the real issue is that there is a huge imbalance in bargaining power between growers and millers.

58. Sugar cane growing and sugar production has been a catalyst for the development of many coastal communities in Queensland, including the Burdekin, and underpins the economic stability of many rural townships. Almost three-quarters of sugar cane farms in the Queensland sugar industry are family owned and run businesses that do not employ any (non-family) personnel. The value of this family investment must be maintained and preserved. Thus, it is imperative that the sale of agricultural land and supporting agribusinesses to foreign owned companies, that has the potential to destabilise or devalue agricultural land, must be properly monitored, and if a critical threshold is attained, consideration should be given to greater regulation.
59. BDCG reiterates that the current disharmony between growers and Wilmar Sugar has more to do with the imbalance of bargaining power than it does to Wilmar Sugar being a foreign owned company. BDCG is seeking a commercial relationship with Wilmar Sugar that balances the interests of growers and Wilmar Sugar.

F. WHETHER THERE IS AN EMERGING NEED FOR FORMAL POWERS UNDER THE COMMONWEALTH COMPETITION AND CONSUMER LAWS, IN PARTICULAR, WHETHER THERE ARE ADEQUATE PROTECTIONS FOR GROWER-PRODUCERS AGAINST MARKET IMBALANCES

60. As previously stated, Wilmar Sugar has demonstrated, by its prior conduct, that it is prepared to:
- (a) act unilaterally, without the growers' consent to alter existing contractual documents to the detriment of growers' interests; and
 - (b) present a standard contract to approximately 1,600 suppliers and refuse to negotiate commercial terms of the contract.
61. Section 33(3) and Chapter 6 of the *Sugar Industry Act 1999 (Qld)(SI Act)* permits growers to appoint a bargaining representative to negotiate a collective supply contract. However, BDCG is of the view this is more of benefit to Wilmar Sugar than growers.

That is, instead of Wilmar Sugar otherwise having to deal with approximately 575 individual suppliers in the Burdekin (or 1,600 suppliers for all 8 mills), Wilmar Sugar limits its contractual negotiations to just 3 grower representative groups and only two or three growers who are not members of any grower representative group. **The collective bargaining power of growers does not negate Wilmar Sugar's monopsonistic powers.** Growers, even collectively, cannot compete with a global agribusiness of the scale of Wilmar Sugar.

62. There is currently no statutory or mandatory dispute resolution process within the sugar industry to assist growers and millers resolve commercial disputes in a mutually beneficial manner when negotiating the terms and conditions of the cane supply agreement (CSA).

63. Section 31 of the SI Act prohibits the supply of cane from a grower to a miller without a written supply contract. The SI Act, however, does not respond to, or resolve, a dispute that arises in negotiating the supply contract. That is, the SI Act provides growers with no statutory right to arbitration or other dispute resolution mechanisms to resolve a dispute that arises in negotiation of the supply contract.

64. **In light of Wilmar Sugar's proposed changes to marketing arrangements it is imperative that formal dispute resolution mechanisms be created to assist growers, when necessary, negotiate fair and reasonable supply contracts with Wilmar Sugar.**

Matters to be considered in establishing a dispute resolution process

65. A useful reference is the opinion of Mr Bret Walker, Senior Counsel, Sydney, dated 20 June 2014. On 15 April 2014 the New South Wales Government commissioned Mr Walker SC to examine the Land Access Arbitration Framework of the *Mining Act* 1992 (NSW) and the *Petroleum (Onshore) Act* 1991 (NSW), which, amongst other things, examined the effectiveness of the arbitration process of resolving disputes between landholders and mining exploration companies. Mr Walker SC's opinion included the following observations and recommendations, which BDCG opines is equally applicable in designing a dispute resolution process for growers and millers:

- (a) The goals of conciliation and arbitration under the legislation were intended to provide maximum flexibility and to be a low cost and non-legalistic mechanism to resolve disputes.
- (b) However, some arbitrations were running over 12 months, some 18 months, meaning that landholders were facing increased time, trouble and expense;
- (c) There needed to be explicit good faith obligations imposed on the parties to ensure the process was fair and the need for legal representation to be a right and not by consent of the parties;
- (d) There was significant disparity in the commercial sophistication and financial resources between landholders and mining companies;
- (e) There needed to be procedural guidance, setting out the process to be followed by the parties and the arbitrator with concise documentation requirements;
- (f) The arbitration process should take no more than 3 months from start to finish and this timeframe should only be waived in exceptional circumstances so as to render the process fair;
- (g) As the landholders rights were being overridden by the mining company seeking an exploration permit over the landholders rights, the mining company should be responsible for contributing to the landholders' negotiation and arbitration costs, including legal and expert fees capped at a maximum amount to prevent uncontrolled and escalating costs;
- (h) The arbitrator should have the ability to give the parties a non-binding view of the dispute, then if the parties do not agree they will be able to proceed further with the process;
- (i) The arbitration should be recorded and a transcript provided;
- (j) Arbitrators should provide written reasons for their decisions.

66. Wilmar Sugar has made the decision to alter the existing convention. There is an analogy between the commercial sophistication and financial resources of mining companies and landholders, to that of millers and growers. Wilmar Sugar has substantially greater resources – knowledge of its business, information, time and monetary resources – than the collective resources of growers. As Wilmar Sugar is now going to be the sole determinant of the net sugar price, then it should recompense any resultant costs incurred by growers to ensure that the commercial relationship is fair and balanced.

67. Examples of provisions that could be implemented in a dispute resolution process include:

(a) Requirements to make an application under the code:

(i) In order to commence an alternative dispute resolution procedure in relation to a dispute in accordance with the code, a party to the dispute must satisfy the committee on application in writing that:

- (1) The party has made a reasonable attempt to resolve the dispute; and
- (2) The subject matter of the dispute is not frivolous or vexatious.

(b) Obligations of Participants under the code:

(i) A person participating in the dispute resolution process must:

- (ii) Act reasonably, fairly, honestly and cooperatively; and
- (iii) Not mislead, harass, intimidate or oppress another party to the dispute.

(c) Requirements to comply with requests of the committee:

(i) Any person participating in an alternative dispute resolution procedure must comply with any reasonable request made by the committee in connection with the committee's attempt to assist the parties in the resolution of the dispute, including a request to do any of the following:

- (1) Exchange information relevant to the dispute with the other party;
- (2) Answer questions in respect of matters relevant to the dispute;
- (3) Attend meetings; and
- (4) Participate in mediation or another form of alternative dispute resolution.

(d) Effect of resolution:

(i) An award will be a final and binding award pursuant to the *Commercial Arbitration Act 2013 (Qld)* or pursuant to the CCA.

68. BDCG recommends that the dispute resolution process form part of either a mandatory or voluntary code of conduct, for many of the reasons proffered by Mr Bret Walker SC.

69. As previously stated, the current SI Act does not include a dispute resolution process to assist growers in resolving a dispute with a miller arising from negotiating a CSA.

Growers are seeking the implementation of a low-cost, efficient and formal dispute resolution process via:

- (a) A mandatory code of conduct; or
- (b) A voluntary code of conduct.

Sugar Industry Mandatory Code of Conduct

70. *The implementation of a mandatory sugar industry code of conduct pursuant to the Competition and Consumer Act 2010 (Cth)(CCA) that includes a formal dispute resolution framework for parties negotiating the terms of a supply contract.*

71. As stated above, the key issues that the proposed mandatory code would address are:
- (a) Wilmar Sugar is altering existing conventions regarding the marketing and sale of growers' notional sugar that is utilised for payment purposes;
 - (b) There will exist no safe guards that will protect the growers' interests;
 - (c) Wilmar Sugar will solely determine the net sugar price that is utilised for payment purposes;
 - (d) Wilmar Sugar will be acting in a position of conflict and bias in determining the net sugar price utilised to pay growers;
 - (e) There will exist problems of lack of transparency in determining the net sugar price utilised to pay growers; and
 - (f) The need for an effective dispute resolution process in resolving disputes.

72. **BDCG is of the opinion that the implementation of a code of conduct will be imperative as there will be a complete failure of the market to protect the growers' interests; that is, there is no competitive market for cane and Wilmar Sugar functions as a monopsony.** A mandatory code of conduct (as opposed to a voluntary code) provides a long-term solution to a permanent imbalance of bargaining power.

73. Regulation via a mandatory conduct that includes formal dispute resolution frameworks would be of assistance to both growers and millers negotiating a supply contract. The advantage of the code is that there can be enforcement action taken against any non-compliance under the CCA.

Sugar Industry Voluntary Code of Conduct

74. *The implementation of a voluntary sugar industry code of conduct under Part IVB of the Competition and Consumer Act 2010 (Cth)(CCA) that includes a formal dispute resolution framework for parties negotiating the terms of a supply contract.*
75. If a mandatory code of conduct is not established, then it is BDCG's preference that the Federal Government facilitates the development and implementation of a voluntary sugar industry code of conduct. **However, this is BDCG's least preferred option as it does not guarantee Wilmar Sugar's participation and it does not provide a long term solution as voluntary codes of conduct are for a limited duration** (for example, the imbalance in bargain power will persist at termination of the voluntary code and should Wilmar Sugar sell its interests, any subsequent owner may choose not to "opt-in" to the code).
76. As a voluntary code under the CCA, millers (and growers) are required to "opt-in" to be legally bound to comply with the code. In this regard, BDCG would be seeking assistance from the Federal Government to act as a mediator to convince any recalcitrant miller to "opt-in".
77. The code would provide growers with access to fair and low-cost dispute resolution processes which will assist in balancing the inequity in bargaining power between millers and growers. Again, the advantage of the code is that there can be enforcement action taken against any non-compliance under the CCA.
78. The ACCC has developed guidelines for developing effective voluntary industry codes of conduct that should be consulted in drafting a sugar industry code of conduct.
79. The code must establish a clear set of principles to resolve disputes between growers and millers.
80. Examples of provisions that could be implemented in a dispute resolution process are set out above and are similar to those utilised under a mandatory code of conduct.

G. CONCLUSION

81. Growers, even collectively, cannot compete, in terms of commercial sophistication and financial resources, with a global agribusiness of the scale of Wilmar Sugar.
82. There is, and will be for the foreseeable future, an inequity of bargaining power between growers and down-stream millers, particularly when those down-stream activities are conducted by the same commercial entity.
83. BDCG is seeking a commercial solution to the growers' dispute with Wilmar Sugar.
84. Further, BDCG is seeking long term, cost effective, commercial tools to resolve disputes with millers arising from negotiating a CSA. BDCG acknowledges that Wilmar Sugar may not, in the future, be the owner of the Burdekin mills, emphasising the importance of attaining long term solutions.
85. Wilmar Sugar has declined to reconsider offering growers a choice of marketer. Wilmar Sugar has removed the obvious safe guards provided by competition and it invites Wilmar Sugar to favour its own interests over that of growers.
86. Due to the effective monopsony Wilmar Sugar will have along the whole of the supply chain, BDCG is concerned that negotiations will, without the assistance of safe guards, result in a commercial arrangement that will be unfair and imbalanced.
87. BDCG considers that the interests of both growers and Wilmar Sugar would be advanced by giving stakeholders in the sugar industry access to enforceable and mandatory dispute resolution frameworks to assist in resolving a wide range of business to business disputes.
88. The dispute resolution frameworks proffered by BDCG are commonly utilised commercial tools and/or are utilised by other agricultural industries.

89. The sugar industry is very important to the Burdekin economy, as is similarly the case in other Queensland coastal towns. This is well demonstrated by certain events in 2010, when Wilmar Sugar withheld or failed to pay growers \$4.25 per tonne of cane (currently subject of a legal dispute between growers and Wilmar Sugar). All businesses, and the community in general, noticed the lack of money circulating in the Burdekin. For example, agribusinesses such as irrigation suppliers noted a 70% decline in business and other service industry providers such as accountants and law firms noted that they were carrying debtors in excess of \$2 million to \$3 million. The long term economic implications to the Burdekin region, and many other regional towns in Queensland, should there be a complete breakdown in the structure and security of the Queensland sugar industry, should be the impetus for the Federal Government to ensure that there is balance in the bargaining power between growers and millers.

BURDEKIN DISTRICT CANE GROWERS LIMITED

