

# BURDEKIN DISTRICT CANE GROWERS LIMITED

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## SUBMISSION TO THE REVIEW OF THE SUGAR CODE OF CONDUCT

### OPENING STATEMENT

The Explanatory Statement to the *Competition and Consumer (Industry Code – Sugar) Regulations 2017 (Sugar Code of Conduct)* states –

*“Regulations can be made under section 51AE of the Act to prescribe industry codes to regulate the conduct of participants in an industry towards other participants in the industry.”*

This submission will respond to the terms of reference for the Review of the Sugar Code of Conduct by highlighting the conduct of Wilmar Sugar in its dealings with its growers, conduct which warrants the continuation of the Sugar Code of Conduct.

The Sugar Code of Conduct regulates the conduct of millers and growers by stipulating –

1. A good faith provision;
2. An arbitration mechanism to resolve a deadlock in the parties agreeing to the terms of a Cane Supply Agreement (CSA) ; and
3. Providing growers a choice of marketer in relation to GEI sugar.

BDCG’s submission supports the proposition that the Sugar Code of Conduct is appropriate to regulate the conduct of millers and growers, remains relevant and necessary, and it achieves its objectives.

### BDCG (BACKGROUND)

Burdekin District Cane Growers Limited (BDCG) has three member organisations:

- (a). Pioneer Cane Growers Organisation Limited (PCGO);



(b). Kalamia Cane Growers Organisation Limited (**KCGO**);

(c). Invicta Cane Growers Organisation Limited (**ICGO**).

By way of clarification, BDCG has no affiliation with CANEGROWERS Queensland.

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* (Qld) (**SIA**).

BDCG represents approximately 4.5 million tonnes, or over 50% of the sugar cane grown in the Burdekin and supplied to all four Wilmar Sugar mills. BDCG is in a unique position in that it only represents growers in the Burdekin, who only supply to Wilmar Sugar. BDCG's submission therefore does not comment on the conduct of any other miller.

### **SUMMARY OF BDCG'S POSITION**

At the outset, the dispute between growers and millers, specifically Wilmar Sugar, was about terms of payment – how was, and who determined, the sugar value that determines what growers get paid for their cane. This submission describes in excruciating detail the effort and resolve of BDCG and its growers, to achieve a CSA for the 2017 season. The journey places under a magnifying glass the imbalance in bargaining power between suppliers and a monopoly processor.

Wilmar Sugar's behaviour, in refusing to consider any other commercial arrangements, other than its own, for the supply contracts, took growers on a three and a half year journey such that negotiations for supply contracts were finally concluded on the doorstep of the 2017 season, on 8 June 2017. Section 31 of the SIA prescribes that a grower cannot supply cane to a miller without a written supply contract. Thus, the 2017 season would not have commenced if there was no resolution.

BDCG sought to utilise the arbitration mechanism provided by section 33A of the SIA when negotiations with Wilmar Sugar stalled. Time was of the essence and BDCG was concerned with on-going delays in resolving the supply contract. At the same time growers witnessed similar behaviour from Wilmar Sugar in its dealings with Queensland Sugar Limited (**QSL**) in negotiating an on-supply or marketing agreement.

Millers have often argued that a Code of Conduct is not necessary; that growers can avail themselves to remedies for alleged breaches of the *Competition and Consumer Act 2010* (Cth) (CCA), however, such remedies involve recourse to the courts which is a lengthy and costly process and would not necessarily result in fair and reasonable commercial terms in a supply contract. The Sugar Code of Conduct, in contrast, regulates behaviour and provides for an independent arbitrator, should the parties be unable to resolve a deadlock in negotiations, and produces a concluded supply contract. Arbitration is a commonly utilised commercial tool and an appropriate response to dealing with a monopsony processor.

It is clearly established in this submission that without legislative intervention, Wilmar Sugar, a monopsony processor, would not offer growers a choice of marketer; that is, repeal of legislation would result in no competition for marketing services for GEI sugar. Growers would be paid subject to the performance and terms of a supply contract on offer by Wilmar Sugar (that is, a likely “take it or leave it” approach).

BDCG, together with CANEGROWERS, Australian Cane Farmers Association and QSL, relies upon the economic analysis of Synergies (submitted separately), which responds to the terms of reference for the review of the Sugar Code of Conduct. Of note is Synergies’ conclusion that the Sugar Code of Conduct *“provided a cost effective and efficacious means of addressing market power issues arising from miller marketing of GEI sugar....The benefits of the Code significantly outweigh the costs. It is expected that the benefits will continue to accrue to the industry whereas the ongoing costs of the Code are not significant.”*

*Annexure A* to this submission is a letter of Mr Geoff Farnsworth, partner of the law firm Holding Redlich, articulating his opinion of the legitimacy of the Sugar Code of Conduct. Mr Farnsworth was retained by BDCG to provide legal advice and assistance in drafting a supply contract, conducting the arbitration and negotiating the supply contract. Mr Farnsworth states *“It is designed to encourage competition, overcome a monopoly and encourage fair dealings. It’s hard to find fault with that.”* Mr Farnsworth corroborates much of BDCG’s experience of dealings with Wilmar Sugar over a three year period.

BDCG supports the continuation of the Sugar Code of Conduct for the reasons articulated in this submission.

## **WILMAR SUGAR'S CONDUCT**

Wilmar Sugar gave notice to its growers of its intent to terminate the Raw Sugar Supply Agreement (marketing agreements) with Queensland Sugar Limited (QSL) and market all sugar produced at its mills from the 2017 season, including GEI Sugar, in April 2014.

Thus the long, arduous journey began to resolve the arrangements for the supply of cane by growers to millers and negotiate the cane supply agreements for the 2017 season. This submission documents BDCG's experience in negotiating CSAs for the growers it represents from April 2014 until resolution of negotiations on 8 June 2017, which was the start of the 2017 season.

There were 2 distinct periods –

***The first – April 2014 to 2 December 2015; and***

***The second – 17 December 2015 – 8 June 2017***

### **APRIL 2014 – 2 DECEMBER 2015**

Wilmar Sugar withdrew its “grower choice” marketing model propositioned by Wilmar Sugar (Mr Kuok) on 23 May 2013 and despite persistent requests by BDCG, and other grower representative groups and growers for Wilmar Sugar to reconsider its position, Wilmar Sugar pursued a marketing model that excluded any competition for marketing services.

During this period BDCG sent correspondence to Wilmar Sugar on 4 March 2014, 28 March 2014 and 18 September 2014 inviting Wilmar Sugar to reconsider a growers' choice model and met with representatives of Wilmar Sugar on –

- 8 April 2014
- 15 April 2014
- 27 May 2014
- 11 June 2014
- 15 October 2014
- 12 December 2014.

Wilmar Sugar's determination to continue on its path was further demonstrated by its refusal of the former Queensland State Government's Minister for Agriculture, Forestry and Fisheries, the Hon. Dr John McVeigh's MP, repeated and public requests for Wilmar Sugar to reconsider a growers' choice marketing model.

Circumstances crystallised on 12 December 2014 when Wilmar Sugar presented BDCG with draft contracts for 2017 season that provided Wilmar Sugar sole choice over commercial sale and marketing of all sugar (Wilmar PowerPoint Presentation to BDCG dated 12 December 2014, together with a draft CSA and marketing contract).

Wilmar Sugar had merely reaffirmed its proposed marketing arrangements and did not reconsider any form of a growers' choice model. Wilmar Sugar's evidence before the Senate Standing committee on Rural and Regional Affairs and Transport's Senate Inquiry into current and future arrangements for Sugar Marketing, given at Townsville on 13 March 2015, was consistent with its communications to BDCG; that is, Wilmar Sugar was not prepared to consider any other marketing model.

During October and November 2015, grower representative groups agreed to attend a mediation with representatives from the millers to negotiate an outcome. The negotiations proved fruitless when the millers refused to consider any other marketing model.

Wilmar Sugar's attitude – to be the only supplier of marketing services to its growers – galvanised growers to lobby for a political solution – which included amendments to the *Sugar Industry Act 1999 (Qld) (SIA)* and a Code of Conduct pursuant to the CCA - and on 2 December 2015 the Queensland Parliament passed amendments to the SIA that included an arbitration mechanism (section 33A) and choice of marketer (section 33B).

The relevance of a journey through history is that it clearly demonstrates that despite numerous endeavours by growers to negotiate an outcome with Wilmar Sugar, Wilmar Sugar was able, due to its monopsony position (that is, no competition for milling services), to dictate commercial terms in a contract.

#### **17 DECEMBER 2015 TO 8 JUNE 2017**

*Annexure B* is a schedule that summarises the exchange of correspondence and meetings between BDCG and Wilmar Sugar from January 2016 to 8 June 2017. Of import is the fact that Wilmar Sugar, other than the initial meeting on 5 July 2016, did not initiate any meetings with BDCG to resolve the CSA. All meetings detailed in *Annexure B* were initiated by contact made by BDCG to Wilmar Sugar.

The amendments to the SIA received assent on 17 December 2015 whereupon BDCG commenced the second part of the journey; to achieve resolution of a CSA, that included a choice of marketer, for the 2017 season.

Time was critical – growers were looking at 18 months before the start of the 2017 season (crushing season commences early June).

Ignoring the fact that sugar cane is a perennial crop and growers' investment is based upon a 5 year crop cycle, growers began incurring costs for the 2017 season in February/March 2016 (planting cane to be harvested in the 2017 season), some 16 months before commencement of the season, with growing costs for the ratoon crops for the 2017 season (the balance of their farm) incurred from June 2016 as the 2016 crop was harvested.

What was crucial was that by March/April of 2016 Wilmar Sugar had knowledge of the cane that would be supplied by growers in the 2017 season and Wilmar Sugar had knowledge of the costs growers would incur growing the crop throughout the following 16 months. This amounted to commitment by growers to supply cane to Wilmar Sugar regardless of the terms and conditions of the CSA.

By letter dated 12 January 2016 BDCG wrote to Wilmar Sugar seeking to meet to negotiate the terms of the CSA. By letter dated 19 January 2016 Wilmar Sugar responded to BDCG's correspondence, declined to meet and advised *"until we advise otherwise Wilmar will not be entering into any negotiation regarding future cane supply agreements."*

From January 2016 until 5 July 2016 Wilmar Sugar refused to meet with BDCG or any other grower representative group to negotiate the terms of the CSA.

On 19 April 2016 Wilmar Sugar met with BDCG to advise that its target for the release of supply contracts would be the end of June 2016. However, BDCG was concerned with the ongoing delays (there was no guarantee that Wilmar Sugar would in fact deliver a proposed CSA some two months later) and thus BDCG made the decision to draft a supply contract which was subsequently delivered to Wilmar Sugar on 30 June 2016 so that negotiations could commence.

On 5 July 2016 Wilmar Sugar met with BDCG to advise of the construct for its proposed CSA, however, did not produce a copy of the contract until 8 July 2016.

Of relevance was Wilmar Sugar's complete refusal to consider the BDCG proposed CSA (Wilmar Sugar correspondence to BDCG dated 15 July 2016). By letter dated 11 October 2016, despite an exchange of correspondence and meetings with Wilmar Sugar on 5 July 2016, 3 August 2016 and 19 September 2016, Wilmar Sugar reiterated its position "*as previously communicated to you, is that the CSA provided by us some time ago for your review and comment is the appropriate agreement and is the basis upon which we intend to proceed.*" Despite the urgency around resolving the terms of the CSA Wilmar Sugar took two weeks to respond that it not intend to negotiate on BDCG's CSA for no other reason than, in its opinion, it was not a useful basis for negotiation.

By letter dated 25 July 2016 BDCG had initiated the negotiation period pursuant to section 33A(1)(a) of the SIA. Wilmar Sugar met with BDCG on 3 August 2016 and 19 September 2016, however, negotiations had stalled. By letter dated 28 September 2016 BDCG gave Wilmar Sugar notice pursuant to section 33A(1)(b) of the SIA that required Wilmar Sugar to use all reasonable endeavours to negotiate a supply contract, with the negotiating period closing on 14 October 2016. Wilmar Sugar did not agree to meet with BDCG at all during this negotiating period. Wilmar Sugar's conduct was inconsistent with its public rhetoric that it was committed to working cooperatively with BDCG to negotiate a CSA. BDCG was of the opinion that Wilmar Sugar had not fulfilled its obligation to use "*best endeavours*" as required by section 33A to negotiate a CSA within the negotiating period.

#### ARBITRATION PURSUANT TO SECTION 33A(2) OF THE SIA

By letter dated 17 October 2016 BDCG gave notice to Wilmar Sugar that it wished to refer the matter to arbitration pursuant to section 33A(2) of the SIA.

However it was not until 14 December 2016 that Wilmar Sugar announced that it proposed challenging the constitutionality of section 33A of the SIA. On 23 December 2016 Wilmar Sugar delivered detailed submissions in relation to its challenge to section 33A of the SIA.

The majority of the arbitration process was devoted by Wilmar Sugar challenging section 33A – the constitutionality of the section and the arbitrator's power to resolve a disputed term.

Wilmar Sugar also unsuccessfully appealed the Arbitrator's interim award to the Supreme Court of Queensland (refer to *Wilmar Sugar Pty Ltd v. Burdekin District Cane Growers Limited* [2017] QSC 3).

Wilmar Sugar will no doubt assert that the arbitration process was costly and time consuming and purport to use its experience to discredit the effectiveness of the arbitration mechanism.

BDCG adamantly refutes such a contention. All of the costs incurred by Wilmar Sugar in the arbitration process were not costs of the Arbitration, with the Arbitrator resolving disputed terms, but Wilmar Sugar using its best endeavours to insure that the Arbitrator would never hand down an award determining the disputed terms of the CSA; to delay such that the Arbitration would fail to produce a concluded CSA pursuant to section 33A(10) of the SIA before the commencement of the 2017 season in early June 2017.

BDCG has demonstrated that Wilmar Sugar utilised every opportunity to delay, obfuscate and erect barriers to achieving resolution of a CSA with BDCG. Wilmar Sugar did not utilise the arbitration process as a means to resolve the terms of the CSA.

It is a reasonable and not farfetched assumption to draw from the chronology (*Annexure B*) that Wilmar Sugar was motivated to delay resolution of a CSA with growers, to entice growers to accept its version of the CSA (Wilmar Sugar referred to its version as an "Individual CSA") and leverage what was to become historically high sugar prices. The Indicative Sugar Swap value [average ICE # 11 sugar price over the four contracts – July, October, March and May – that growers can secure for up to 60% of their anticipated GEI sugar and referred to as "forward pricing"] changed as follows –

<b>Indicative Sugar Swap values</b>	
29 January 2016	\$442.79
8 July 2016	\$526.78
12 August 2016	\$539.58
16 September 2016	\$583.85
7 October 2016	\$606.13
2 June 2017	\$442.01

There were two requirements to permit growers to forward price with a marketer other than Wilmar Sugar –



1. The CSA; and
2. On-Supply Agreement between Wilmar and the marketer (QSL was the only viable alternate marketer to Wilmar Sugar) and the on-supply agreement was the marketer's only means of access or title to the GEI sugar,

neither of which existed until 8 June 2017 and 22 May 2017 respectively. The majority of growers were unable to undertake swaps via a financier as they could not meet various pre-conditions such as being an existing customer of that bank, growing minimum tonnes (some set a minimum of 60,000 tonnes), meeting credit and security requirements. Some banks did not deal in sugar swaps and growers would have to refinance with another bank to access a swaps facility.

By December 2016 growers could see the indicative sugar swap value beginning to fall from historical highs of over AUD \$600 a tonne to hovering around AUD \$530 a tonne IPS sugar. Wilmar Sugar, by November 2016 (for example, Wilmar Sugar sent an email to growers dated 30 November 2016), was posturing that growers could execute Wilmar Sugar's Individual CSA and Marketing Agreement (referred to as a Pooling and Pricing Agreement with Wilmar Sugar Australia Trading) and when the on-supply agreement was executed with QSL, Wilmar Sugar would permit the growers, should growers meet certain requirements, to choose QSL as their marketer and novate any forward pricing to QSL. There was a proviso, "*the offer will be conditional on QSL agreeing to accept the nominations and the novation of associated forward currency and commodity contracts to it in accordance with the terms of the offer*". It was misleading in the respect that it raised as an innuendo that Wilmar Sugar had been in discussions with QSL to establish such an arrangement, when in fact Wilmar Sugar had never raised the issue with QSL (confirmed by QSL) and secondly, did not advise growers what costs, if any, would be imposed upon growers should they then seek to change marketers. Further, growers had to first accept Wilmar Sugar's Individual CSA.

BDCG, on four separate occasions - 28 January 2016, 5 July 2016, 3 August 2016 and 19 September 2016 - sought agreement from Wilmar Sugar to permit growers entering into what we termed a "novating or interim CSA"; that is, Wilmar Sugar's Individual CSA on the basis that when negotiation of the BDCG CSA was finalised, by agreement, the BDCG CSA replaced the Individual CSA. There was some possibility that if growers were able to enter into a CSA QSL would be able to offer growers the ability to forward price. Also, those growers who wanted to nominate Wilmar Sugar as their marketer, would do so on (eventually) the BDCG

CSA, and not Wilmar Sugar's Individual CSA. There was no risk to Wilmar Sugar – the sugar cane for the 2017 season was already in the paddock with growers incurring the costs of growing the crop ensuring that growers would be supplying this sugar cane in 2017. On each occasion Wilmar Sugar refused BDCG's request. The lost opportunity to growers was in the order of some AUD \$200 per tonne IPS sugar for up to 60% of the growers' GEI sugar for just the 2017 season (growers can forward price up to 3 years in advance).

What occurred, and the lost opportunity, highlights the importance of an arbitration mechanism to achieve a CSA in a timely and cost effective manner.

#### GROWERS' CHOICE AND RIGHT TO TERMINATE THE CANE SUPPLY AGREEMENT

The CSA propositioned by Wilmar Sugar contains a right to terminate clause; that is, should both the 2015 amendments to the SIA and the Sugar Code of Conduct be repealed, Wilmar Sugar is entitled to terminate the CSA (without the requisite 2 years notice either party must otherwise give). BDCG was not successful in negotiating out this clause.

Wilmar Sugar has made its position abundantly clear – it will not agree to commercial terms that permit a choice of marketer. Without legislative intervention growers would not have access to an alternate sugar marketer to determine the sugar value of GEI sugar that is utilised to pay growers for their cane.

#### OTHER MATTERS

##### **SECTION 33A OF THE *SUGAR INDUSTRY ACT (1999) (QLD)* – THE HONOURABLE MR JOHN MUIR QC, ARBITRATOR**

On 6 March 2017 the Arbitrator, the Honourable Mr John Muir QC, handed down his award on what was referred to as “determination of preliminary issues”, one of which was Wilmar Sugar's challenge to the constitutionality of section 33A of the SIA. Mr Muir QC found that section 33A was invalid as being beyond the legislative competence of the Queensland Parliament. Section 33A(2)(b) of the SIA prescribed a statutory arbitration to resolve disputes, the arbitration to be governed by the *Commercial Arbitration Act 2013 (Qld) (CCA)*. Mr Muir QC found that section 34 of the CCA limited the right of recourse to the court and was so limited and hedged with restrictions as to fail to satisfy the requirement of access to a superior

court and deprived the Supreme Court of its supervisory jurisdiction. Thus Mr Muir QC held that section 33A of the SIA was invalid.

The Sugar Code of Conduct therefore provides the only arbitration mechanism to resolve disputes between growers and millers of disputed terms of the supply contract.

### **QLD LABOR GOVERNMENT DOES NOT SUPPORT SIA AMENDMENTS**

The Queensland Labor Government (minority government at the time) opposed the 2015 amendments to the SIA, such opposition being voiced very loudly on the floor of the Queensland Parliament during the debate of the amending Bill (refer to Hansard final proof dated 2 December 2015). The Honourable JA Trad, Deputy Premier, and then Minister for Transport, Minister for Infrastructure, Local Government and Planning and Minister for Trade, stated at page 3,126 of Hansard:

*“ This bill will only kill investment in our sugar industry and poison our state’s prospects with business, jeopardising our reputation as a strong economy to invest in. This outcome would not benefit Queensland; it will only hurt our economic credibility.”*

The Deputy Premier’s hysterical rhetoric reflected the sentiment expressed by Labor Members of the Parliament to the amending Bill.

By letter dated 1 December 2016, the Deputy Chief of Staff of the Office of the Premier of Queensland, in response to correspondence from PCGO to the Premier reiterated that *“The Queensland Government did not support the Act. The Queensland Government’s long-standing position has been consistent from the outset in that the dispute is a commercial matter that should be resolved by industry.”*

The Queensland Government has given no indication that its position in relation to the 2015 Amending Act has changed.

The significance of this comment is reflected in a clause of the existing CSA; that is, that Wilmar Sugar has a right to terminate the CSA without notice (the CSA otherwise has a two year termination notice provision) should the 2015 amendments to the SIA and the Sugar Code of Conduct be repealed. Though stating the obvious, it is important to note that the 2015 amendments to the SIA can be easily repealed by the Queensland Government. The

Queensland political landscape reinforces the importance and necessity for the continuation of the Sugar Code of Conduct.

### **CODE DOES NOT PREVENT MILLERS AND GROWERS AGREEING TO COMMERCIAL TERMS**

Clause 10 of the Sugar Code of Conduct provides –

#### ***10 Terms of supply contract about sale of on-supply sugar***

*(1) A supply contract for cane between a grower and a mill owner must include each of the following:*

- a. A term providing for the amount, or the basis for working out the amount, of payment to the grower for the supply of the cane (the cane payment);*
- b. **Unless the grower and mill owner otherwise agree** – a term (a related sugar pricing term) requiring the amount of the cane payment to be worked out in a stated way by linking that amount to the sale price of the on-supply sugar to which the supply contract relates;*
- c. If the supply contract included a related sugar pricing term, both of the following, **unless the grower and mill owner otherwise agree: ....**” (emphasis added).*

The Sugar Code of Conduct only prescribes as mandatory in the supply contract a clause that stipulates the manner in which growers are paid for their cane (clause 10(1)(a)). This is fundamental in every commercial contract and the importance of consideration (that is, payment) is reflected in the common law. The balance of the provisions of the Sugar Code of Conduct permit the grower and miller to otherwise agree on commercial terms – refer to clause 10(1)(a) and (b) of the Sugar Code of Conduct.

The Sugar Code of Conduct does not prohibit, restrict or otherwise prevent the parties agreeing on any commercial terms.

### **GROWERS’ OPINIONS**

BDCG, by this submission, seeks to give a voice to growers’ concerns of Wilmar Sugar’s conduct and the relevancy of the Sugar Code of Conduct. BDCG polled its growers via a questionnaire. *Annexure C* is a representative sample of grower responses. Set out below is an example of the views expressed by growers:

**Grower 1**

*“I appointed QSL as my marketer. This was directly because of the actions of Wilmar in not negotiating in good faith and them trying to stop me having access to a choice of marketer as well as their poor performance in marketing in the past. Also the fact that Wilmar did everything it could to stifle competition and stopped me from being able to secure high future pricing in a falling sugar market with an alternative marketer has made me decide while there is competition in the marketing space I will go with any marketer than Wilmar.”*

**Grower 2**

*“Without the sugar code of conduct, Wilmar can dictate the terms and growers have no avenue to challenge the unrealistic and unfair conditions imposed by Wilmar in the grower-Wilmar contract. Growers must accept this contract (or not grow sugar cane) since there is no other miller in the Burdekin, therefore creating a monopoly. Without the code, growers would be back to relying on negotiations with a company proven to be immovable on their desire to utilise a monopoly and be the sole marketer of sugar cane in our region. Previously, Wilmar’s stalling tactics delayed the grower’s ability to sign a cane supply agreement and therefore, price their cane with their preferred marketer at historically high prices. It was only through the implantation of Qld legislation and now the Code of Conduct that allowed a fair resolution to be achieved. This extended negotiation resulted in a large immeasurable loss of income to farmers, and consequently the district. Hence without a code of conduct this situation would continually arise and would financially cripple the entire community.”*

**Grower 4**

*“The additional benefits include – By allowing us to choose our marketer we will be able to choose who is attaining the best prices, so far QSL has achieved the highest return to growers.*

*Sugar Marketers will be competing for our business, we are already being offered a much wider variety of products to price our Sugar.*

*QSL is a not for profit company, which means all profits are passed on to growers.”*

Growers expressed similar themed concerns regarding Wilmar Sugar’s conduct and the benefit of the Code of Conduct.

## **CONCLUSION**

It is BDCG's submission that the Sugar Code of Conduct should remain in operation without amendment.

The existing supply contract with Wilmar Sugar is a three year rolling agreement. Thus the supply contract is not negotiated each year. The Sugar Code of Conduct should have a ten year review period. A reasonable period is required to fully assess the effectiveness (growers would argue, benefits) of the Sugar Code of Conduct.

The weight of evidence provided by this submission justifies intervention by these regulations. It is significant that the Sugar Code of Conduct does not prevent growers and millers agreeing on commercial terms and the Sugar Code of Conduct only regulates the conduct of the parties in the event of there being disputed terms of the supply contract.

As evidenced by this submission prior to legislative intervention the relationship between growers and Wilmar Sugar was turbulent. Legislative intervention has had a positive impact, calmed the waters and provided much needed certainty to growers, of being able to nominate a marketer for their GEI sugar and utilise an arbitration mechanism to resolve deadlocks in negotiating terms of a supply contract. Growers are seeking Wilmar Sugar to compete to access their GEI sugar. Growers have perceived improvements, namely greater choice of pricing and payment products, and improved returns, as a result of the competition between Wilmar Sugar and QSL.

The uncertainty that now exists is that the legislative intervention (both the amendments to the SIA and the Sugar Code of Conduct) may be repealed, resulting in Wilmar Sugar, as a monopsony processor, being able to dictate the terms of the supply contract, particularly the terms of payment by controlling the marketing of the GEI sugar.

# BURDEKIN DISTRICT CANE GROWERS LIMITED

## *ANNEXURE A*

21 August 2018

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### **Review of the Sugar Code of Conduct**

We refer to the above matter and wish to provide the following comments in relation to your submission to the current Review of the Sugar Code of Conduct.

Between 2015-2017 we acted for you and your growers (**Growers**) in negotiation of a Cane Supply Agreement with Wilmar.

#### **Historical Background**

For 100 years cane growers have been paid for their cane with reference to the value of the sugar produced from that cane. This is known as the "Cane Payment Formula" and it traditionally returns 2/3s of the sugar value to the growers. The balance goes to the Mill Owner and is in effect payment for crushing the cane and producing the sugar.

For the last 50 years that sugar value has been determined by the marketing efforts of a 3<sup>rd</sup> party (that is, not the grower and not the Miller). That meant in effect that the Growers and the Millers received the same sugar value and it was in their joint interests to make sure that the 3<sup>rd</sup> party got the best price at the lowest cost and returned the best dividend to the Growers and the Millers.

That changed with deregulation with the effect that Wilmar could mill and market all sugar produced from Burdekin cane giving it in effect a monopoly. If the Growers were not happy with this arrangement their only options were to sell their farm or grow another crop.

If they chose to try to negotiate with Wilmar, and if the "take it or leave it" terms on offer from Wilmar were unfair or unconscionable, the Growers' only recourse would be to seek relief under the Competition legislation.

#### **Negotiations with Wilmar**

At an early stage of the negotiations of the post June 2017 Cane Supply Agreement the Growers confronted an inequality of bargaining power and "take it or leave it" attitude from Wilmar characterised by the refrain that "it's our (that is, Wilmar's) sugar". While that is true, it is also a simplification. The Growers were always entitled to be paid for their cane with reference to value of that sugar. Under Wilmar's offering, there was no transparency in how sugar would be priced and sold which

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created an obvious concern that by not obtaining the best price for the sugar Wilmar could potentially benefit at the Grower's expense. It would be virtually impossible for (and outside the competency of) the Growers to continuously monitor how Wilmar was marketing the sugar and allocating the proceeds.

No one has suggested that Wilmar acted or had any intention of acting in breach of the Competition law, but the Growers' concerns were real.

It seemed to the Growers that competition was an obvious way to address this concern. This set the Growers' on the path to a Code of Conduct under the *Competition and Consumer Act*. However this came via amendments to the Queensland *Sugar Industry Act* which was not Burdekin Growers' preference and which ultimately cost them and Wilmar a fortune in an aborted arbitration process.

The only trigger for that arbitration process was Wilmar's refusal to negotiate with the Growers. We'll never know whether Wilmar intentionally forced the Growers to commence an arbitration knowing that they would overturn it as unconstitutional. What we do know is that faced with a choice between arbitration and negotiating a fair and balanced contract which complied with the provisions of the legislation, Wilmar chose arbitration.

Throughout the period of our dealings Wilmar was represented by "top tier" law firms. Despite Wilmar's significant legal spend and resources, they were at time difficult to engage with, despite the urgency of our need to finalise a Cane Supply Agreement.

At this point it is worth observing that Wilmar is not the only mill owner in Queensland. The mills at Tully, Maryborough, Mulgrave, South Johnstone and the Tableland Mill are also owned by multinationals based in China and Thailand respectively. However their dealings with their growers have not been marked by conflict. Contracts have been negotiated and signed without dispute and Growers are allowed a choice of marketer without apparently destroying anyone's business model.

### **Industry Codes**

Industry Codes of Conduct are nothing new. They are regulated pursuant to the *Competition and Consumer Act*. In addition to the Sugar Code of Conduct which is now in place, at present there is also a Horticulture Code of Conduct, a Food and Grocery Code of Conduct and a Wheat Port Code of Conduct. All of those Codes require dealings in "good faith" and all contain a dispute resolution mechanism.

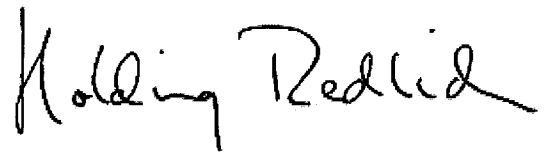
Key features of the Sugar Code of Conduct are an obligation on the parties to deal with each other in good faith; a choice of marketer, and pre-contractual arbitration in the event of a negotiation stalemate.

The arbitration provision is only there to break a stalemate. No one can be sure of the results of an arbitration and Wilmar will continue to have significantly more resources than the Growers can ever hope to muster meaning recourse to arbitration would only ever be a "last resort".

There can't be competition for the Burdekin grower's cane unless new mills are built in the region which would lead to wasteful overcapacity. The best way to encourage competition is by allowing a choice of marketer. Growers will support whoever brings them the best return. Wilmar has vast access to international markets as well as a substantial balance sheet so should have nothing to fear from competition with the only other active marketer, QSL.

The Sugar Code of Conduct is an entirely legitimate policy response to a deadlock between Growers and one Miller in particular. It is designed to encourage completion, overcome a monopoly and encourage fair dealings. It's hard to find fault with that.

Yours faithfully

A handwritten signature in black ink that reads "Holding Redlich". The signature is written in a cursive, flowing style.

**Holding Redlich**

# BURDEKIN DISTRICT CANE GROWERS LIMITED

## *ANNEXURE B*

## CHRONOLOGY – JANUARY 2016 – 8 JUNE 2017

12 January 2016	BDCG requests to meet with Wilmar Sugar to negotiate CSA for 2017	Letter BDCG to WS dated 12 January 2016
19 January 2016	Wilmar refuses to enter into any negotiations regarding CSA.	Letter WS to BDCG dated 19 January 2016
28 January 2016	BDCG requests Wilmar Sugar offer forward pricing products to growers for 2017 and 2018 season whilst CSA is negotiated.	Letter BDCG to WS dated 28 January 2016
5 February 2016	BDCG chases response from Wilmar Sugar to letter of 28 January 2016.	Letter BDCG to WS dated 5 February 2016
10 February 2016	Wilmar Sugar advises it is not in a position to negotiate a CSA and therefore declines to negotiate for growers to be able to forward price for those growers choosing Wilmar sugar as their marketer.	Letter WS to BDCG dated 10 February 2016
11 February 2016	Email WS to growers – Wilmar Sugar advises it does not have CSAs for the 2017 season available, though they are working hard to understand the implications of the amendments to the SIA.	Email WS to growers dated 11 February 2016
25 February 2016	Email WS to growers – Wilmar Sugar advises that it is not able to discuss supply agreements with grower collectives.	Email WS to growers dated 25 February 2016
24 March 2016	Email WS to growers – Wilmar Sugar advises that its target for the release of 2017 supply agreements is the end of June 2016.	Email WS to growers dated 24 March 2016
15 April 2016	Email WS to growers – Wilmar Sugar again advises that its target for the release of 2017 supply agreements is 30 June 2016.	Email WS to growers dated 15 April 2016
31 March 2016	Email WS (David Burgess) to BDCG (Julie Artiach) arranging a without prejudice discussion in Brisbane on 19 April 2016	Email David Burgess to Julie Artiach dated 31 March 2016
19 April 2016	Without prejudice discussion in Brisbane BDCG and Wilmar Sugar (Wilmar Sugar advising it was not in a position to negotiate supply agreements.	WS PowerPoint Presentation 19 April 2016
17 June 2016	Email from John Pratt seeking to arrange a meeting on 5 July 2016 to discuss contractual arrangements (Only meeting arranged by WS).	Email John Pratt to Julie Artiach dated 17 June 2016

30 June 2016	BDCG delivers to Wilmar Sugar proposed CSA and PPA for 2017 season.	Letter BDCG to WS dated 30 June 2016
5 July 2016	Meeting with Wilmar Sugar – first presentation regarding Wilmar Sugar’s 2017 Contracts	PowerPoint Presentation
8 July 2016	Wilmar Sugar releases a copy of its contracts – CSA, Molasses Gain Sharing Deed and PPA	CSA, Deed and PPA
12 July 2016	BDCG seeks meeting with Wilmar Sugar to negotiate BDCG’s CSA and PPA.	Letter BDCG to WS dated 12 July 2016
15 July 2016	Wilmar Sugar disagrees with BDCG’s interpretation of <i>Sugar Industry Act 1999</i> (SIA) amendments and refuses to consider BDCG’s draft CSA and PPA	Letter WS to BDCG dated 15 July 2016
19 July 2016	BDCG initiates period of negotiation pursuant to section 33A(1) of the SIA.	Letter BDCG to WS dated 19 July 2016
25 July 2016	BDCG nominates a meeting on 29 July 2016 for the purpose of negotiating a CSA pursuant to section 33A(1)(a) of the SIA.	Letter BDCG to WS dated 25 July 2016
2 August 2016	BDCG responding to Wilmar Sugar’s request for an agenda for meeting on 3 August 2016	Letter BDCG to WS dated 2 August 2016
3 August 2016	BDCG and Wilmar Sugar (Ayr) – negotiating meeting pursuant to section 33A(1)(a) of SIA.	
15 September 2016	BDCG seeks a copy of Wilmar Sugar’s proposed GEI sugar sales agreement.	Letter BDCG to WS dated 15 September 2016
16 September 2016	BDCG seeks to progress negotiations on certain principles.	Letter BDCG to WS dated 16 September 2016
19 September 2016	BDCG and Wilmar Sugar (Brisbane) – negotiating meeting pursuant to section 33A(1)(a) of the SIA.	
22 September 2016	BDCG again requests Wilmar Sugar produce a copy of its proposed GEI sugar sales agreement.	Letter BDCG to WS dated 22 September 2016
28 September 2016	BDCG nominates a negotiating period pursuant to section 33A(1)(b), ending on 14 October 2016, seeking to discuss the matters in dispute on or before 4 September 2016.	Letter BDCG to WS dated 28 September 2016
11 October 2016	Wilmar Sugar advises it will only negotiate its contracts and declines to consider BDCG’s contracts.	Letter WS to BDCG dated 11 October 2016

13 October 2016	BDCG opines that Wilmar Sugar has not fulfilled its obligations to use best endeavours (section 33A(1)(b)) to resolve matters in dispute by not meeting with BDCG during the negotiating period.	Letter BDCG to WS dated 13 October 2016
14 October 2016	Negotiating period pursuant to section 33A(1)(b) concludes without meeting with Wilmar Sugar.	
17 October 2016	BDCG delivers notice of arbitration to Wilmar Sugar pursuant to section 33A	Letter BDCG to WS dated 17 October 2016
<b>Informal negotiations commence – all meetings instigated by BDCG</b>		
7 January 2017	Russ McNee contacts John Pratt to arrange to meet	Telephone call
January 2017	Russ McNee and John Pratt meet over coffee	Townsville
January 2017	Allan Parker, Russ McNee and John Pratt meet	Townsville
16 February 2017	BDCG meets with Wilmar – Paul Giordani, Steve Postma and Dave Langham	Ayr
2 March 2017	BDCG meets with Wilmar – Paul Giordani, Steve Postma and Dave Langham	Ayr
22 March 2017	BDCG meets with Wilmar – Paul Giordani, Steve Postma and Dave Langham	Ayr
6 April 2017	BDCG (and Geoff Farnsworth) meets with Wilmar (and Eddie Scuderi)	Brisbane
19 April 2017	BDCG (and Geoff Farnsworth) meets with Wilmar (and Eddie Scuderi and Kirby)	Brisbane
24 April 2017	BDCG meets with Wilmar (John Pratt)	Townsville
18 May 2017	BDCG meets with Wilmar (John Pratt)	Townsville
24 May 2017	BDCG (and Geoff Farnsworth) meets with Wilmar (and Eddie Scuderi)	Brisbane
25 May 2017	BDCG (and Geoff Farnsworth) meets with Wilmar (and Eddie Scuderi)	Brisbane

# BURDEKIN DISTRICT CANE GROWERS LIMITED

## *ANNEXURE C*

## BDCG Questionnaire

**Context:** The Australian Government has recently announced a review of the *Competition and Consumer (Industry Code – Sugar) Regulations 2017* (the Code), to examine whether it is providing certainty and stability for the sugar industry.

The Code was enacted in 2017 to provide a federal framework to regulate the conduct of growers, mill owners and marketers in relation to contracts or agreements for supply of cane or on supply of sugar. It reinforces grower's choice of marketing entity for the sale of sugar for which the grower bears the price exposure risk. The review of the Code focuses on whether the benefits of the Code outweigh the costs.

**Objective of the questionnaire:** BDCG is seeking grower input on the positive/negative impacts of the Code to your business and to the sugar industry. Your response will inform the BDCG submission to the Australian Government review of the Code.

**Please return the questionnaire to Julie Artiach by 31 July 2018**

1. Which Wilmar Sugar mill in the Burdekin do you supply?

Pioneer and Inkerman.

2. Can you explain any differences you experienced in the negotiations with the mill for last year's and this year's cane supply agreement compared to previous seasons?

As there has not been a negotiation since 2009 this question is not really relevant except to say that negotiations were deliberately started by growers in 2016 to try and stop Wilmar pushing them out to the last minute to wedge the growers into having to sign a contract as the growers had already expended their money on the 2017 crop up to 18 months before and Wilmar had spent little money to this point, so the growers had to have a contract to deliver cane conclude by June 2017. However, Wilmar still managed to push negotiations out until the last moment and they were only concluded after Government intervention. BDCG did take advantage of amendments in the state Sugar legislation to go to Pre-Contractual arbitration in its negotiations however this legislation was found to be unconstitutional. It was after this that the Sugar Code of Conduct was enacted.

3. Who did you decide would market your Grower Economic Interest Sugar (GEI Sugar) that was produced last year and this year? Were your decisions influenced by any actions of Wilmar Sugar that limited your ability to exercise choice of marketer and/or forward pricing? If so, and if Wilmar Sugar had acted differently, would you be likely to appoint the same marketer for next year's crop?

I appointed QSL as my marketer. This was directly because of the actions of Wilmar in not negotiating in good faith and them trying to stop me having access to a choice of marketer as well



as their poor performance in marketing in the past. Also the fact that Wilmar did everything it could to stifle competition and stopped me from being able to secure high future pricing in a falling sugar market with an alternative marketer has made me decide while there is competition in the marketing space I will go with any marketer than Wilmar.

4. What are the greatest benefits/improvements that have arisen as a result of the Code to your business and the industry?

Pre-Contractual arbitration as it can level the current bargaining imbalance somewhat.

5. Are any additional benefits likely to emerge over the long term from the Code? If so, what longer term benefits do you see?

The potential negating of the historical bargaining imbalance between the growers and millers is a longer term benefit of the Code of Conduct.

6. What additional costs have you incurred as a result of the Code, including changes to agreements with Wilmar Sugar? Do you expect to incur significant additional costs in the future as a result of the Code?

I think additional costs will be in the order of needing more professional services to negotiate with the millers as opposed to a complete loss of bargaining power without the Code for growers.

7. What are the greatest risks to growers (and the industry) if the Code was removed?

The greatest risk for growers with removal of the Code will be complete exploitation of growers by millers because in my case, Wilmar's relatively huge superior financial position compared to not just me but also compared to the entire grower industry in the Burdekin, will allow them to hold out in negotiations. This along with the fact that the grower has expended most of his costs to produce a crop up to 18 months before he gets a return and thus because it is a perishable commodity at this point which means it needs to be supplied in a particular period to maximize the value of the cane for the grower. Also having to make a commitment of being in a cane crop for at least 5 years to recoup the initial monetary outlay puts the grower at a decided disadvantage to the miller.

8. Are there any improvements you think are necessary to make the Code more effective?

Making the Code legislation. Putting a longer time period on the code before review.(10years?) so that growers can have confidence in future investment.

9. Are you aware of any evidence of differences in the impacts of the Code or the behaviour of other millers across different sugar-producing regions?

Yes. MSF and Cofco have had a more conciliatory attitude in their negotiations with their growers and alternative marketers than Wilmar.

10. Any other matter you would like to comment upon.

Even though some millers have taken a more conciliatory position with contracted parties than Wilmar, this demonstrates the effectiveness of the Code and the state legislated amendments to the Sugar Industry act to stop millers from exploiting growers.

Thank you for taking the time to complete this questionnaire. Your responses will be anonymous.

## BDCG Questionnaire

**Context:** The Australian Government has recently announced a review of the *Competition and Consumer (Industry Code – Sugar) Regulations 2017* (the Code), to examine whether it is providing certainty and stability for the sugar industry.

The Code was enacted in 2017 to provide a federal framework to regulate the conduct of growers, mill owners and marketers in relation to contracts or agreements for supply of cane or on supply of sugar. It reinforces grower's choice of marketing entity for the sale of sugar for which the grower bears the price exposure risk. The review of the Code focuses on whether the benefits of the Code outweigh the costs.

**Objective of the questionnaire:** BDCG is seeking grower input on the positive/negative impacts of the Code to your business and to the sugar industry. Your response will inform the BDCG submission to the Australian Government review of the Code.

Please return the questionnaire to Les Elphinstoneby **31 July 2018**

1. Which Wilmar Sugar mill in the Burdekin do you supply?

Kalamia and Pioneer

2. Can you explain any differences you experienced in the negotiations with the mill for last year's and this year's cane supply agreement compared to previous seasons?

3. Who did you decide would market your Grower Economic Interest Sugar (GEI Sugar) that was produced last year and this year? Were your decisions influenced by any actions of Wilmar Sugar that limited your ability to exercise choice of marketer and/or forward pricing? If so, and if Wilmar Sugar had acted differently, would you be likely to appoint the same marketer for next year's crop?

We decided to have Queensland Sugar Limited (QSL) market our Grower Economic Interest (GEI) sugar. Our decisions were directly influenced by the actions of Wilmar Sugar. During our efforts to keep QSL as a marketing option, it was obvious Wilmar desired to use their monopoly power to be the sole marketing option in the Burdekin. If Wilmar had allowed fair marketing choice we would have given them a percentage of our sugar to market. However, after years of negotiations that were intentionally drawn out by Wilmar, we will never price sugar with Wilmar again. Our decision is further supported by the knowledge that it was the QLD opposition government (with support from minor parties) that brought in the QLD legislation forcing Wilmar to come to a fair resolution. Had this not happened, it seemed Wilmar would have continued to seek a contract that made them the sole marketing option, making full use of their monopoly in the district.

4. What are the greatest benefits/improvements that have arisen as a result of the Code to your business and the industry?

The greatest benefit of the Code is the ability to have a bargaining position against Wilmar, who has the monopoly in our district. It has been proven through recent negotiations what without QLD legislation and now the Code of Conduct, Wilmar will use its monopoly to suit its own interests with no consideration given to growers. This bargaining position allows growers to enforce that a compromise is reached as opposed to Wilmar dictating the terms of the contract.

5. Are any additional benefits likely to emerge over the long term from the Code? If so, what longer term benefits do you see?

One additional benefit is that there will be competition among the sugar marketers. This has already resulted in an increased variety of avenues to sell our sugar within each company such as; actively managed pools, harvest pool and the target pricing pool. There is also now a variety of options in payment scheduling. This would not happen without competition and maintaining this competition will ensure that pricing will continue to be optimised.

Another benefit is that QSL is a grower owned, not for profit company. All returns are directly passed on to growers and this is obviously desirable among our grower community.

Finally, the code also allows growers to choose who is achieving the greatest prices for the sugar. Since both pricing options (QSL and Wilmar) have been available to growers, QSL has outperformed Wilmar every year. In the long term it is definitely in grower interest to have choice.

6. What additional costs have you incurred as a result of the Code, including changes to agreements with Wilmar Sugar? Do you expect to incur significant additional costs in the future as a result of the Code?

There have been no additional costs since the implementation of Code and no additional cost are expected if the code is maintained.

7. What are the greatest risks to growers (and the industry) if the Code was removed?

Without the sugar code of conduct, Wilmar can dictate the terms and growers have no avenue to challenge the unrealistic and unfair conditions imposed by Wilmar in the grower-Wilmar contract. Growers must accept this contract (or not grow sugar cane) since there is no other miller in the Burdekin, therefore creating a monopoly.

Without the code, growers would be back to relying on negotiations with a company proven to be immovable on their desire to utilise a monopoly and be the sole marketer of sugar cane in our region. Previously, Wilmar's stalling tactics delayed the grower's ability to sign a cane supply agreement and therefore, price their cane with their preferred marketer at historically high prices. It was only through the implantation of QLD legislation and now the Code of Conduct that

allowed a fair resolution to be achieved. This extended negotiation resulted in a large immeasurable loss of income to farmers, and consequently the district. Hence without a code of conduct this situation would continually arise and would financially cripple the entire community.

8. Are there any improvements you think are necessary to make the Code more effective?

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9. Are you aware of any evidence of differences in the impacts of the Code or the behaviour of other millers across different sugar-producing regions?

Other producers in cane growing areas were able to come to a satisfactory agreement with their millers. They were able to conclude negotiations in a timely manner, resulting with them being able to take advantage of the historically high price for the sale of their sugar and having a choice with their marketer.

10. Any other matter you would like to comment upon.

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Thank you for taking the time to complete this questionnaire. Your responses will be anonymous.

## BDCG Questionnaire

**Context:** The Australian Government has recently announced a review of the *Competition and Consumer (Industry Code – Sugar) Regulations 2017* (the Code), to examine whether it is providing certainty and stability for the sugar industry.

The Code was enacted in 2017 to provide a federal framework to regulate the conduct of growers, mill owners and marketers in relation to contracts or agreements for supply of cane or on supply of sugar. It reinforces grower's choice of marketing entity for the sale of sugar for which the grower bears the price exposure risk. The review of the Code focuses on whether the benefits of the Code outweigh the costs.

**Objective of the questionnaire:** BDCG is seeking grower input on the positive/negative impacts of the Code to your business and to the sugar industry. Your response will inform the BDCG submission to the Australian Government review of the Code.

Please return the questionnaire to **Julie Artiach** by **31 July 2018**

1. Which Wilmar Sugar mill in the Burdekin do you supply?

Pioneer Mill

2. Can you explain any differences you experienced in the negotiations with the mill for last year's and this year's cane supply agreement compared to previous seasons?

CSA duration is a three year rolling contract. Wilmar not willing to negotiate outside its contract and it did not willing negotiate an on-supply agreement with the marketer, QSL.

3. Who did you decide would market your Grower Economic Interest Sugar (GEI Sugar) that was produced last year and this year? Were your decisions influenced by any actions of Wilmar Sugar that limited your ability to exercise choice of marketer and/or forward pricing? If so, and if Wilmar Sugar had acted differently, would you be likely to appoint the same marketer for next year's crop?

QSL for 2017 and 2018 as marketer. I initially gave some GEI Sugar in 2016, but given the market conditions, Wilmar's results were very poor; less than QSL. Ability to do our own forward pricing is very important for the Industry to even survive.

4. What are the greatest benefits/improvements that have arisen as a result of the Code to your business and the industry?

Been only one contract where we have struggled to maintain the status quo particularly the milling terms in the contract. Wilmar wanted to breakdown the growers' position negotiated over many previous contracts (again this is in relation to the milling of the cane). Our last contract only reached agreement because of the Code and political intervention with growers not being able to forward price until a long drawn out process of negotiation of the on-supply agreement with QSL. I see as

a result of Wilmar drawing out negotiations that the time limit of 90 days to reach agreement as being central to the ability to achieve a contract.

5. Are any additional benefits likely to emerge over the long term from the Code? If so, what longer term benefits do you see?

We hope to maintain choice of marketer and arbitration marketer and without the Code choice of marketer will disappear. Wilmar's behaviour is detrimental to grower's survival long term.

6. What additional costs have you incurred as a result of the Code, including changes to agreements with Wilmar Sugar? Do you expect to incur significant additional costs in the future as a result of the Code?

Without the Code Wilmar's original draft contracts would shift significant costs to growers on top of an already high input cost environment. For example, wages, water, electricity, and rates. Also liability transfer, for example, Wilmar's original draft contract transferred to growers the risk attached to processing and the consequence of that was growers wearing increased risk of forward pricing (where you did not supply sufficient sugar to meet your forward pricing due to the mill failure to crush your cane and produce sugar).

7. What are the greatest risks to growers (and the industry) if the Code was removed?

We cannot negotiate with a monopoly processor. There will be no competition in marketing and QSL would be gone. Wilmar has not shown good faith at any stage. In negotiating CSAs or On Supply Agreements Wilmar had a very aggressive overhand approach to negotiating.

8. Are there any improvements you think are necessary to make the Code more effective?

We must maintain competition at all possible levels. It is paramount that growers maintain the right to forward price and as this is at the grower's risk, and not at Wilmar's cost or risk, we need the ability to ensure that this forms part of the CSA or relationship between the grower and marketer. The Code achieves this.

Wilmar refused to let growers forward price when the sugar price was at historical highs in late 2016 and early 2017, using it as a lever to bully growers to accept their devious, diluted draft CSA, endeavouring to breakdown the long established fabric of the industry for greater control and reward for them. Monopolies are no good unless you own them.

9. Are you aware of any evidence of differences in the impacts of the Code or the behaviour of other millers across different sugar-producing regions?

Other millers COFCO, Mitr Phol, under the Qld legislation accepted the situation and got down to business with growers and came up with CSAs that allowed growers to capitalise on pricing opportunities making them much better placed to ride out the current down turn caused by India, Pakistan and Thailand subsidised sugar based on the world market.

10. Any other matter you would like to comment upon.

If the Code goes growers become price takers in a corrupt world market (no level playing field) and as a result the Industry would decline in our very high input cost environment. I would like to refer

to the Senate Enquiry where Senators were by-partisan in their scathing statements directed at Wilmar's non-willingness to negotiate on their hard line one sided approach. Growers have never used their supposedly inferior negotiating position to try to obtain any advantage. Current contracts are 3 years rolling with clauses guaranteeing Wilmar's supply with only flexibility for growers to reduce their obligations to supply cane and grower and alternate crop. I think this is a win/win situation for Wilmar. Wilmar is guaranteed supply.

Thank you for taking the time to complete this questionnaire. Your responses will be anonymous.



## BDCG Questionnaire

Context: The Australian Government has recently announced a review of the *Competition and Consumer (Industry Code – Sugar) Regulations 2017* (the Code), to examine whether it is providing certainty and stability for the sugar industry.

The Code was enacted in 2017 to provide a federal framework to regulate the conduct of growers, mill owners and marketers in relation to contracts or agreements for supply of cane or on supply of sugar. It reinforces grower's choice of marketing entity for the sale of sugar for which the grower bears the price exposure risk. The review of the Code focuses on whether the benefits of the Code outweigh the costs.

Objective of the questionnaire: BDCG is seeking grower input on the positive/negative impacts of the Code to your business and to the sugar industry. Your response will inform the BDCG submission to the Australian Government review of the Code.

Please return the questionnaire to Les Elphinstone by **31 July 2018**

1. Which Wilmar Sugar mill in the Burdekin do you supply?  
Kalamia
2. Can you explain any differences you experienced in the negotiations with the mill for last year's and this year's cane supply agreement compared to previous seasons?

3. Who did you decide would market your Grower Economic Interest Sugar (GEI Sugar) that was produced last year and this year? Were your decisions influenced by any actions of Wilmar Sugar that limited your ability to exercise choice of marketer and/or forward pricing? If so, and if Wilmar Sugar had acted differently, would you be likely to appoint the same marketer for next year's crop?

Originally we had decided to give Wilmar and QSL 50% each of our GEI Sugar to market, however after Wilmar dragged out the negotiations in an obvious bid to be the only Sugar Marketer in the Burdekin, therefore forcing us to miss out on the record high prices that were on offer at the time, we gave 100% of our GEI Sugar to QSL and it is our intention to NEVER market our sugar with Wilmar. Furthermore, if the Qld opposition government with the support of some minor parties not forced Wilmar to resolve this dispute in a fair manner Wilmar would have continued to seek to become our sole marketing choice.

4. What are the greatest benefits/improvements that have arisen as a result of the Code to your business and the industry?

Wilmar has proved that without legislation and the Code of Conduct, it would make full use of its monopoly to pursue their own agenda with no concern with the Growers needs. Therefore the greatest benefit/improvement to having the Code is it gives us the power to negotiate with Wilmar instead of them having all the power.

5. Are any additional benefits likely to emerge over the long term from the Code? If so, what longer term benefits do you see?

The additional benefits include: - By allowing us to choose our marketer we will be able to choose who is attaining the best prices, so far QSL has achieved the highest return to growers.

: -Sugar Marketers will be competing for our business, we are already being offered a much wider variety of products to price our Sugar.

: - QSL is a not for profit company, which means all profits are passed on to the growers.

6. What additional costs have you incurred as a result of the Code, including changes to agreements with Wilmar Sugar? Do you expect to incur significant additional costs in the future as a result of the Code?

We expect that there will be no additional costs to growers!!

7. What are the greatest risks to growers (and the industry) if the Code was removed?

Again, Wilmar has proven they have no interest in the Farmers or the rest of our Industry, if the code was removed we would be back to Wilmar being the sole marketer and using the monopoly they would once again have, which would likely be the end of our local Sugar Industry and disaster to our local community. The prices we missed out on during the stalling tactics Wilmar used while the Code was being negotiated were the highest on record and would have seen a considerable improvement in our local economy.

Growers would be forced to accept unfair conditions from Wilmar or choose to grow other crops.

8. Are there any improvements you think are necessary to make the Code more effective?

We are not in a position to comment on this question.

9. Are you aware of any evidence of differences in the impacts of the Code or the behaviour of other millers across different sugar-producing regions?

Other Cane growing areas, were able to negotiate with their Miller in a much shorter time period which allowed them to take advantage of the high prices at the time.

10. Any other matter you would like to comment upon.

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Thank you for taking the time to complete this questionnaire. Your responses will be anonymous.

## BDCG Questionnaire

Context: The Australian Government has recently announced a review of the *Competition and Consumer (Industry Code – Sugar) Regulations 2017* (the Code), to examine whether it is providing certainty and stability for the sugar industry.

The Code was enacted in 2017 to provide a federal framework to regulate the conduct of growers, mill owners and marketers in relation to contracts or agreements for supply of cane or on supply of sugar. It reinforces grower's choice of marketing entity for the sale of sugar for which the grower bears the price exposure risk. The review of the Code focuses on whether the benefits of the Code outweigh the costs.

Objective of the questionnaire: BDCG is seeking grower input on the positive/negative impacts of the Code to your business and to the sugar industry. Your response will inform the BDCG submission to the Australian Government review of the Code.

Please return the questionnaire to Les Elphinstone by **31 July 2018**

1. Which Wilmar Sugar mill in the Burdekin do you supply?

Kalamia

2. Can you explain any differences you experienced in the negotiations with the mill for last year's and this year's cane supply agreement compared to previous seasons?

There was a substantially longer negotiation process with most recent CSA as opposed to previous agreements. Whilst previous agreements did experience a delay and in some cases were signed under duress due to pending commencement of season, time period was not as drawn out as most recent CSA/current miller. With current CSA there was not only a cost impact on grower in the form of additional levy to assist with legal requirements but growers could not take advantage of attractive sugar prices during this time without being forced to sign a individual CSA,

3. Who did you decide would market your Grower Economic Interest Sugar (GEI Sugar) that was produced last year and this year? Were your decisions influenced by any actions of Wilmar Sugar that limited your ability to exercise choice of marketer and/or forward pricing? If so, and if Wilmar Sugar had acted differently, would you be likely to appoint the same marketer for next year's crop?

Chosen marketer was QSL. Had a strong desire for traditional marketer ie. QSL to market my GEI Sugar and this was inhibited due to millers delay tactics and inability to negotiate a fair and just On Supply Agreement. Marketer could not be selected until OSA had been negotiated. If Wilmar had acted responsibly and negotiated both CSA and OSA in a fair and timely manner allowing me to take advantage of attractive pricing at the time I would have given both marketers an equal portion of my GEI sugar.

4. What are the greatest benefits/improvements that have arisen as a result of the Code to your business and the industry?

Code of Conduct has seen marketers provide an increase in options available in so far as products mix.

5. Are any additional benefits likely to emerge over the long term from the Code? If so, what longer term benefits do you see?

Ability for me to continue to choose marketer of choice be it existing or a possible new player and the ability via arbitration under the code to negotiate future fair and reasonable CSA in a timely manner.

6. What additional costs have you incurred as a result of the Code, including changes to agreements with Wilmar Sugar? Do you expect to incur significant additional costs in the future as a result of the Code?

No significant additional costs envisaged in future negotiation process.

7. What are the greatest risks to growers (and the industry) if the Code was removed?

Continued long drawn out and costly negotiation process if/when new agreement is required. Of major concern if there was no choice of marketer we would be dictated to by a monopolistic foreign company with little regard for growers interest.

8. Are there any improvements you think are necessary to make the Code more effective?

Have a strong desire for T & C's of existing code to remain in place.

9. Are you aware of any evidence of differences in the impacts of the Code or the behaviour of other millers across different sugar-producing regions?

No known impacts that I am aware of.

10. Any other matter you would like to comment upon.

Whilst the Code of Conduct remains in place it has the effect of keeping both miller and marketers in place.

Thank you for taking the time to complete this questionnaire. Your responses will be anonymous.

## BDCG Questionnaire

Context: The Australian Government has recently announced a review of the *Competition and Consumer (Industry Code – Sugar) Regulations 2017* (the Code), to examine whether it is providing certainty and stability for the sugar industry.

The Code was enacted in 2017 to provide a federal framework to regulate the conduct of growers, mill owners and marketers in relation to contracts or agreements for supply of cane or on supply of sugar. It reinforces grower's choice of marketing entity for the sale of sugar for which the grower bears the price exposure risk. The review of the Code focuses on whether the benefits of the Code outweigh the costs.

Objective of the questionnaire: BDCG is seeking grower input on the positive/negative impacts of the Code to your business and to the sugar industry. Your response will inform the BDCG submission to the Australian Government review of the Code.

Please return the questionnaire to Julie Artiach by 31 July 2018

1. Which Wilmar Sugar mill in the Burdekin do you supply? Pioneer
2. Can you explain any differences you experienced in the negotiations with the mill for last year's and this year's cane supply agreement compared to previous seasons? I felt more confident signing the cane supply agreement due to higher understanding of the cane supply agreement. It is horrifying enough not having a choice in Millers! The thought of not having a choice in marketers was no less horrifying. Wilmar's initial cane supply agreement was very vague and lacked transparency. Wilmar's first cane supply agreement (when they wanted to be the sole marketer) felt like there was no room for negotiations and we got a glimpse of what might happen should the miller get a monopoly on both milling and marketing.
3. Who did you decide would market your Grower Economic Interest Sugar (GEI Sugar) that was produced last year and this year? Were your decisions influenced by any actions of Wilmar Sugar that limited your ability to exercise choice of marketer and/or forward pricing? If so, and if Wilmar Sugar had acted differently, would you be likely to appoint the same marketer for next year's crop?

We selected QSL and will continue to do so. We are opposed to any monopoly in any industry. We want a choice in where we buy our groceries and we certainly want a choice in who markets our GEI Sugar. Wilmar show nothing but contempt for farmers and the continue to lobby for a monopoly.

4. What are the greatest benefits/improvements that have arisen as a result of the Code to your business and the industry? Farmers have a choice in who markets our sugar. That in itself is a great benefit and gives farmers confidence for the future. Before the code we were considering leaving the industry. Having read about the Australian Wheat Board and what they have gone through I believed we were heading down the same path and that was not a direction we want to go in. I believe the code will prevent the sugar industry suffering from the same mistakes that have seen so many other primary industries suffer.
  
5. Are any additional benefits likely to emerge over the long term from the Code? If so, what longer term benefits do you see? Competition is another benefit of the code. Competition is good for any industry as it encourages performance. If there is no one to compete with, what incentive is there to do your best. Who sets the bar for performance? If Wilmar are so good at their business, why are they afraid of competition?
  
6. What additional costs have you incurred as a result of the Code, including changes to agreements with Wilmar Sugar? Do you expect to incur significant additional costs in the future as a result of the Code? Due to Wilmar's actions and delays fighting a code that 95% (approx.) of Burdekin farmers wanted, we missed out on the highest price I have seen in 25 years of farming. That price would not only have benefited our business and lives, but the Burdekin community as a whole would also have flourished. If Wilmar had permitted everyone to price while the court actions were proceeding, not only would we have been able to get that price, it would've resinated as an act of good faith on their behalf. It cost us all (Burdekin community) financially and it cost Wilmar that faith and any goodwill going forward.
  
7. What are the greatest risks to growers (and the industry) if the Code was removed? If the code was removed we would be working under a dictatorship. The way the supply contract was originally written, farmers had no say. No one company should have control of all the mills and all the marketing. Wilmar were free to pay us or not pay us any price they deemed fit and were not at liberty to explain themselves. Would you like to work all year only to be told at the end you won't be paid? Without any explanation as to why!! If the code is removed we will sell!! A farm that we purchased at great expense and have fought for in the hope of bringing our children up on the land.

8. Are there any improvements you think are necessary to make the Code more effective? Yes! Lock the code in for 10 years (minimum) so that we farmers can take a minute to breath and make some plans for our future and future of our children.
  
9. Are you aware of any evidence of differences in the impacts of the Code or the behaviour of other millers across different sugar-producing regions? I am friends with many farmers in other districts including Proserpine, Mosman and Mackay. While we all have our problems with Millers, never have I been told that the code has had a negative impact of farming.
  
10. Any other matter you would like to comment upon. Suicide and depression in rural areas are increasing at alarming rates. I can not fathom why farming industries continue to have to battle for the basic work place fairness that other industries receive. I have lived my entire life in the Burdekin. In the first 35 years of my 42 total years on this earth, I could only recall one young man who took his own life. In the last few years, I have attended too many funerals of friends who took their own lives and visited too many friends suffering depression. Something needs to be done to protect our farmers and rural areas. The Code plays a role in that protection.

Thank you for taking the time to complete this questionnaire. Your responses will be anonymous.



## BDCG Questionnaire

**Context:** The Australian Government has recently announced a review of the *Competition and Consumer (Industry Code – Sugar) Regulations 2017* (the Code), to examine whether it is providing certainty and stability for the sugar industry.

The Code was enacted in 2017 to provide a federal framework to regulate the conduct of growers, mill owners and marketers in relation to contracts or agreements for supply of cane or on supply of sugar. It reinforces grower's choice of marketing entity for the sale of sugar for which the grower bears the price exposure risk. The review of the Code focuses on whether the benefits of the Code outweigh the costs.

**Objective of the questionnaire:** BDCG is seeking grower input on the positive/negative impacts of the Code to your business and to the sugar industry. Your response will inform the BDCG submission to the Australian Government review of the Code.

Please return the questionnaire to Julie Artiach by 31 July 2018

1. Which Wilmar Sugar mill in the Burdekin do you supply?

Pioneer

2. Can you explain any differences you experienced in the negotiations with the mill for last year's and this year's cane supply agreement compared to previous seasons?

The agreement was difficult to understand and appeared to benefit Wilmar over grower interests.

It took far too long to reach an agreement that was acceptable.

All I required was similar terms and conditions that had been in these agreements for many years.

3. Who did you decide would market your Grower Economic Interest Sugar (GEI Sugar) that was produced last year and this year? Were your decisions influenced by any actions of Wilmar Sugar that limited your ability to exercise choice of marketer and/or forward pricing? If so, and if Wilmar Sugar had acted differently, would you be likely to appoint the same marketer for next year's crop?

QSL

Wilmar actions definitely influenced my decision. I don't believe Wilmar thought growers were a priority

I was not comfortable with the hard-line Wilmar took not allowing grower marketing choice plus Wilmar inserted unspecified deductions in the contract.

I was concerned that our price was going to be controlled by a foreign company with no competition.

4. What are the greatest benefits/improvements that have arisen as a result of the Code to your business and the industry?

It has allowed us to price our sugar with a not for profit company that has grower interests at the forefront. If the code had not been in place we would not have had a choice of marketer

5. Are any additional benefits likely to emerge over the long term from the Code? If so, what longer term benefits do you see?

The benefit of not relying on a pricing agent that has the monopoly for pricing our cane.

Cane that we can't supply to another competitor because of transport logistics and deterioration of the product

6. What additional costs have you incurred as a result of the Code, including changes to agreements with Wilmar Sugar? Do you expect to incur significant additional costs in the future as a result of the Code?

The loss of income because I could not to take advantage of the early high prices before the code was implemented

7. What are the greatest risks to growers (and the industry) if the Code was removed?

Being held to ransom by a foreign own company

Prices received by growers to decrease because of the lack of competition

8. Are there any improvements you think are necessary to make the Code more effective?

Always have the certainty of choice of marketing

9. Are you aware of any evidence of differences in the impacts of the Code or the behaviour of other millers across different sugar-producing regions?

Not familiar with other areas

10. Any other matter you would like to comment upon.

Thank you for taking the time to complete this questionnaire. Your responses will be anonymous.