FEDERAL COURT OF AUSTRALIA

Mackay Sugar Limited v Wilmar Sugar Australia Limited (No 2)

[2016] FCA 1179

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| File number(s): |  |
|  |  |
| Judge(s): | **GREENWOOD J** |
|  |  |
| Date of judgment: | 3 October 2016 |
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| Catchwords: | **CORPORATIONS** – consideration of an application for a declaration that a resolution making amendments to the Constitution of Queensland Sugar Limited (“QSL”) are not oppressive to, unfairly prejudicial to or unfairly discriminatory against particular members of QSL, for the purposes of s 232 of the *Corporations Act 2001* (Cth)  |
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| Legislation: | *Corporations Act* *2001* (Cth), s 232  |
|  |  |
| Cases cited: | *Wilmar Sugar Australia Limited v Queensland Sugar Limited (No 2)* [2016] FCA 180*Wayde v New South Wales Rugby League Limited* (1985) 180 CLR 459  |
|  |  |
| Date of hearing: | 29 and 30 August 2016 |
|  |  |
| Date of last submissions: | 30 August 2016 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Sub-area: | Economic Regulator, Competition and Access |
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| Category: | Catchwords |
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| Number of paragraphs: | 115 |
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| Counsel for the Applicants: | Mr M Hodge and Ms F Lubett |
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| Solicitor for the Applicants: | McCullough Robertson |
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| Counsel for the First Respondent: | Mr J Giles SC and Mr S Fitzpatrick |
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| Solicitor for the First Respondent: | Minter Ellison |

ORDERS

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|  | QUD 449 of 2016 |
|  |
| BETWEEN: | MACKAY SUGAR LIMITED ACN 090 152 211 (and others named in the Schedule)First Applicant |
| AND: | WILMAR SUGAR AUSTRALIA LIMITED ACN 098 999 985 (and others named in the Schedule)First Respondent |

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| JUDGE: | GREENWOOD J |
| DATE OF ORDER: | 3 OCTOBER 2016 |

THE COURT ORDERS THAT:

1. The applicants are directed to submit the form of a final declaration within 14 days for further consideration.
2. The cross‑claim of the first respondent is dismissed.
3. The first respondent pay the costs of the applicants of and incidental to the proceedings.
4. Pursuant to s 23 and s 37P of the *Federal Court of Australia Act 1976* (Cth), rule 1.32 and rule 1.36 of the *Federal Court Rules 2011*, these orders and the reasons for judgment in support of these orders are made and published from Chambers.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

GREENWOOD J:

## Background

1. On 13 June 2016, pursuant to a Notice of Requisition from Bundaberg Sugar Limited (“Bundaberg”), ISIS Central Sugar Mill Company Limited (“ISIS”) and Mackay Sugar Limited (“Mackay”), collectively called the “BIM Mills”, dated 8 June 2016, Queensland Sugar Limited (“QSL”) sent a letter to the members of QSL informing them that a general meeting of QSL members would be held on 5 July 2016 at 2.30pm to consider two proposed resolutions. The letter enclosed the following documents:
	1. *Notice of General Meeting of Members* calling a General Meeting of members of QSL to be held on 5 July 2016 at 2.30pm;
	2. five pages of *Explanatory Notes*;
	3. a copy of the *Notice of Requisition* date 8 June 2016;
	4. a two page *Statement* from the BIM Mills; and
	5. *Annexures A and B* being copies of the QSL Constitution with “marked up” proposed changes.
2. At the meeting, the members of QSL passed both proposed resolutions. The QSL Constitution was amended as set out in Annexure A to the Notice of Requisition (the “2016 amendments”).
3. By these proceedings, the three applicants otherwise known as the BIM Mills seek a declaration that the resolution to amend the QSL Constitution described in Item 1 of the Notice of General Meeting dated 13 June 2016 is “not oppressive to, unfairly prejudicial to, or unfairly discriminatory against” the first respondent, Wilmar Sugar Australia Limited (“Wilmar”) and the second respondent, MSF Sugar Limited (“MSF”) within the meaning of s 232 of the *Corporations Act 2001* (Cth) (the “Act”).
4. The third respondent to the proceeding is QSL.
5. Wilmar filed a cross‑claim by which it seeks the following declarations as against QSL, Mackay, ISIS, Bundaberg and MSF:
6. A declaration that the Resolutions 1 and 2 passed by the general meeting of members of [QSL] on 5 July 2016 are void as a fraud on the power of the shareholders, or otherwise beyond the power, conferred by s 136 of the *Corporations Act 2001* (Cth) (**Act**).
7. A declaration that the affairs of QSL have been conducted in a manner which is contrary to the interests of the members as a whole or oppressive to, unfairly prejudicial to, or unfairly prejudicial against [Wilmar] (or the members of QSL other than [Mackay, ISIS and Bundaberg]) within the meaning of s 232 of the Act:
8. by proposing or making the amendments to the QSL Constitution that were the subject of Resolutions 1 and 2; or
9. by proposing or making the amendments to Article 31 of the QSL Constitution that were the subject of Resolutions 1 and 2.
10. Wilmar also seeks an order under s 233(1)(b) of the Act that the QSL Constitution be varied to delete the Resolution 1 amendments so as to restore the Constitution to the form it took at 4 July 2016, or alternatively, to delete Article 31 of the Constitution and reinstate that Article to the form it took at 4 July 2016 (together with any necessary consequential amendments required to give effect to the reinstatement order).
11. As things transpired, MSF withdrew its objections to the amendments to the Constitution: (Ex 1). As a result a notice of discontinuance was filed by the applicants against MSF.
12. The *Notice of General Meeting of Members* set out the business of the meeting in these terms:

BUSINESS

**Item 1 Amendment to the Company’ Constitution**

To consider and, if in favour, pass the following resolution (**Resolution 1**) as a special resolution:

“That, subject to Resolution 2 being approved, the constitution of the Company be amended as detailed by the marked up changes set out in the document in Annexure A”.

**Item 2 – Amendment to the Company’ Constitution in the event of a finding of oppression**

To consider and, if in favour, pass the following resolution (**Resolution 2**) as a special resolution:

“That, subject to Resolution 1 being approved, in the event that a court rules that any of the amendments to the Company’s constitution, as set out in Annexure A, are oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members of QSL, the Company’s constitution be modified by repealing all amendments set out in Annexure A and restoring the constitution in the form it took immediately before the amendments were approved”.

1. As to the earlier amendments, on 8 December 2015, the members of QSL resolved to amend the Constitution in accordance with amendments proposed in Item 1 of a Notice of Meeting of Members dated 13 November 2015 called the “2015 amendments”. On 3 March 2016, Yates J ordered, pursuant to s 233(1)(b) of the Act that QSL’s Constitution be modified by repealing the 2015 amendments and restoring the Constitution to the form it took immediately before the 2015 amendments were made: Order 2, *Wilmar Sugar Australia Limited v Queensland Sugar Limited (No 2)* [2016] FCA 180. The principal decisions in relation to that matter are the subject of an appeal.
2. The 2015 amendments, put simply, affected the standing of a “Mill Owner Member” to exercise rights under Article 31 of QSL’s Constitution (which was and is concerned with the topic of the election and removal of “Mill Owner Directors” of QSL and the filling of vacancies in such a position), as it stood, by introducing the notion of “Continuing Mill Owner Members” which operated on the footing that if a Mill Owner Member, as a party to a Raw Sugar Supply Agreement (“RSSA”) with QSL, gave notice to QSL of termination of the agreement (as from a future date such as a relevant season end date), such a Mill Owner Member would cease to be a Continuing Mill Owner Member notwithstanding that the RSSA remained *on foot* until the future end date. Yates J found that the resolution giving effect to the 2015 amendments was oppressive to, unfairly prejudicial to, or unfairly discriminatory against Wilmar.
3. The BIM Mills say that the 2016 amendments do not suffer from the vice inherent in the 2015 amendments because a Continuing Mill Owner Member, under the 2016 amendments, is a Mill Owner Member which *has* an *agreement to supply* raw sugar to QSL for sale to export markets which has not terminated, completed or otherwise expired (irrespective of whether a notice to terminate that agreement has been given). Other points of differentiation are made by the applicants about the 2015 amendments as compared with the 2016 amendments. The applicants say that Yates J was confronted with a situation under the 2015 amendments in which Wilmar was completely disenfranchised notwithstanding that, as at December 2015, Wilmar was continuing to supply 100% of its raw sugar for export through until 30 June 2017 to QSL under its RSSA. They say that that is not the case under the 2016 amendments. They also say that Wilmar is not deprived of a right to have an influence over the appointment of a member to the Board. Under the 2016 amendments, Wilmar is able to influence or have control over one Board position rather than exercise control over all four Mill Owner Director positions. The decision of Yates J turns upon the particular amendments in question, the evidence before his Honour and the particular issues his Honour was required to determine in that context. The question to be addressed turns upon the 2016 amendments themselves. Although contextually relevant, these proceedings are not about points of differentiation between the 2016 amendments and the 2015 amendments per se.
4. The applicants rely upon an affidavit of Mr Gregory Beashel sworn 17 August 2016. Mr Beashel is the Chief Executive Officer and Managing Director of QSL. He has held this position since 1 February 2012. He joined QSL in May 2000 when the company was formed. He was initially seconded from “CSR Raw Sugar Marketing” where he had worked since 1996. In the period between May 2000 and 1 February 2012, he was responsible for operations including port terminal management, capital and maintenance management, shipping operations, chartering and trade finance, for QSL.
5. Mr Beashel affirmed an affidavit on 16 December 2015 (the “2015 affidavit”) in the proceedings in relation to the 2015 amendments. He annexes that affidavit to his affidavit in these proceedings affirmed 17 August 2016 and says that the evidence contained in his earlier affidavit “remains current and correct”, except for two changes to the earlier evidence. The *first* is that in his earlier affidavit he said that QSL, as at 16 December 2015, had four Board directors. They were Mr Beashel and three independent non‑executive directors all of whom were appointed by the Board Selection Committee: Ms Sarah Scales appointed 1 January 2013; Mr Christopher Leon appointed 15 February 2014; and Mr Guy Cowan re‑appointed 1 January 2015. Mr Beashel says that QSL currently has three Board directors consisting of Mr Beashel and two independent non‑executive directors. The directors are: Mr Beashel, Ms Sarah Scales and Mr Guy Cowan. The *second* is that Mr Beashel also makes a change to his earlier affidavit to correct a diagrammatic illustration of matters related to the topic of “*2017 Season Onwards ‘Growers Choice’”*.
6. Apart from those matters, Mr Beashel adopts, for the purposes of these proceedings, the matters set out in the earlier affidavit.
7. Wilmar elected not to cross‑examine Mr Beashel.

## The history and role of QSL

1. QSL is a public company limited by guarantee. It was incorporated in 1999.
2. QSL is described as the “present incarnation” of what was once the Queensland Sugar Board. The Queensland Sugar Board was a government entity established in 1923 which marketed sugar on behalf of the Queensland industry. In 1991, the Queensland Sugar Board was replaced by the Queensland Sugar Corporation (“QSC”), a newly established statutory authority. In 1999, QSL was incorporated to replace QSC and transitional arrangements were put in place to enable QSL to take over QSC’s subsisting contractual arrangements for the export marketing of raw sugar which then existed under arrangements with CSR Raw Sugar Marketing.
3. Mr Beashel says that QSL serves the interests of growers and millers for the long term prosperity of the Queensland sugar industry. It is independent of government and receives no government funding. QSL provides its members, which consist of growers and millers, with a range of services which include financing, pricing, marketing and logistics services. QSL is a not for profit company owned by its members. Mr Beashel says that it conducts its undertaking on a “pass through” basis, that is, QSL’s costs are deducted from revenues derived from its marketing activities and the “net proceeds” passed on to mill owners under the terms and conditions of supply agreements between QSL and mill owners. Mr Beashel says that these arrangements are designed to pass on 100% of QSL’s net sale proceeds to millers and growers.
4. Mr Beashel says that QSL employs around 160 people. About 120 of those employees are based in regional Queensland. QSL’s members are drawn from the Queensland sugar industry and comprise sugar cane growers; sugar cane grower representative bodies; and the owners of sugar cane mills. Mr Beashel says that QSL manages the marketing and sale of bulk raw sugar on the international export market on behalf of seven mill owners and their “4,000 or so” sugar cane growers.
5. Mr Beashel says that QSL currently handles (at least until the end of the 2016 season which ends on 30 June 2017) 85% of Australia’s total raw sugar exports (with about 95% of Australia’s raw sugar exports produced in Queensland). In recent years this activity has involved the sale of more than three million tonnes of raw sugar each year and generated approximately $1.7 billion in revenue each year.
6. Mr Beashel says this about bulk sugar terminals (“BSTs”).
7. Prior to QSL’s establishment, QSC owned six bulk sugar terminals in Queensland from which raw sugar was exported overseas to customers. When QSL was established, ownership of these terminals was transferred to Sugar Terminals Limited (“STL”). QSL is the operator and lessee of each of the six BSTs pursuant to a sublease at a cost of about $48 million per year. QSL stores and loads raw sugar at, and from, the BSTs. The current term of the sublease is five years commencing 1 January 2014 and expiring on 31 December 2018. A term of QSL’s sublease with STL is that if QSL’s tonnage falls below a minimum amount, STL is entitled to terminate the sublease.

## QSL’s members

1. QSL has 30 members which represent the Queensland sugar industry. Those members are these.
2. *First*, QSL has seven “Mill Owner Members” which together own 21 mills. The members are: Wilmar (with eight mills); Bundaberg (with two mills); ISIS (with one mill); Mackay (with four mills); MSF (with four mills); Tully Sugar Limited (“Tully”) (with one mill); and WH Heck & Sons Pty Ltd (“Heck”) (with one mill). Heck supplies all of its raw sugar to the domestic market but has an RSSA with QSL in relation to any exports of raw sugar it may have in the future.
3. *Second*, QSL has 23 “Grower Representative Members” comprising:
	1. one person appointed by the Australian Cane Farmers Association Limited (“ACFA”);
	2. one person appointed by the Queensland Cane Growers Organisation Limited (known as “Canegrowers”); and
	3. 21 Grower Representative Members who are “Elected Holders” under Article 8A of QSL’s Constitution.
4. As to these bodies, ACFA is an Australian voluntary lobby organisation which promotes the interests of its sugar cane grower members from Northern New South Wales to Far North Queensland. Canegrowers is the peak body representing Australian sugar cane growers and it represents approximately 80% of Australia’s sugar cane growers. The 21 Grower Representative Members are individual sugar cane growers who either own or lease sugar cane farms in each of QSL’s 21 designated “Mill Areas” and they are elected by growers in their region or mill area.
5. Mr Paul Schembri affirmed an affidavit in the proceedings on behalf of the applicants on 17 August 2016. Mr Schembri was not required for cross‑examination. Mr Schembri is the chairman of Canegrowers. He has held that position since June 2013. He is also the chairman of Canegrowers Queensland Policy Council. He has held that position since June 2013. He is also a director of “Canegrowers Mackay”. He has 41 years of practical experience as a cane farmer. He says that Canegrowers represents its members’ interests at area and district level and in State, national and international forums. He describes Canegrowers as the peak body for Australian sugar cane growers and it represents growers, directly and indirectly, on every important issue within the Australian raw sugar industry.
6. He says this about the relationship between *growers* and their *mill*.
7. Growers are usually tied to their local mill for reasons of geography. That follows because cane is typically supplied to a mill in close vicinity to the farm on which it is grown and that arises for three reasons. *First*, sugar cane must be crushed very soon after being cut. Once it has been cut, it deteriorates rapidly. It is a perishable commodity. Cane is usually crushed within an average of 14 hours of being cut. Cane is not conducive to being transported long distances. *Second*, sugar cane is extremely expensive to transport. Mr Schembri estimates that it costs between $10.00 and $15.00 per tonne to transport sugar cane. It is expensive to transport because it consists of high quantities of water and is therefore very heavy. It is very bulky. Mr Schembri says that one truck could transport about 25 to 30 tonnes of cane at a time and thus it is not economically feasible to transport cane long distances. *Third*, the only means of transport for cane between competing mills throughout Queensland is by road. There is no rail infrastructure that would make transport cheaper.
8. Mr Schembri says that in most cane growing area in Queensland, there is only one mill in close vicinity to the supplying farm. He says that in the following regions there is only one *miller* to which growers can economically supply their cane: in the Burdekin there are four mills operated by Wilmar; in Herbert, two mills both operated by Wilmar; in Maryborough, one mill operated by MSF; at Rocky Point, one mill operated by Heck; in Mossman, one mill operated by Mackay; in Gordonvale, one mill operated by MSF; in South Johnstone, one mill operated by MSF; in Tully, one mill operated by Tully; and in Proserpine, one mill operated by Wilmar.
9. In three areas in Queensland, growers have a choice of a mill and they are: Bundaberg/ISIS where there is a choice between the Bundaberg mills and the ISIS mill; Mackay where there is a degree of choice as between Mackay’s three mills and Wilmar’s mill in the region; and on the Atherton Tablelands there is a choice between MSF and Mackay Sugar.
10. Mr Schembri says that even in these areas where there is some choice between millers, the choice is not available to all growers at all times because most of the mills operate at substantially full capacity and therefore cannot always take on new growers even where contestability might arise.
11. The point of all of this is that there is a natural geographic and economic connection between growers and mills which is local and regional, as to crushing and production.
12. Some aspects of QSL’s Constitution, in the form it took prior to the 2016 amendments, are these. A “Mill” is a building or other structure, located in Queensland, equipped for the manufacture of sugar from cane and is either in operation or not permanently closed: the crushing of cane is a seasonal activity.
13. A “Mill Owner” means the owner of a mill and “Mill Owner Members” are “Members”, for the time being, who are Mill Owners. “Mill Owner Directors” are the “Directors”, for the time being, elected by Mill Owner Members under Article 31. A “Mill Area” includes, in relation to a Mill which is supplied by Growers under an agreement between Growers and the Mill Owner (which provides for the Growers to supply sugar cane to that particular Mill), the area comprising all sugar cane farms that supply the Mill. A “Grower” is a person who supplies sugar cane under a contract to a Mill either alone or with others but does not include a person who is a Mill Owner or a corporation which is a subsidiary of a Mill Owner. A “Grower Representative” is a person appointed by ACFA; and, a person appointed by Canegrowers, in the way contemplated by the Constitution. An “Elected Holder” is a Grower who is elected or appointed as a Grower Representative to represent a Mill in accordance with Article 8A of the Constitution.
14. Article 4 recognises that QSL is a company limited by guarantee. The contribution to the liabilities is capped at $100.00 (the “guarantee amount”). Article 4(c) provides that a Mill Owner which owns more than one Mill shall be taken as having a membership for each Mill it owns and its liability for the guarantee amount is calculated accordingly.
15. Article 6 describes its objects in these terms:

(a) The *principal object* of the company, without limiting its powers under the Law, is to *promote the development of the sugar industry*, assisted by the following objects:

(i) to enhance the efficiency and competitiveness of the Queensland sugar industry;

(ii) to provide *access to markets* for the Queensland sugar industry or the sugar industry elsewhere;

(iii) to enhance the *long term economy* of the Queensland sugar industry and the benefits flowing from it to Growers and Mill Owners;

(iv) to encourage initiative, innovation and value adding within the Queensland sugar industry or the sugar industry elsewhere and downstream processing of sugar;

(v) to provide timely and relevant sugar market information to Growers and Mill Owners;

(vi) to *market raw sugar* in the best interests of Growers and Mill Owners; and

(vii) to *act commercially* in the discharge of its functions.

(b) In carrying out its objects, without limiting its powers under the Law the company will seek to pursue the matters provided in Charter.

[emphasis added]

1. A person who is a Grower Representative is eligible to be admitted to QSL as a “Grower Representative Member”: Article 8(a). A person who is a Mill Owner is eligible to be admitted to QSL as a Mill Owner Member: Article 8(b). As mentioned, Article 8A addresses the topic of the election of “Elected Holders”. With the exception of Elected Holders who become Grower Representative Members upon being elected or appointed, an application for membership is to be made in writing, signed by the applicant and sent to the secretary. The application is to be considered by the directors and, if the applicant is “eligible” to be a member, the directors are required to accept the application either, relevantly, as a Grower Representative Member or a Mill Owner Member: Article 9.
2. As to the passing of resolutions at general meetings, Article 19 is in these terms:

(a) Subject to paragraph (b), resolutions at general meetings shall be passed by a simple majority of Grower Representative Members who are Members Present and a simple majority of Mill Owner Members who are Members Present.

(b) Resolutions to:

(i) change this Constitution;

…

shall be passed by a majority that comprises Grower Representative Members holding at least 75% of the total number of votes cast by all Grower Representative Members who are Members Present and Mill Owner Members holding at least 75% of the total number of votes cast by all Mill Owner Members who are Members Present. As well, resolutions to change Article 30 of this Constitution must be passed by the Grower Representative Members appointed to be Grower Representatives by [ACFA] and [Canegrowers].

1. As to the question of the calculation of votes a Member or a class of Members are entitled to cast at such a meeting, Article 22 provides, subject to the Constitution, that each person present and entitled to vote has *one vote*, on a show of hands. On a poll, a Grower Representative Member has *one vote* and a Mill Owner Member has a number of votes calculated according to the formula in Article 22(b)(ii), subject to the matters at Article 22(e). Two things should be noted. *First*, the formula in Article 22(b)(ii) for calculating the number of votes that might be cast at a meeting of members is in different terms to the formula in Article 31(b)(ii) (to be mentioned later in these reasons). *Second*, the qualification in Article 22(e) provides that a Mill Owner Member, which has a current agreement to supply raw sugar to QSL for sale to export markets, in respect of which a Notice to Terminate has been given, is not entitled to vote (and will not be included within the calculations of “A” or “B” for the purposes of the Article 22(b)(ii) formula) on any resolution *except* a resolution which, if passed, would result in QSL falling within the conduct described at Article 22(e)(i) to (iv). Those classes of conduct include, at (iv), “amending Article 6 or Schedule 1 of this Constitution”. Thus, any Mill Owner Member who has given a Notice to Terminate nevertheless retains a right to vote on a change to the objects of QSL. Article 22 does not regulate the voting on the appointment of directors. As a result of Article 22(e), Wilmar was not entitled to vote on the resolutions to amend the Constitution at the meetings of members on 5 July 2016.
2. Article 29 is concerned with the topic of the “Board Selection Committee”.
3. Article 29(a) provides for the establishment of a Board Selection Committee with responsibility for appointing Independent Director(s) to *fill vacancies* that arise on QSL’s Board. It is to consist of four Members: two elected by Mill Owner Members; two elected by Grower Representative Members. Article 29(c) sets out the procedure for the initial election of the two Members of the Board Selection Committee to be elected by Mill Owner Members (or in the event of a subsequent vacancy of such members arising). Article 29(d) sets out the process in relation to the Grower Representative Members. Article 29A addresses the process to be undertaken in filling an Independent Director vacancy on QSL’s Board.
4. Article 29A(c) provides that the Board Selection Committee may appoint up to a *maximum* of *four* Independent Directors although it may initially appoint less than four Independent Directors or choose not to fill an Independent Directorship vacancy which arises, *provided* that QSL’s Board continues to have a *minimum* of *three* Independent Directors.
5. Article 29B addresses the topic of “Industry Director vacancies”. It provides:

(a) When a vacancy in the company’s Grower Directors [and that term is defined to mean Directors for the time being elected by the Grower Representative Members under Article 30] exists a panel shall *not* be appointed to elect a Grower Director in relation to that vacancy *unless* a majority of Grower Representative Members vote in favour of doing so. On such a vote, each Grower Representative shall have *one vote*.

(b) When a vacancy in the company’s Mill Owner Directors exists a nomination shall *not* be made by any Mill Owner Member to fill that vacancy *unless* Mill Owner Members vote in favour of considering the nomination. On such a vote each Mill Owner Member shall have that number of votes *calculated* in accordance with the *formula* contained at *Article 31(b)(ii)*.

 [emphasis added]

1. Article 30(a)(i) provides that Grower Representative Members may elect four Grower Directors. Article 30 sets out the mechanism in relation to that process.
2. Article 31 addresses the topic of “Mill Owner Directors”. Article 31(a) provides:

(a) The Mill Owner Members may:

(i) *elect 4* Mill Owner Directors;

(ii) *remove* any Mill Owner Directors; and

(iii) elect a person to be a Mill Owner Director *in the place* of a Mill Owner Director who dies, resigns or is removed from or otherwise *vacates* office under this Constitution.

 [emphasis added]

1. Article 31(b) is in these terms:

(b) The Mill Owner Directors are to be elected or removed in accordance with the following:

(i) Mill Owner Members shall nominate to the company a person to fill any vacancy occurring among Mill Owner Directors from time to time;

(ii) in the event that Mill Owner Members are unable to agree on the person to fill a vacancy occurring among Mill Owner Directors, Mill Owner Members shall vote to choose between the candidates proposed by Mill Owner Members. On such a vote, each Mill Owner Member shall have that *number of votes* calculated in accordance with the following formula:

A/B x 100

where:

***A*** is the tonnes of raw sugar supplied to the company, or delivered to the company pursuant to an agency agreement with the company, for sale to export markets by Mills in Queensland owned *by that Mill Owner Member* over the *3 complete crushing seasons preceding* the calendar year in which the vote is held

***B*** is the total tonnes of raw sugar supplied to the company, or delivered to the company pursuant to an agency agreement with the company, for sale to export markets *by Mills in Queensland* over the *3 complete crushing seasons preceding* the calendar year in which the vote is held

 [emphasis added]

1. So far as the formula in Article 31(b)(ii) is concerned, the following volume statistics set out at para 50 of Mr Beashel’s affidavit are relevant. Mr Beashel says that as at the date of his affidavit of 16 December 2016, QSL was currently handling approximately 3.5 million tonnes of raw sugar annually. Of that, approximately 2 million tonnes have been supplied by Wilmar; 850,000 tonnes have been supplied by Tully and MSF; and 650,000 tonnes have been supplied by the BIM Mills. Thus, on a proportional basis, Wilmar supplies, approximately, 57.14% of the tonnes of raw sugar supplied to QSL by mills in Queensland for sale to export markets; Tully and MSF supply 24.2%; and the BIM Mills supply 8.57%. On that footing, Wilmar controls the outcome of a vote under Article 29B(b) and Article 31(b)(ii).
2. Mr Beashel provides an explanation about some aspects of the introduction of Article 29B into the Constitution. Article 29B was introduced as a result of a resolution passed by the Members on 25 June 2008. Mr Beashel says that Sucrogen Limited (now called “Wilmar”), which had been a member of QSC since 28 July 2000, took the position, from about mid‑2008 (May), according to Mr Beashel’s recollection, that directors drawn from industry interests ought not to be directors of QSL and that QSL should move to an independent Board. Article 29B(b), as described, prevents a nomination by any Mill Owner Member to fill a vacancy in a Mill Owner Director position unless Mill Owner Members vote to consider the nomination. The volume supply based proportional voting formula of Article 31(b)(ii) adopted by Article 29B(b)(ii) would enable Wilmar to determine the outcome of any vote on a proposed resolution to nominate a director (or employee) of a Mill Owner Member as a Mill Owner Director. By 31 December 2008, all 12 directors of QSL had resigned including all eight industry directors. In 2009, four independent directors were appointed. The Chief Executive Officer is also a director and is required by the Constitution to be the Managing Director: Article 32. Thus, there have been no industry directors of QSL since 2009.
3. Article 38 addresses the topic of “Powers of directors”. It provides that subject to the “Law” and the Constitution of QSL, the business of the company is managed by the directors who may exercise all powers of the company which are not required to be exercised by the company in general meeting.
4. The parties accept that the RSSA in evidence as between QSL and Wilmar is substantially similar in every material way to each RSSA between QSL and each of the Mill Owners. The Wilmar Agreement was entered into on 23 December 2013 and it was amended by a further Deed on 29 January 2015. On 21 May 2014, Wilmar gave notice to QSL under clause 3.2 that it would not be extending the RSSA to include the 2017 season and thus the RSSA will terminate following the 2016 season on 30 June 2017. MSF and Tully also served notices on 27 and 30 June 2014 respectively concerning each of their RSSAs with QSL. Those agreements will also end on 30 June 2017.

## The historical supply arrangements

1. It is now necessary to say some things about the historical supply arrangements between Mill Owners and QSL and the elements of the current RSSA. Mr Beashel says this at paras 38 and 39 of his 2015 affidavit about the historical sugar supply arrangements:

38. Generally speaking, the main sugar marketing services that QSL provides (and has historically provided) are as follows:

(a) storage and handling of raw sugar;

(b) sugar quality management;

(c) managing the export shipping program of the sugar;

(d) selling sugar, which includes offering various pricing products and undertaking financial risk management by hedging (for both currency and for sugar) through the use of futures contracts; and

(e) financing and paying advance payments to millers.

39. Prior to the current RSSAs the arrangements among growers, mill owners and QSL for the supply and sale of raw sugar were as follows:

(a) pursuant to the *Sugar Industry Act 1999* (Qld) growers in the vicinity of a particular mill had to have a supply contract with a mill. Typically the grower supplied 100% of his crop to the mill. Title in the cane passed to the mill owner;

(b) each of the mills crushed the cane and, pursuant to supply contracts with QSL, typically supplied 100% of the manufactured sugar for export to QSL for QSL to market and sell to overseas customers. Title in the sugar passed to QSL at the BST weighbridge; and

(c) QSL sold the sugar and returned net sale proceeds of the manufactured sugar to the mills. Each mill deducted a percentage of the proceeds received from QSL and returned the balance proceeds to growers.

## The current RSSAs

1. By clause 5, the Mill Owner agrees to supply 100% of that part of its “Total Raw Sugar” *intended* for Bulk Export, during any season while the agreement remains on foot, to QSL, for delivery to the Lucinda, Townsville or Mackay BSTs (or any other like facility nominated by QSL). “Total Raw Sugar” is the total “Raw Sugar” (as defined) for a Season (as defined) produced by the Supplier from a mill in Queensland, including any Raw Sugar sold to the domestic market. Clause 6.1(a) requires the Supplier to advise QSL by a relevant date (the “Marketing Declaration Date”), of the estimated quantity of “Nominated EI Sugar” for that season up to a maximum of the then estimated “Supplier Export Economic Interest Sugar” (called the “Initial EI Amount”) in accordance with a particular formula. “Nominated EI Sugar” means the “Supplier Export Economic Interest Sugar” supplied to QSL which the Mill Owner Supplier “has elected to market” in accordance with clause 6.1. “Supplier Export Economic Interest Sugar” (“SEEIS”) means “Supplier Economic Interest Sugar” (“SEIS”) less two nominated components and SEIS means that part of the Total Raw Sugar for which, pursuant to cane supply or other agreements with Growers, the Supplier (or its related entities) has the “price exposure” which excludes any Raw Sugar for which a Grower (apart from a Grower which is a Related Body Corporate of the Supplier) has the price exposure. The Supplier must also advise QSL by the relevant date of the *respective proportions* of SEEIS and “Grower Export Economic Interest Sugar” (“GEEIS”) for that season; whether the Supplier will market the Supplier EI Component of US Quota Tonnage; and whether its Nominated EI Sugar will be payment on Shipment Sugar or subject to the advances payment scheme: clause 6.1(iii). So GEEIS means “Grower Economic Interest Sugar (“GEIS”) intended for Bulk Export and GEIS is defined to mean Raw Sugar for which Growers (excluding Growers who are Related Bodies Corporate of a Supplier) bear the price exposure under cane supply agreements (or other agreements) between the Supplier and the Grower.
2. For all practical purposes relevant to these proceedings, I will treat SEEIS as SEIS and GEEIS and GEIS.
3. The estimates provided by the Supplier must be substantiated. By the Pricing Declaration Date, the Supplier must advise QSL of the estimated quantity of supply (specifying weekly deliveries to the BSTs) and the amounts and proportions of the Nominated EI Sugar (the SEIS the Supplier has elected to market) and the SEIS and GEIS components by amount and proportion: clause 6.3; clause 6.4. Title and risk for Raw Sugar supplied to QSL passes on completion of weighing at the receival station for any of the BSTs: clause 11. QSL stores the Raw Sugar and has the right to comingle deliveries: clause 10. The RSSA commences on the commencement date and continues for the Supplier’s 2014, 2015 and 2016 season’s production of Raw Sugar for export and ends on 30 June 2017 subject to a number of things including an automatic extension for 12 months on 30 June each year so as to bring about a “rolling three year term” unless either side gives notice that it no longer wants any further 12 month extensions: clause 3.
4. Schedule 2 to the RSSA provides that Raw Sugar supplied under the agreement is to be allocated to a number of Pools and the pricing received by the Supplier will be derived from the outcomes realised for those Pools. The categories are “QSL Marketed Pools” (category A of those Pools is made up of many Pools and category B is a “Harvest Pool”); and a Supplier EI Pool. If a Supplier has made a nomination of SEIS, Raw Sugar as delivered is allocated pro rata to the QSL Marketed Pools and the Supplier EI Pool according to the relevant proportions. The formula for total payments to a Supplier is set out at clause 1.3 of the Schedule. An important element of the formula is the “Net Price IPS for a Pool” which consists of two elements, a “Gross Price Element” and a “Shared Pool Element”. The pricing methodology to be applied to determine the “Gross Price Element in AUD per Tonne IPS Supplied” for each Pool is set out in clause 3 of the Schedule. Clause 4 sets out the considerations for determining the “Shared Pool Element in AUD per Tonne IPS”. These two elements determine the Net IPS Price for the relevant Pool. For the Supplier EI Pool, pricing is to be managed by the Supplier: clause 3.5(a). The Supplier must nominate one or more methods it intends to use: clause 3.5(b). As to the “Shared Pool Element”, QSL operates a Shared Pool which includes certain QSL revenues and costs. Clause 4.1 identifies the categories of revenue and costs. The allocation from the Shared Pool to derive the generally applicable “Shared Element” of the “Net IPS Price” for a Pool depends upon whether the Pool is a QSL Marketed Pool or a Supplier EI Pool: clause 4.1(c). The marketing revenue share for a Supplier EI Pool is any agreed premium under the FOB Sales Contract: clause 4.2(b)(iv). The direct marketing costs for a Supplier EI Pool are the marketing costs for the FOB Sales Contract. Each Pool is to be allocated “a portion of the RSSA Shared Costs for a Season” and the “RSSA Shared Costs” means the aggregation of eight classes of costs set out at clause 4.5(a). Apart from “RSSA Shared Costs” there are “Pool Specific RSSA Costs” as defined at clause 4.6. However, since some of these costs relate solely to services provided by QSL to QSL Marketed Pools, some of these costs are not allocated to the Supplier EI Pool.
5. The point of all of this is that the RSSA proceeds on the footing that 100% of a Supplier’s Total Raw Sugar intended for bulk export sale is supplied to QSL. Elections can be made concerning Nominated EI Sugar for the relevant season. Raw Sugar as supplied is allocated to the relevant Pool and the payment of the Supplier is based upon and derives from the performance of the Pool so as to derive the Net IPS Price for the Supplier for the relevant Pool in AUD per Tonne IPS which takes into account the Shared Pool Element and the particular classes of allocated costs, relevant to the particular Pool, amortised over total volumes per Pool in dollars per tonne.
6. The evidence in these proceedings is that some or all of the nominated SEIS of a particular Mill Owner can and is sold under these mechanisms. Sometimes, a part of the nominated SEIS is sold by QSL and other parts of it are the subject of export sales arrangements by specialist export sugar marketers appointed by the Mill Owner. The mechanisms also involve a re‑supply by QSL of SEIS to the Mill Owner with transfer of title occurring as the bulk raw sugar passes over the ship rail which is the point in time when title transfers and payment falls in.
7. Mr Beashel sets out his applied industry working understanding of the RSSAs in these terms:

42. Under the current RSSAs, including Wilmar’s RSSA, the arrangement among growers, mill owners and QSL for the supply and sale of raw sugar is as follows:

(a) the grower supplies cane to the mill …;

(b) each of the mills crushes the cane and, pursuant to the RSSA, supplies 100% of the manufactured sugar for export to QSL. Title in the sugar passes to QSL at the BST weighbridge;

(c) QSL markets the majority of raw sugar manufactured by the mills to export markets. QSL manages and markets the export of raw sugar under a pooling arrangement where sales revenues and the associated costs and risks, are allocated on a shared basis between mill owners who have supply contracts with QSL;

(d) within the framework of the pooling arrangement, the mill owner may elect to market its [SEIS] …;

(e) if a mill owner elects to nominate an amount of SEIS QSL must supply the nominated amount back to the mill owner who is then entitled to sell that nominated amount of raw sugar itself. The balance of the raw sugar sold to QSL is referred to as [GEIS] and is marketed by QSL to export customers;

(f) net proceeds of the sugar sold by QSL are returned to the mill owner. The supply agreement between the mill owner and grower typically provides that in exchange for milling, the mill owner will keep approximately one third of all sale revenue and the grower receives approximately two thirds of all net sale proceeds from sugar sales.

## The statutory arrangements

1. The principal object of the *Sugar Industry Act 1999* (Qld) is to facilitate an internationally competitive, export oriented sugar industry based on sustainable production that benefits those involved in the industry and the wider community: s 3. Chapter 3 of that Act, prior to the enactment of the *Sugar Industry Amendment Act 2005* (Qld) (the “2005 Act”) (which commenced on 28 November 2005) addressed the topic of “Marketing” and Part 1 addressed the topic of “Marketing of Sugar Vested in QSL”. Section 100(1) provided that all sugar, on manufacture, became the absolute property of QSL free from all mortgages, charges, liens, pledges and trusts unless an exemption was in place under s 100(2). Property divested from any person by operation of that vesting was converted into a right to receive payments under the Act. By s 101, QSL was required to market the sugar vested in it and calculate the net value of each tonne of sugar included in each payment scheme under the Act and the payments due to each Mill Owner. That vesting mechanism came to an end with the enactment of the 2005 Act. By the 2005 Act, Chapter 3 of the earlier Act was omitted from the legislation. The Explanatory Notes for the 2005 Bill (for the 2005 Act) contain the following contextual observations for the aid of the Parliament:

**Policy objectives**

To amend the *Sugar Industry Act 1999* (Sugar Industry Act) to remove statutory vesting and to provide transitional arrangements to facilitate the orderly marketing of the Queensland sugar crop.

**Reasons for the policy objectives**

Since the beginning of 2002, both the State and Federal Governments have been closely examining the long term viability of the sugar industry in Queensland. This examination has been prompted, in particular, by the pressures placed on the industry by its competitive global environment.

…

The 2002 review also identified a further regulatory impediment facing the industry, namely the compulsory acquisition (“vesting”) of raw sugar on the domestic market. This requires all sugar to go through a “single desk” marketing body (Queensland Sugar Limited).

The *Sugar Industry Reform Act 2004* included some limited relaxation of domestic marketing arrangements.

…

In October 2005, a Memorandum of Understanding (MOU) was executed between the State Government, ASMC and CANEGROWERS to progress [a new marketing system for Queensland Sugar from the 2006 season].

…

The MOU recognises that [the Queensland Government] … is committed to support an orderly transition from legislative to *contractually‑based* marketing arrangements for bulk export sales.

…

… This will be accomplished by way of commercially negotiated contractual arrangements between participating mill owners and [QSL] for the export of bulk raw sugar for an initial period of three years.

The new contract‑based arrangements will replace the current compulsory acquisition or “vesting” of raw sugar under the *Sugar Industry Act 1999*, thereby allowing all the provisions of the Act dealing with vesting and statutory based marketing arrangements to be repealed.

1. The *Sugar Industry Act 1999* (Qld) was amended by the *Sugar Industry (Real Choice in Marketing) Amendment Act 2015* (Qld) (the “Real Choice Act”) which commenced on 17 December 2015. The principal Act as amended by the Real Choice Act provides, by s 33B, as follows:

**33B Terms of supply contract about sale of on‑supply sugar**

(1) This section applies to a supply contract for cane between a grower and a mill owner unless the grower is a related body corporate of the mill owner.

(2) The supply contract must include each of the following –

(a) a term providing for the amount, or the basis for working out the amount, of the payment to the grower for the supply of the cane (the ***cane payment***);

(b) unless the grower and the 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 includes a related sugar pricing term, both of the following, unless the grower and the mill owner otherwise agree –

(i) a term requiring the mill owner to bear the sale price exposure for the sale of a proportion of the on‑supply sugar that is worked out in a stated way;

(ii) a term (a ***GEI sugar price exposure term***) requiring the grower to bear the sale price exposure for the sale of the remaining on‑supply sugar (the ***grower economic interest sugar***);

(d) if the supply contract includes a GEI sugar price exposure term –

(i) a term (a ***GEI sugar marketing term***) requiring the mill owner to have an agreement with a stated entity (the ***GEI sugar marketing entity***) to sell the quantity of the on‑supply sugar that is at least equal to the quantity of the grower economic interest sugar; and

(ii) unless the grower and mill owner otherwise agree, a term providing for an entity nominated by the grower to be the GEI sugar marketing entity;

(e) if the supply contract provides for an entity nominated by the grower to be the GEI sugar marketing entity – a term requiring the mill owner to deliver for sale the quantity of the on‑supply sugar that is at least equal to the quantity of the grower economic interest sugar, as directed by the entity, within a stated reasonable period.

(3) However, subsection (2)(d) does not apply if the supply contract states that the mill owner will sell the on‑supply sugar.

(4) Without limiting subsection (2)(e), the stated period must be reasonable having regard to the likely period in which the mill owner could deliver the on‑supply sugar for sale to a related body corporate of the mill owner.

*Note –*

 See section 298.

1. The explanatory context for the Real Choice Act is set out in these extracts from the Revised Explanatory Notes for the Bill for that Act:

**Reasons for the Bill**

The Bill takes into account current and future arrangements for the marketing of on‑supply sugar produced by the Queensland sugar industry. It is to ensure that all growers have real choice in terms of nominating the marketing entity for on‑supply sugar in which they have a legitimate economic interest. Importantly, it is also to prevent anti‑competitive behaviour and promote pro‑competitive outcomes for the Queensland sugar industry.

The need to safeguard growers’ choice has been enlivened by alternative marketing options for on‑supply sugar arising in the Queensland sugar industry. To this end the Bill supports the transition away from almost exclusive marketing via [QSL]. It also anticipates stakeholders invested as mill owners, among others, competing as marketing entities in the Queensland sugar industry.

This is consistent with deregulation and competition policy objectives.

…

The potential for this situation to occur arises because growers in a region are commercially reliant on local mill owners to process their cane into on‑supply sugar. The risk of growers being unduly influenced and exploited is heightened when an entity owns multiple mills of logistical importance to growers.

The Bill takes into account the intrinsic relationship between growers and mill owners in this context and safeguards growers in two ways:

* Firstly it enables a grower or bargaining representative to properly negotiate a supply contract with a mill owner, irrespective of the growers’ preferred marketing entity for on‑supply sugar in which they have a legitimate economic interest.
* Secondly, it enables a grower to nominate the marketing entity of their independent choice, or collective choice with other growers as applicable, without undue influence in relation to attaining a fair supply contract with a mill owner.

Again this is consistent with deregulation and competition policy objectives.

1. Section 298(2) provides that s 33B does not apply to an existing cane supply contract.
2. The term “on‑supply sugar” to which a supply contract relates, means the raw sugar manufactured or to be manufactured from the cane supplied, or to be supplied, under the supply contract. The term “sugar” means all raw sugar, crystal sugar, sugar syrups, inverted syrups, liquid sugar and any other form of manufactured sugar other than final molasses, sugar grown outside Queensland and a form of sugar manufactured from another form of sugar previously disposed of by QSL.
3. The applicants say that under the RSSAs the Mill Owners can nominate an SEIS portion of their raw sugar supplies. QSL re‑supplies that portion from the bulk sugar terminals to enable the Mill Owner or an agent to sell that portion (or a part of that portion) on the export market. Bundaberg has not nominated any SEIS portion. Heck does not supply raw sugar for export. The other five Mills have nominated a portion as SEIS. The applicants and Wilmar seem to be in agreement that when they are supplying raw sugar to QSL and nominating an SEIS portion, the Mill Owners have an economic interest in the performance of QSL concerning its dealings in SEIS. ISIS supplies SEIS sugar to Itochu Corporation (“Itochu Sugar Co Ltd”) for sale and Mackay supplies Alvean for the sale of SEIS. The price paid to each Mill Owner includes a QSL premium. As Mr Beashel says, the industry rule of thumb is that one third of the sugar supplied is SEIS and two thirds is GEIS. The applicants say that with the termination of each RSSA by Wilmar, MFS and Tully on 30 June 2016, none of those companies will supply any raw sugar to QSL for export sale. However, under the Real Choice Act, as from 1 July 2017, Growers will be entitled to select the entity which sells their GEIS proportion of the sugar. That entity is known as the “GEI sugar marketing entity” (“GEISME”). As from 1 July 2017, the Mill Owner and the Grower will be obliged to have contracts that allow the Grower to appoint a GEISME. The new arrangements will not consist simply of nomination of SEIS, appointment of an export seller of the SEIS portion and sale and an account by QSL of the proceeds of sale of the GEIS portion but will also involve nomination by Growers of a GEISME which might be QSL or Alvean or Itochu or any other GEISME with selling desk experience, services and facilities. The party with the economic interest in GEI sugar is the Grower because it is Grower “economic interest” sugar. Should a Mill Owner be nominated as a Grower’s GEISME, the Mill Owner has a commercial interest in the marketing service and fees but not an economic interest in the GEI sugar, itself.
4. The applicants make five points about this new environment. *First*, Wilmar, Tully and MSF have chosen to end their supply arrangement with QSL. However, should the Growers who supply sugar cane to those Mills for crushing nominate QSL as their GEISME then some of the raw sugar those Mills manufacture will continue to be supplied to QSL. The Grower holds the economic interest in that portion of the raw sugar so produced by those Mills. Plainly enough, the non‑GEIS portion will not be supplied to QSL. As to the BIM Mills, their expectation is that the Growers will nominate QSL as their GEISME and the BIM Mills say (and it will be necessary to turn to the evidence shortly) they will support the Growers in that regard. However, nothing is certain and any Grower irrespective of their relationship with a particular Mill Owner either by reason of circumstance, geography, the inherent features of cane production and crushing or otherwise, is free to select any one of a number of GEISMEs.
5. *Second*, for this very reason, QSL now finds itself in competition for Grower nominations.
6. *Third*, as to the BSTs, should QSL’s tonnage fall below a minimum amount, QSL’s sublease is susceptible of termination.
7. *Fourth*, the competition among marketers of export raw sugar for volume to sell, will result in significantly less tonnages available to QSL for export sale. In gross terms, Wilmar, Tully and MFS represent an annual volume of 2,850,000 tonnes out of 3,500,000 tonnes or 81.42% of the volume. Some proportion of those tonnes may remain with QSL should it be nominated as the GEISME for the Growers. The competition for those nominations is likely to be vigorous given the nature of contestability in such an industry. QSL is confronting scale operations designed to accommodate and amortise costs over a pool of revenues based on the export sale of 3.5 million tonnes of raw sugar, 650,000 tonnes.
8. *Fifth*, Mr Lowry, the Chief Executive Officer of Mackay and Mr Gorringe, the Chief Executive Officer of ISIS, believe that QSL will need to extract efficiencies and reduce its costs significantly having regard to the greatly reduced number of tonnes likely to be sold by QSL.
9. Wilmar contests the relevance of virtually all of these contentions to the central question in issue which is: Are the amendments to the Constitution of 5 July 2016 oppressive to, unfairly prejudicial to, or unfairly discriminatory against Wilmar, objectively viewed by the hypothetical commercial bystander or hypothetical member? Wilmar says that this statutory question has, within it, the earlier notions of a fraud upon the power. Wilmar also says that none of these new world competition imperatives are an answer to an amendment that deprives it of an existing right under Article 31. I will turn to the content of Wilmar’s contentions later in these reasons.
10. The applicants contend for two other propositions both of which are contested by Wilmar. *First*, the effect of the Real Choice Act is to divide Mill Owners into camps. Heck is by itself because it does not supply raw sugar for export. The second camp is made up of those Mill Owners who have chosen to terminate their relationship with QSL and who will be competing for Grower nominations. The third camp consists of the BIM Mills who presently remain contractually committed to QSL and will continue to supply 100% of their raw sugar to QSL for export sale under the existing rolling agreement. Those Mills may nevertheless have contracts with Growers under which, from 1 July 2017, Growers will be entitled to nominate a GEISME. The applicants say that the question is ultimately this: Would a commercial bystander think that it was unfair for QSL to switch, by the 2016 amendments, to a system that draws a distinction between, on the one hand, Mill Owners who remain aligned with QSL and, on the other hand, Mill Owners who have chosen to end their future supply relationship with QSL from 30 June 2017 with the consequent effect that Mill Owners who remain aligned with QSL, namely Bundaberg, ISIS and Mackay, are each entitled to elect a director to the Board of QSL (so long as they remain aligned with QSL) and those Mill Owners who have chosen to no longer be aligned with QSL are entitled to vote on just one of four director positions allocated to Mill Owner Members? The applicants say that the answer to that question involves identifying the degree of difference (and how great it is) in the commitment of the BIM Mills to QSL as compared with Wilmar. The applicants say that the hypothetical commercial/member bystander would see and understand that each of the individual BIM Mills have very different views and now very different future relationships with QSL against which the question of unfairness of the amendments is to be judged. Ultimately, they say, having regard to these differences, the question is: Are the amendments to the Constitution so unfair that objectively viewed, the hypothetical reasonable bystander who considers the matter, would not have thought the passing of the amendments to be fair?

## Other aspects of the evidence

1. It is necessary to return to aspects of the evidence of Mr Beashel. At paras 46 and 47 of his 2015 affidavit, Mr Beashel describes aspects of the sugar supply arrangements in the period after 30 June 2017. Mr Beashel notes that the Grower will be entitled to require the Mill Owner to sell that quantity of the on‑supply sugar at least equal to the quantity of the GEIS to an entity nominated by the Grower for export sale. Mr Beashel says that the entities which might be nominated include QSL, Wilmar, MSF, Alvean, Dreyfus, Cargill, Czarnikow and Bunge, but there are others as well. Mr Beashel says that one third of the volume supplied to it by each of Wilmar, Tully, MSF, ISIS and Mackay is currently SEIS which those companies sell in competition with QSL.
2. Mr Beashel says that nearly all of QSL’s customers are sugar refiners. Those refiners seek to purchase raw sugar on the most competitive delivered price (and product offering). Mr Beashel says that QSL’s Board is considering and putting in place steps and strategies to be in a position to directly compete with Wilmar, Tully and MSF beyond 30 June 2017 and to be in a position to compete with them from now on in respect of the 2017 season and beyond. Mr Beashel says that QSL is seeking to market its services to Growers in a bid to secure Grower nominations for QSL as their GEISME rather than Wilmar, Tully or MSF or anyone else. Mr Beashel says that this question of competing for Grower nominations is one of the most significant and pressing items of business for the Board of QSL. Mr Beashel sets out considerations relating to that matter at para 55 of his 2015 affidavit. He also says, in his view, that the competition presented by Wilmar, Tully and MSF will directly affect the returns to the BIM Mills and the Growers who supply the BIM Mills who all depend upon QSL to achieve the best net price it can for raw sugar supplied by the BIM Mills to QSL.
3. Mr Gorringe is the CEO of ISIS.
4. Mr Gorringe says that it is important for ISIS to obtain a QSL Board position as soon as possible so that ISIS has the ability to influence QSL’s decisions and future directions “in the new landscape”. He seeks to identify the key reasons why a presence on the QSL Board for ISIS is important. He says that the current RSSA that all Mill Owners have with QSL contains a “bonus scheme” referred to as the “Premium Customer Grade” scheme and under this scheme Mills receive bonus payments for high quality sugar. Since ISIS produces high quality sugar, the scheme is of particular interest to ISIS. ISIS wants to ensure that the scheme is retained. Another key reason for seeking to obtain a Board seat is that ISIS wishes to be able to understand “certain risks to its business” arising out of QSL’s decisions because ISIS needs to make a decision in the near future as to whether to continue its RSSA with QSL or not. It must make the decision by 15 December 2016. Mr Gorringe says that ISIS will be exposed to additional costs if QSL is required to restructure its workforce due to lower volumes of raw sugar being supplied to QSL after the 2016 season. He understands that QSL intends to undertake “any necessary restructuring” in the 2016 season while the existing Mills – Wilmar, MSF and Tully are operating under their RSSAs. The costs of the restructure would then be borne by all of the Mills rather than just some of the Mills. Mr Gorringe is concerned that the restructure will take place in the 2017 season when the costs will be borne by a much smaller group of Mills across lower volume.
5. Apart from these issues, Mr Gorringe says that ISIS wants to make QSL more cost effective and reduce its costs as this is the “key way” QSL can become more competitive. He says that given that ISIS and the other BIM Mills are considering whether to remain with QSL, they have a vested interest in ensuring that the operating structures are as cost efficient as possible. He says that his own view, and that of ISIS, is that ISIS needs to appoint a director to the QSL Board as soon as possible in order to have a say in the decisions of QSL going forward to make it more competitive “given the way that the marketplace has now changed and particularly given that QSL will now be competing with Wilmar and MSF and other sugar marketing entities for the GEIS nominations of growers …”.
6. Mr Gorringe says that ISIS supplies all of its sugar for export to QSL under its RSSA and the proportion nominated as SEIS is about 40%. The SEIS is re‑supplied when the bulk sugar passes over the ship rail as raw sugar is discharged from one of the BSTs. ISIS has a contract with Itochu Corporation for the sale of a *portion* of its SEIS, *not all* of its SEIS. The other portion is marketed by QSL. The price paid to ISIS by Itochu Corporation is essentially based on the QSL price (determined according to the futures contract formulation) plus a premium. Mr Gorringe says that ISIS is exposed to the distribution of QSL’s costs apart from costs associated with direct marketing. Those costs include freight costs, the costs of visiting customers and the costs associated with running the QSL marketing team. Those costs represent costs apportioned to ISIS in the calculation of the price paid to it. Mr Gorringe understands that all companies selling SEIS through QSL are exposed to the cost distribution formula. Mr Gorringe also says that the primary motivation for striking a relationship with Itochu Corporation was to “get some learnings as a risk mitigation measure … with the least amount of financial impact as possible”. He says that if ISIS could make some money out of it at the same time that would be “great”. Mr Gorringe was pressed about some aspects of his key reasons for seeking to obtain a Board seat for ISIS on the QSL Board. He accepted that having a Board seat would enable ISIS to have better access to information. Propositions were put to Mr Gorringe that the primary objective was to serve the interests of ISIS rather than the interests of QSL. Mr Gorringe accepted that having the Board seat would give greater direct access to information. However, he rejected the notion that he was seeking to benefit ISIS alone. He took the view that ISIS could bring skills to the Board that the Board currently does not have. That was especially so in this sense: “… if QSL is looking to deal direct with growers I think that they have no understanding of the relative issues involved with pricing arrangements direct with growers and the complexity and how to do that cost effectively that, certainly, ISIS could bring”. Mr Gorringe added this: And, clearly, it’s in our interest for QSL to have the highest return it can get so I think we can add some value to the board”. Mr Gorringe accepted that he wanted to advance the idea that a restructure ought to take place as soon as possible and that all participants ought to bear the proportional cost of the restructure.
7. Mr Guy Basile is the CEO of Bundaberg.
8. Mr Basile says that the withdrawal by Wilmar, Tully and MSF from QSL has a significant impact on how QSL will operate because after June 2017 those Mills will no longer provide their raw sugar to QSL. Apart from any other consideration concerning Grower nominations, QSL is confronting the export sale of approximately 650,000 tonnes of raw sugar rather than 3.5 million tonnes. Mr Basile says that following the withdrawal of those Mills, Bundaberg formed the view that the size of QSL would need to be reduced. He says that concern for the increased marketing cost that could be payable by Bundaberg (and aligned Growers) is one of the reasons that led Bundaberg to consider potential changes to the QSL Constitution. He says that Bundaberg is concerned that it is already disadvantaged by not having a director on the QSL Board. He says that QSL seems to be focused on maintaining its current business structure rather than setting up the business for a new environment and making costs reductions that are necessary to ensure a viable business future for QSL. He says that he has no indication that QSL is starting to make a plan for the business that will take it beyond the 2016 season. He says that Bundaberg is concerned that QSL’s costs structure is higher than that of its competitors and this will impact on the revenue received by Growers. He says this is a factor which would ultimately drive Growers to nominate their GEIS in favour of competitors of QSL. Mr Basile says that the “Grower Choice” legislation has caused Bundaberg to re‑evaluate whether it should remain aligned with QSL in the manner in which it is currently aligned and a decision about this question must be made by 15 December 2016. He says that the question of whether it should remain aligned or not would “pose less of a problem if Bundaberg Sugar had representation on the QSL Board”.
9. Mr Basile says currently Bundaberg is 100% aligned with QSL both in terms of the SEIS and the GEIS elements. Bundaberg sells sugar domestically as refined sugar and the quantity of raw sugar it supplies to the domestic market is a function of the capacity of the refinery. The domestic price is based on the export sugar crops. Bundaberg will always put as much sugar as it can through the refinery which leads to a reduction in the volume of sugar supplied to QSL than that which would otherwise be supplied. 100% of Bundaberg’s raw sugar for export is supplied to QSL. Mr Basile said that he wanted a position for Bundaberg on the Board of QSL because Bundaberg wants to protect its Growers and be able to ensure that a competitive price, as compared with marketers, is being offered by QSL. He believes that that can be achieved by cutting costs at QSL. He says that the problem posed for Bundaberg of whether it should remain aligned would be less of a problem should Bundaberg obtain a Board seat because Bundaberg would then be able to influence the QSL model. He says the QSL model has to be “more robust” than it currently is in order to protect export sales both from Bundaberg’s position and that of the Growers. Having a Board seat would mean that Bundaberg could get “a bit closer to the action”. Mr Basile has ideas about how a restructure might be done. He says QSL has not responded to his proposals in that regard.
10. Mr Jason Lowry is the CEO of Mackay.
11. Mr Lowry has been in that role since September 2015. However, he commenced work with Mackay in May 2012 as Director of Factory Operations and then General Manager of Operations from May 2014. Mackay supplies 100% of its sugar for export from its Mills to QSL under the RSSA. One third of that amount is nominated as SEIS. He says that membership in QSL has several benefits for Mackay as compared with dealing with marketers of export raw sugar or, for that matter, compared with Mackay taking steps to expand its own marketing and financing activities. As to the latter, it has not done so.
12. The benefits of membership in QSL include access to pricing and marketing services, financing, and the operation of the BSTs. He says that QSL can offer these benefits over the alternatives because they are the incumbent marketing entity and they have all the systems and procedures set up and, in the past, they have had large volumes over which the costs can be shared. Mr Lowry says that with the withdrawal of the Wilmar, Tully and MSF volume, QSL will be reduced to selling much lower volumes. He says that with the introduction of the “Grower Choice” legislation, QSL may now have access to larger volumes through Grower nominations than it would otherwise have had. He says that in the new environment, Growers will be presented with a number of marketing options for their consideration including choosing QSL or their own milling company. Mr Lowry says that the Grower will be attracted to the best offering in terms of price transparency, pooling, financing and pricing options. He says QSL will be competing with other marketing alternatives to attract the nominations of the Growers. Mr Lowry says that entities in this environment will be competing with QSL to provide offerings that will attract Grower nominations. Mr Lowry says that what follows from this is that QSL’s ability to compete is crucial and Mackay’s view (and his own view) is that it is imperative that QSL is run as efficiently as possible. He says this is one of the key reasons why Mackay wishes to have a say in the operation of QSL through a Board seat. Mr Lowry says that QSL will be required to make changes to its business model which will include cost containment and reconsideration of the required staff levels to provide the ongoing level of services. Mr Lowry says that Mackay wishes to continue to market its sugar through QSL but wants to be able to appoint a director so as to have input into the operational changes required to make QSL competitive.
13. Mr Lowry says that Mackay holds a 25% interest in the Sugar Australia Joint Venture and New Zealand Sugar Company Limited. It has a contractual requirement to supply milled cane to the joint venture. Thus, raw sugar is sold either to the export market or to the domestic market. Mackay supplies 450,000 tonnes of available milled sugar to the joint venture and the excess goes to QSL for export. All of Mackay’s SEIS that goes to export is supplied to Alvean. Mackay sells SEIS to Alvean because it makes a greater profit from doing so than by selling SEIS through QSL. However, once it became clear to Mackay that Wilmar, Tully and MSF had elected to withdraw from QSL, Mackay became concerned about QSL’s future with the result that Mackay “needed to have an intro into the market in the instance, or the time, where QSL was no longer in operation”. Mr Lowry says that Mackay’s contracts go through to 2019 with QSL. The next rollover date for the contracts is 15 December 2016. Mr Lowry says that the premium on the Alvean sales of SEIS is shared two thirds/one third with the Growers.
14. Mr Lowry was pressed about Mackay’s notion that it wishes to continue to market its sugar through QSL in circumstances where it has chosen not to market SEIS through QSL. He says that Mackay intends to continue to supply its export raw sugar to QSL. He does not accept that Mackay’s intention to do so is contingent upon Mackay obtaining a Board seat on QSL. Mr Lowry does not accept that Mackay has no economic interest in GEIS. He says that the returns that come out of QSL go into a pool with the returns that come out of Alvean and that money is pooled and is split according to a formula in the cane supply arrangements. In that sense, Mackay remains exposed to QSL. Mr Lowry accepts that his corporate objective is to make as much money for Mackay as he possibly can but he also says that “the whole intention here is that we help QSL through the board seat to become efficient, become more efficient, and compete [and] it’s our intention to stay in QSL”.

## Considerations

1. Wilmar resists the declaration sought by the applicants and cross‑claims for relief. Fundamentally, Wilmar says that the amendments to the Constitution adopted on 5 July 2016 discriminate against Wilmar which is unexplained by any reference to any of the considerations the applicants rely upon in support of the declaration they seek. Wilmar says that the amendments operate by *selecting* Wilmar (and other Mill Owner Members having given a Notice to Terminate) for *differential* treatment in a way which reduces the objectively neutral mathematical formula contained within the Constitution to a discriminatory set of facts which work oppression upon Wilmar. Wilmar says that because the discriminatory selection of it (and the other terminating Mills) is unexplained, the amendments operate in a way which is unfair, unfairly prejudicial to it and oppressive to it. Wilmar also says that inherent in the consideration of that which constitutes unfair prejudice, unfair discrimination and oppression, is the notion that the amendments work a fraud upon the power of the Members in general meeting to effect the amendments.
2. These propositions are amplified in the written submissions.
3. One aspect of these contentions has a necessary inter‑relationship with the Constitution itself. Particular emphasis is placed upon Article 6 of the Constitution and the point made is that the emergence or existence of competition between a Mill Owner Member and QSL is not, as a matter of construction of the Constitution, a matter which justifies discriminatory treatment between Mill Owner Members. The proposition is that a close examination of Article 6 shows that differential treatment between Members by reason of their competitive posture or the consequences of emergent contestability provides no basis, consistent with the objects of QSL, for adopting amendments going to the appointment of Mill Owner Directors which discriminates between Mill Owner Members of QSL. Wilmar says that this is especially so when the *relevant field* of contestability concerns GEIS which, by definition, is Grower “economic interest” sugar. QSL, Wilmar, other Mill Owner Members, other marketers of export sugar will all be vigorously engaged in seeking to secure Grower nominations in the new environment. Wilmar makes this point throughout its submissions by reference to the various objects within Article 6 of the Constitution. However, the synthesis of the point is as I have just described it.
4. Wilmar says that when the Constitution is properly construed, having regard to the totality of the provisions (and I have quoted the relevant provisions in these reasons), it can be seen that Wilmar loses a vote of the kind and quality which it held under the Constitution before the amendments. Instead of being able to vote on the appointment of up to *four directors* (and control any vote on any of the directors), Wilmar is now reduced to being able to vote for only one director. Qualitatively (and quantitatively) this has the effect, it is said, of entrenching the BIM Mills with the result that although the amendments do not bring about a complete disenfranchisement of Wilmar (and other Mills choosing to terminate their RSSAs), it nevertheless remains the position that Wilmar and the other two terminating mills have been “singled out” for treatment in a way which is *different* from all other Mill Owner Members. Between the three Mill Owner Members who have elected to terminate their agreements, they now have a voting say in relation to the appointment of *one director* only. Wilmar also says that, correspondingly, the BIM Mills have *entrenched* their position having obtained the right to each *appoint* a director to the Board of QSL.
5. Wilmar also says that there is a question of construction in relation to the amendments because the definition of “Continuing Mill Owner Member” means a Mill Owner Member which has an agreement to supply raw sugar to QSL for sale to export markets which agreement has not terminated (irrespective of whether a Notice to Terminate that agreement has been given), completed or otherwise expired. Wilmar says that the only *content* of that agreement is that there must be an agreement to supply raw sugar to the company for sale for export markets and that no other content is identified. However, s 33B of the Real Choice Act gives a Grower, unless otherwise agreed, the right to cause the Mill Owner to sell GEIS to a nominated marketing entity and that, by and large, everyone is therefore likely to have an agreement to supply raw sugar to QSL for sale to export markets because, for the foreseeable future at least, QSL will continue to market raw sugar for export representing the GEIS component. Although the long term future might be different, the immediate position is otherwise.
6. More fundamentally, Wilmar says that *competition* for Grower nominations for GEIS is no basis for *discrimination* between Mill Owner Members for the purpose of the Constitution and this is especially so because Mill Owners do not have the economic equivalent of ownership in GEIS. Wilmar says that contestability for GEIS nominations between a field of market participants including Mill Owners and export desk sellers provides no justification for differential treatment, within the Constitution, of Mill Owner Members. Wilmar says that elevating this kind of contestability to a *proper basis* for differential treatment is explained on the footing of “camps” and “alignments” and those notions rise no higher than the relevance of the underlying competition itself which may or may not have informed decisions on the part of some Mill Owner Members to cease to be “aligned”.
7. Wilmar chose to call no evidence in its case. Wilmar put in one document which is drawn from Mr Shayne Rutherford’s affidavit. Mr Rutherford is the Executive General Manager of Strategy and Business Development for Wilmar and a Director of Wilmar. Nevertheless, no evidence was called from Mr Rutherford.
8. As to the evidence of Mr Gorringe for ISIS, Mr Basile for Bundaberg and Mr Lowry for Mackay, I accept their evidence. They answered all questions put to them frankly. There is no doubt that each of these entities conducts their business undertaking as profit maximising entities. There is also no doubt that they wish to take steps to exercise a right to each appoint a director to QSL with a view to seeking to inject business disciplines into the decision‑making of that company so as to reduce costs and enable QSL, if possible, to continue to function on a structural basis which enables it to secure acceptable returns to Mill Owner Members and Growers in an environment in which its historical structures, put in place for the purpose of marketing 3.5 million tonnes of raw sugar, are seen, by the industry members, as inappropriate to a new market function of securing export sales for perhaps as little as 650,000 tonnes of raw sugar. That may prove to be untrue because QSL might, through whatever mechanisms it deploys in a contestable way, secure Grower nominations for GEIS which will mean that it will have more raw sugar to sell on the export market than 650,000 tonnes. Having had the benefit of their evidence, I am satisfied that each of those parties have approached the exercise of the power to make amendments for entirely proper purposes consistent with the evidence they have given.
9. I accept the evidence of Mr Beashel.
10. The question remains of whether, because the amendments discriminate against a Mill Owner Member who has, on the one hand, given a Notice to Terminate and, on the other hand, Mill Owner Members who have not, the amendments operate in a way which is properly described for statutory purposes as unfairly discriminatory, prejudicial or oppressive. The parties do not disagree about the law to be applied. The test is whether, objectively viewed, the hypothetical reasonable commercial bystander having regard to all the *relevant* circumstances would regard the amendments as unfair. A point of differentiation between the applicants and Wilmar concerns the authorities relied upon by the applicants. Wilmar says that authorities directed to proprietary entities have no proper application to an entity such as QSL which has the objects recited in its Constitution and is a company limited by guarantee.
11. QSL is a substantial trading corporation. It happens to have a particular structure based on its historical evolution. However, annually, it sells about 3.5 million tonnes of raw sugar on the export market and generates about $1.7 billion in revenue.
12. I accept that the question of whether the hypothetical reasonable bystander would regard the amendments as unfair within the statutory language engages an objective consideration by that hypothetical commercial bystander or hypothetical member of the circumstances which conditioned the amendments to the Constitution. Those amendments did not come out of the ether. The Constitution contains an existing method or protocol for the appointment to the Board of QSL of Mill Owner Directors. Under that system, votes were allocated in proportion to the quantity of raw sugar supplied to QSL for export. That system no doubt had rationality about it as one method because it reflected a degree of influence over the appointment of Mill Owner Directors linked to the extent of the economic interest of a particular Mill Owner Member in QSL measured by the volume of sugar it supplied to QSL. The power of appointment was, understandably, placed in the hands of those who supplied the most export sugar over the relevant three year period. Smaller Mill Owners were left with no meaningful say in the appointment of Mill Owner Directors. That method itself operated to discriminate between and amongst Mill Owner Members based on what might rationally be regarded as the greater or lesser interest held between and amongst those Mill Owners according to the proportion of the raw sugar they supplied to the corporation for export sale. Moreover, if a Mill Owner Member such as Heck supplied no raw sugar for export to QSL, its position was once further removed. A Mill Owner Member that has supplied no raw sugar to QSL for export sale has no say at all in the appointment of Mill Owner Directors.
13. I accept that this method cannot properly be described as neutral. It is simply one method adopted by the Constitution. It is commercially logical in the sense that it is based upon a voting formula referable to calculable numbers based upon volume. It brought about the result that Wilmar which supplied 60% of the raw sugar for export sale to QSL over the preceding three years was able to control 100% of the Mill Owner Director appointments or whether there would be any Mill Owner Director appointments. Those who supplied to QSL 40% of the raw sugar for export sale effectively had no control over the appointment of the four Mill Owner Directors notwithstanding that they were contractually bound to supply 100% of their raw sugar production for export sale, to QSL.
14. Such a system was also rational in a commercial sense because, in a particular environment, those Mill Owner Members over the preceding three years who had supplied the most raw sugar to QSL for export sale probably had the highest degree of interest in the future success of QSL’s market performance as an export selling desk with associated risk management skills in finance, hedging and all of the other features required to function as a credible export seller of raw sugar. Those Mill Owner Members with that high degree of interest might rationally have a corresponding degree of influence over the appointment of Mill Owner Directors because they would have the most significant stakeholder interest in the future performance of QSL, managed and governed, as it would be, by its Board.
15. However, the future is not what it used to be, in this industry. *Past* commitment to QSL’s future over three previous years or otherwise has *no relevance* to QSL’s actual future. Once Wilmar, Tully and MSF gave a Notice to Terminate their respective RSSAs, the Mill Owner Members of QSL were confronted with two choices either of which or neither of which might have been best adapted to the changing circumstances. The first choice involved continuing with the existing system which would mean that a value judgement was being made that a Mill Owner Member which supplied more than 50% of the raw sugar to QSL for export in the preceding three years should continue to control 100% of the Mill Owner Director positions (or whether there would be any Mill Owner Directors) entirely regardless of, and detached from, its commitment to QSL in the future. The other choice involved selecting a new system which, objectively viewed, has the effect that each Mill Owner Member who remains committed to QSL for the future is entitled to appoint a director but only for so long as that commitment remains.
16. Mill Owner Members which remain committed to supporting QSL by seeking to make it capable (by restructure and other disciplines) of providing a competitive offering to the Growers with whom those continuing Mill Owner Members have relationships, and to the Mill Owner Members themselves, seek, on the evidence, to secure appointments to the Board of QSL to see whether QSL can endure in the new competitive environment.
17. The applicants say that unlike the 2015 amendments, the 2016 amendments which reflect the choice of enabling those Mill Owner Members who remain committed, in the future, to QSL, to appoint a Mill Owner Director so long as the Mill Owner Member remains committed to a supply relationship with QSL, does not disenfranchise those Mill Owner Members who have given a Notice to Terminate from 1 July 2017 because that class of Mill Owner Members nevertheless retains the right to vote on the appointment of one of the four director positions and in the event that Bundaberg, ISIS or Mackay gives a Notice to Terminate to QSL, they would be able to also vote on the additional director position.
18. I accept that, for the purposes of oppression, the question is not whether one particular approach or choice is correct or incorrect or whether one particular choice confers advantages on one group as opposed to another. The question to be asked is whether it is *unfair* to Wilmar to select the choices inherent in the new system reflected in the 2016 amendments over the old system. Would an informed reasonable hypothetical member or bystander have thought it unfair, objectively viewed, to adopt amendments which conferred benefits upon those Mill Owner Members who continue to support QSL as compared with those Mill Owner Members who do not and who have chosen to leave their support behind (with their substantial volumes essentially lost to QSL from 1 July 2017). It may be that QSL will, by its contestable conduct, secure nominations from Growers but as Mr Basile said, it may not. Those who stay “aligned” to QSL have a *direct interest* in ensuring that QSL is capable of conducting the remnant business undertaking in a way which is disciplined and useful to continuing Mill Owner Members and the Growers with whom those Mill Owner Members have historically had a strong relationship.
19. I also accept that the hypothetical fully informed reasonable bystander would be fully informed about the change to circumstances both in relation to the election by Wilmar, Tully and MSF to no longer supply raw sugar for export to QSL (subject to Grower nominations that might be won by QSL) and the changes in the environment after 1 July 2017. The question the hypothetical reasonable bystander or hypothetical member will ask themselves is this: Having regard to the preferences or choices before informed industry participants seeking to deal with QSL and its position in a forward‑looking way, is it *unfair*, objectively viewed, to implement a system, by amendments to QSL’s Constitution, that will remove Wilmar’s absolute control over the appointment of Mill Owner Directors (or whether there will be any Mill Owner Directors appointed) in circumstances where Wilmar has chosen to take the volume of its sales away from QSL as from 1 July 2017, with no prospect of that volume ever coming back (subject to any Grower nominations QSL might contestably win), and allow other Mill Owner Members who remain to appoint directors and implement their decision‑making over the management of the company for the future.
20. I am satisfied that no reasonable bystander would, objectively viewed, regard the amendments as unfair. I accept that in order to be oppressive, the reasonable bystander must consider, objectively viewed, the amendments to be unfair. It is not enough that minds might differ about the choices or that there are advantages and disadvantages in the choices made by the amendments or that the amendments might operate in a way which could be regarded as “harsh”, although I do not regard the amendments as operating in that way. The question is whether the amendments are *unfair* objectively viewed having regard to all the relevant circumstances, from the perspective of the hypothetical reasonable commercial bystander.
21. On what basis can it be said that Mill Owner Members who have chosen to no longer have a future supply relationship with QSL, should retain the right to control the appointments of Mill Owner Directors to the Board of QSL? Plainly enough, in the period up to 30 June 2017, the departing Mill Owner Members still have, in a limited temporal sense, a fully engaged relationship with QSL. Disregarding that aspect of the matter was the vice inherent in the 2015 amendments.
22. I am satisfied that the statement of principle concerning the scope of the question to be answered by the hypothetical commercial bystander is reflected in these observations of Mason ACJ, Wilson, Deane and Dawson JJ in *Wayde v New South Wales Rugby League Limited* (1985) 180 CLR 459 at 467, in these terms:

The answer to this contention is that no amount of sympathy for Wests can obscure the fact that the League was expressly constituted to promote the best interests of the sport and empowered to determine which clubs should be entitled to participate in competitions conducted by it. It was upon this basis that the clubs, including Wests, chose to incorporate. Indeed, the 1984 correspondence between Wests and the League which is in evidence plainly shows that Wests itself fully appreciated that it had no secure right to participate in the premiership competition. In truth, the Board was confronted with a conflict of immediate interest between Wests on the one hand and the League as a whole on the other and the exercise of the power conferred by Art 76 must necessarily be prejudicial to one or the other. Given the special expertise and experience of the Board, the bona fide and proper exercise of the power in pursuit of the purpose for which it was conferred and the caution which a court must exercise in determining an application under s 320 of the Code in order to avoid an unwarranted assumption of the responsibility for management of the company, the appellants faced a difficult task in seeking to prove that the decisions in question were *unfairly* prejudicial to Wests and therefore not in the overall interests of the members as a whole. It has not been shown that those decisions of the Board were such that no Board acting reasonably could have made them. The effect of those decisions on Wests was harsh indeed. It has not, however, been shown that they were oppressive or unfairly prejudicial or discriminatory or that their effect was such as to warrant the conclusion that the affairs of the League were or are being conducted in a manner that was or is oppressive or unfairly prejudicial.

1. At p 473, Brennan J said this:

The question here is whether the resolutions which were manifestly prejudicial to and discriminatory against Wests, were also unfair – that is, so unfair that reasonable directors who considered the disability the decision placed on Wests would not have thought it fair to impose it. The decision by the League’s directors to reduce the number of competitors to twelve and to exclude Wests was in fact taken with full knowledge of the disability that that decision would place on Wests. But the directors also knew that the larger competition was burdensome to, and perhaps dangerous for, players and that a shorter season was conducive to better organisation of the Premiership Competition. The directors had to make a difficult decision in which it was necessary to draw upon the skills, knowledge and understanding of experienced administrators of the game of rugby league. The court, in determining whether the decision was unfair, is bound to have regard to the fact that the decision was admittedly made by experienced administrators to further the interests of the game. There is nothing to suggest unfairness save the inevitable prejudice to and discrimination against Wests, but that is insufficient by itself to show that reasonable directors with the special qualities possessed by experienced administrators would have decided that it was unfair to exercise their power in the way the League’s directors did.

1. I am satisfied that the degree and measure of the difference in the commitment to QSL as between the BIM Mills and Wilmar, Tully and MSF is critical. It informs the objective view the hypothetical reasonable bystander would reach. No doubt, the BIM Mills are considering their position. A decision has to be made by 15 December 2016. Evidence has been given by Bundaberg, ISIS and Mackay. Plainly, in some cases, portions of the SEIS are being marketed through alternative marketers. Equally plainly, the BIM Mills are profit maximising entities. However, it cannot *seriously* be doubted, on the evidence, that the BIM Mills are committed to seeking to make QSL an effective enduring export seller of raw sugar. Plainly, some Mill owners have engaged with Alvean and Itochu partly because of an apprehension that QSL might not endure and partly because they need to obtain the services and experience of another exporter. However, fundamentally, the BIM Mills remain committed to QSL. In a contest between the *degree* of commitment as between Wilmar, Tully and MSF on the one hand and the BIM Mills on the other, it is perfectly plain that the BIM Mills have a commitment and the others do not, as to the future of QSL.
2. I am satisfied that all of these considerations and the emergence of the contestable environment for GEIS are matters which the reasonable bystander would take into account in determining whether the 2016 amendments are *unfair* in the statutory sense. I am not satisfied that *that* decision is informed by construction questions going to Article 6 of the Constitution.
3. Moreover, I am satisfied that the amendments, as a matter of construction, are reasonably plain. They contemplate a circumstance in which a *Mill Owner Member* which has *an agreement* to *supply raw sugar* to QSL for sale to export markets which agreement has *not terminated* (irrespective of whether a Notice to Terminate the agreement has been given) completed or otherwise expired, is a *Continuing Mill Owner*. The BIM Mills are entities which have an agreement to supply raw sugar to QSL for sale to export markets which satisfies the description in the definition and thus they are *Continuing Mill Owner Members* because they are Continuing Mill Owners. The term *Original Continuing Mill Owner Members* means the Continuing Mill Owner Members as at 30 May 2016 (Mackay, ISIS and Bundaberg) and who, in relation to each such Member: (a)  continues to be a Continuing Mill Owner Member; and (b)  has not given a Notice to Terminate in respect of their *current agreement* to supply raw sugar to the company for sale to export markets. The effect of the new Article 31 is that each Original Continuing Mill Owner Member may appoint one Mill Owner Director and remove any Mill Owner Director appointed by that Original Continuing Mill Owner Member and those Mill Owner Members who have given a Notice to Terminate have a right to appoint one Mill Owner Director.
4. I am satisfied that the construction and operation of the amendments is clear.
5. I am satisfied that the cross‑claim is not made out. I am satisfied that a declaration ought to be made as sought by the applicants.
6. The first respondent is to pay the costs of and incidental to the proceedings.

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| I certify that the preceding one hundred and fifteen (115) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Greenwood. |

Associate:

Dated: 3 October 2016

SCHEDULE OF PARTIES

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| Applicants |  |
| Second Applicant: | ISIS CENTRAL SUGAR MILL COMPANY LIMITED ACN 009 657 078 |
| Third Applicant: | BUNDABERG SUGAR LIMITED ACN 077 102 526 |
| Respondents |  |
| Second Respondent: | MSF SUGAR LIMITED ACN 009 658 708 |
| Third Respondent: | QUEENSLAND SUGAR LIMITED ACN 090 152 211 |