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27 April 2010

By email and post: hrtramway@ncc.gov.au

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National Competition Council
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Contact
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Attention: Natalie Naylor / Jessamine
Lumley

Dear Mr Fell

Application for declaration of Herbert River Tram Network

Please find **attached** to this letter an electronic copy of a Submission by Sucrogen (Herbert) Pty Ltd (formerly CSR (Herbert) Pty Ltd), together with the relevant Annexures.

Appendix 1 to the Submission (comprising a map of the cane railway) is not available electronically. A hard copy of the Submission, together with all Annexures, (including the map) is being couriered to you.

Representatives of Sucrogen would appreciate a meeting with the Council's staff to discuss the Submission and other matters relating to NQBE's Application for Declaration. We will contact your office to arrange a suitable time, assuming you are able to meet with us.

In the meantime, if you have any questions regarding the attached Submission, please do not hesitate to contact us.

Yours faithfully

Corrs Chambers Westgarth



Eddie Scuderi
Partner

Sucrogen (Herbert) Pty Ltd

Submission to National Competition Council

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1 Executive Summary and Key Points

- 1.1 Sucrogen (Herbert) Pty Ltd (**Sucrogen**) submits that the Council cannot, and should not, recommend the declaration of the service the subject of the application by North Queensland Bio-Energy Corporation Limited (**NQBE**) for reasons including the following.
- 1.2 **Increased access to the service will not promote competition.** The Council cannot be affirmatively satisfied that the declaration would promote a material increase in competition in a market for the following reasons.
- (a) NQBE's project is totally speculative, and to Sucrogen's knowledge, fundamentally deficient in the necessary level of development required for a project at, or near, financial close. For example, NQBE has:
- (i) not secured a Development Approval for the land on which its proposed factory will be built, and the Development Approval it has lodged is seriously deficient;
 - (ii) not provided any details of its financing for the \$400 million it says it needs to build and commission the proposed factory;
 - (iii) insufficient share capital to fund any significant component of the project – its issued share capital is less than \$130,000;
 - (iv) no current cane supply agreements in place—previously entered agreements are no longer in force—and has not provided any evidence to support the assertion that it has secured over 2 million tonnes of sugarcane for its proposed factory;
 - (v) no easements or licensed rights over land to which it would need access in order to collect sugarcane for its proposed factory;
 - (vi) no access to water for its proposed factory due to a State Government moratorium and has provided no details on how it will secure the very substantial volumes of water it will require to operate its factory;
 - (vii) no connection and access agreements allowing it to connect to the electricity transmission network for the electricity its says its factory will produce; and
 - (viii) no sale agreements for the sale of the ethanol and electricity it says its factory will produce.
- (b) Even if NQBE's project was subsequently implemented, it would not promote a material increase in competition in the market for sugarcane, or in the markets for any of the proposed products, as expert economic analysis commissioned by Sucrogen demonstrates.

- (c) The service has insufficient capacity for concurrent operations of another operator and therefore such access would require significant capital upgrades or force a sub-optimum utilisation pattern by the second operator, either of which is highly likely to render NQBE's project uncompetitive and unviable.
 - (d) The points in (b) and (c) apply equally to any other potential access seekers.
 - (e) Sucrogen is not aware of any other potential access seekers and if the service is declared, NQBE is likely to be the only access seeker because in Sucrogen's view, a single new milling entrant would not be viable in the supply-constrained Herbert cane growing region; consequently, any additional new milling entrants would clearly be unviable.
- 1.3 **Sucrogen cannot provide an integral part of the service.** Essential parts of the service NQBE seeks declaration of (namely easements and rights of passage over land) cannot be declared as Sucrogen has no rights at law to provide access to third parties under its easement agreements. Even if they could be declared, the terms of easements prevent the relevant landholders from granting rights that interfere with Sucrogen's rights.
- 1.4 **The tram network is not nationally significant.** Sucrogen's Herbert region tram network is not nationally significant having regard to:
- (a) size, replacement cost, or throughput (less than 0.4% of global production) ; or
 - (b) its contribution to trade, commerce, and the national economy (the value of cane transported is less than 0.02% of GDP).
- 1.5 **Duplication of the service is economic.** Sucrogen submits it is economic to duplicate the service by using road transport. Road transport of cane is economically used at a number of Queensland sugar mills and is the only form of cane transport used in Brazil, Thailand and other sugar producing countries that have lower or similar cost structures to Australia. Road transport is also the sole source of cane transport at 24% of Australian sugar mills.
- 1.6 **Declaration is not in the public interest.** Declaration of the service is not in the public interest as this is likely to result in significant regulatory burdens for Sucrogen as its exemption from the operation of the *Transport Infrastructure Act 1994* (Qld) will likely cease to apply.
- 1.7 **The service is use of a production process.** The transport of cane from sidings to Sucrogen's sugar mills is an essential component of Sucrogen's sugar milling production process. Due to the unique perishable nature of sugarcane (it must be milled as soon as possible after harvesting), Sucrogen controls (with 24 hour real-time adjustment to manage stoppages, delays or capacity constraints in any segment of the process) the scheduling of harvesting groups and cane movement from the sidings to Sucrogen's mills so that Sucrogen's mills can continuously mill sugarcane.

- 1.8 The supporting analysis and argument for the points made above are further summarised in the following Key Points and fully detailed in the following submissions and annexures.

Key Points

Criterion (a) – Promotion of competition

- 1 The Council cannot recommend declaration of a service if it is not satisfied that access **would** promote a material increase in competition in a market.
- 2 The Council cannot be satisfied that access to Sucrogen’s Tram Service would promote competition in any market because:
 - NQBE’s application is entirely speculative, premature and misconceived;
 - This is not a case in which a fully planned and funded project is seeking an access declaration in order to proceed; here the application for declaration precedes all of the fundamental project development elements that one could reasonably expect to see in a sound project proposal and hence there remains a significant risk that the project will not proceed.
 - NQBE has:
 - failed to provide the feasibility study upon which its project is based (or if it has provided it to the Council, it has not been made available to CSR for review, thereby denying Sucrogen an opportunity to respond to it)
 - not secured a Development Approval for the land on which its proposed factory will be built, and the Development Approval it has lodged is seriously deficient;
 - not provided any details of its financing for the \$400 million it says it needs to build and commission the proposed factory;
 - insufficient share capital to fund any significant component of the project – its issued share capital is less than \$130,000;
 - no current cane supply agreements in place - previously entered agreements are no longer in force - and has not provided any evidence to support the assertion that it has secured over 2 million tonnes of sugarcane for its proposed factory;
 - no easements or licensed rights over land to which it would need access in order to collect sugarcane for its proposed factory;
 - no access to water for its proposed factory due to a State Government moratorium and has provided no details on how it will secure the very substantial volumes of water it will require to operate its factory;
 - no connection and access agreements allowing it to connect to the electricity transmission network for the electricity its says its factory will produce; and
 - no sale agreements for the sale of the ethanol and electricity it says its

factory will produce.

- 3 In any event, the Council cannot be satisfied that access by NQBE, or any other access seeker to Sucrogen's dedicated cane Tram Service would promote a **material increase** in competition because, as concluded by the economic analysis commissioned by Sucrogen from Synergies Economic Consulting (Synergies),:
- declaration will not have any material impact on entry into the cane production sector in the Herbert River district;
 - as a result of the combined effect of the geographic constraint on the production of sugarcane and the impact of competing land uses it is highly unlikely that there will be a material increase in sugarcane supply;
 - it is highly unlikely that declaration will cause the increase in returns to cane growers necessary to raise the incentives for producing cane to the point that it would result in a material increase in competition for the sale and production of sugarcane;
 - declaration is not necessary for NQBE or any other access seeker to enter the sugarcane processing market in the Herbert district;
 - declaration will not result in a material increase in the national ethanol market given the range of potential feed-stocks, the existence of import competition, the constraints on production of sugarcane in the Herbert district and the potential competition from other sugar millers if the market conditions are such as to encourage entry into the ethanol market;
 - consistent with the view expressed by ROAM Consulting, declaration will not have a material impact on competition in the market for electricity;
 - declaration of the Tram Services could not possibly have a material impact on international sugar prices or competition in the international market for sugar.

Essential parts of the Service cannot be declared

- 4 NQBE seeks to have declared a service which includes "*easements and other facilities which provide access to the tram route*". NQBE needs that access to allow it collect sugarcane from sidings at various points along the Tram Network.
- 5 Sucrogen does not have the legal right to permit NQBE, or any other access seeker, to have the benefit of the easements to which CSR only has limited purpose and personal rights of use. Declaration cannot overcome this legal impediment.
- 6 The specific terms of the easements over which the Tram Network runs both prevent Sucrogen from granting any access seeker rights to use the easements, and prevent the relevant landholders from granting rights that interfere with Sucrogen's rights under the easements.
- 7 In any event, it is beyond the power of the Council to recommend

declaration of the Tram Service including the easements, because an easement is not a “facility” within the meaning of Part IIIA.

Criterion (c) - national significance

- 8 The Council cannot be satisfied that the Tram Network is nationally significant because, consistent with the views of Sucrogen’s economic consultant, Synergies:

Size

- (a) even if one assumes a higher replacement cost (\$258m is a figure used in this submission as a conservative estimate) for the Tram Network than that quoted by NQBE (\$77m), it is still at the lower end of the range of estimates for rail network replacement costs for other rail networks considered by the Council;
- (b) the length of the Tram Network is not, of itself, a determinative factor on the question of national significance on the basis of size. Moreover, the physical characteristics of the Tram Network are markedly different to those rail networks where size has been one of the factors considered relevant by the Council in the past and here, the entire Tram Network is located within a single local government area and comprises a radial rather than point-to-point network;
- (c) the throughput and capacity of the Tram Network (3.9Mtpa and 5.5Mtpa respectively) are well below corresponding volumes for those railway networks that have satisfied the criterion;

Importance to trade, commerce and the economy

- (d) the sugar industry is a very small contributor to Australia’s export earnings compared to other export commodities and the Herbert district accounts for less than 20% of raw sugar exports and 0.4% of total world production. All sugarcane transported on the Tram Network has a value of less than \$200m which represents less than 0.02% of GDP;
- (e) the Herbert district contains only 2 of 25 processing mills in the Australia; and
- (f) significantly, the introduction of a second sugar processor in the Herbert district will not result in any increase in the volume of raw sugar produced in the district or carried on the Tram Network – the available land for sugarcane is constrained and NQBE simply proposes to acquire sugarcane that would otherwise be acquired by Sucrogen.

Criterion (b) - uneconomical to duplicate

- 9 NQBE has failed to provide any cogent evidence or substantive analysis for its assertion that it is uneconomic to develop another facility to provide the service – it relies, in part, on a three line email from a trucking contractor.
- 10 By contrast, Sucrogen’s economic consultant, Synergies, concludes that

road transport is a source of supply-side substitution in the sugar haulage market in the Herbert district and that consequently, in the absence of further assessment, there is a strong element of doubt about whether the declaration application satisfies this criterion.

- 11 Sucrogen's view is that the NQBE application on this point is naive and simplistic. Sucrogen also notes that road transport is the sole source of cane transport in 24% of Australian sugar mills and the sole source of transport in other sugar producing countries.

Criterion (f) – Not contrary to public interest

- 12 The Council should not declare the Network Service if by doing so, it would expose CSR to significant regulatory burdens and a loss of statutory exemptions. Declaration would expose the Tram Network operation of the *Transport Infrastructure Act 1994* (Qld) which carries significant regulatory burdens from which CSR is currently exempt because it operates the Network as a cane railway. NQBE intends to use the Network for the transportation of non-cane commodities and other access seekers may also transport other products
- 13 It is not in the public interest for the Council to recommend declaration or for the Minister to declare a service that is unlikely to be utilised.
- 14 Sucrogen is not aware of any other party (apart from NQBE) ever seeking rights to use Sucrogen's Tram Service and therefore the utility of the declaration is appropriately judged against NQBE's application.
- 15 NQBE is unlikely to ever utilise the Tram Service because:
- (a) its project is highly speculative and fails to exhibit any of the detailed planning, funding and underlying contractual arrangements needed for anyone to have confidence that the project will proceed;
 - (b) even if the Tram Service is declared there is no capacity available for any access seeker during the constrained (22 week long) cane harvesting and crushing season – the crushing season is the primary access period because the Tram Service is designed and dedicated to the collection of sugarcane;
 - (c) there is a lack of daily capacity during the cane season given the logistical and sugarcane specific constraints of collection, transportation and crushing;
 - (d) NQBE has failed to recognise or provide any details for how it will fund the very significant costs of access, including the costs of numerous new passing loops, new sidings, new communication systems, new signalling systems, maintenance costs and access charges; and
 - (e) NQBE has failed to provide any details of how it will fund the acquisition of locomotives and rolling stock or details of the lead-time for their availability.

Production Process

- 16 The Council cannot declare a service if it is a production process.
- 17 By reason of many factors, including:
- (a) the perishable nature of sugarcane which means it cannot be stockpiled;
 - (b) the daily planning, implementation and adjustment of co-ordinated harvesting, collection, transportation and crushing schedules during the limited (22 week) cane season;
 - (c) the link under the payment provisions of cane supply contracts between the daily deliveries of cane by a farmer using the Tram Service and the crushing of that specific cane;
 - (d) the fact that Sucrogen is subject to financial “penalties” for delays in crushing after collection at rail sidings; and
 - (e) the fact that any delay in the crushing of cane will have a direct impact on the collection and transportation schedule for that day and possibly the next, and vice versa,
- the transportation of sugarcane using the Tram Service is part of an integrated single production process.
- 18 The decision in BHPBIO is distinguishable:
- (a) by reason of the very different nature of the Sucrogen network as compared to the rail network in the Pilbara and the very different nature of the product transported – sugarcane cannot be stockpiled and must be processed promptly; and
 - (b) unlike Fortescue, NQBE expressly states in its application for declaration that it will be using the Tram Service to process sugarcane and other products at its factory.

Conclusion

For all the reasons set out above and more particularly discussed in the balance of this submission, the Council should not recommend declaration.

2 Introduction

- 2.1 NQBE has applied under section 44F(1) of the *Trade Practices Act 1974* (Cth) asking the Council to recommend the Tram Service be declared. (For convenience, Sucrogen uses the definitions in NQBE’s application unless defined otherwise in this submission.)
- 2.2 The Tram Network comprises a narrow-gauge, multi-point, single-track rail network linking farms (via numerous sidings) in the Herbert River (or Herbert) sugarcane district to the Victoria and Macknade sugar mills owned by Sucrogen (**Sucrogen’s Mills**) and linking Sucrogen’s Mills to the Lucinda bulk sugar terminal on the Queensland coast near Ingham. A full description of the cane railway network operated by Sucrogen in the Herbert district is contained in **annexure A**.

- 2.3 This submission is made by Sucrogen,¹ the owner of the facility used to provide the Tram Service, under section 44GB.
- 2.4 Sucrogen submits that NQBE's submission is so fundamentally deficient that it does not permit the Council to be satisfied about the declaration criteria.
- 2.5 Sucrogen submits that the Council should not recommend the declaration of the Tram Service for the following reasons.
- (a) The Council cannot be satisfied that access (or increased access) to the Tram Service will promote competition in any relevant market (criterion (a)).
 - (b) An integral aspect of the Tram Service (which NQBE seeks to have declared), namely the benefit of easements and other rights to pass over land, cannot be provided by Sucrogen.
 - (c) The Council cannot be satisfied that the Tram Network is of national significance (criterion (c)).
 - (d) The Council cannot be satisfied it is uneconomic to duplicate the Tram Network (criterion (b)).
 - (e) The Council cannot be satisfied that declaration of the Tram Service is not contrary to the public interest (criterion (f)).
 - (f) The Tram Service cannot be declared because it is the use of a production process.

Why the Council should focus on NQBE's application

- 2.6 Sucrogen recognises that, if the Tram Service is declared, it is declared for all access seekers, not just NQBE.
- 2.7 However, Sucrogen submits that it is appropriate for the Council to focus on the issue arising in NQBE's application as detailed in this submission for three reasons.
- 2.8 **First**, because the issues that face NQBE's proposal will be faced by any other potential access seeker. In this regard, Sucrogen notes that the Tram Network is designed and dedicated to the collection of sugarcane.² The lines that form the Tram Network are dictated by the location of sugarcane farms. Because of this it is unlikely to be suitable for the bulk transport of any other primary product.
- 2.9 **Secondly**, because NQBE is the only person who has sought access to the Tram Network. Sucrogen is not aware of any other person who has sought (formally or informally) access to the Tram Network at any stage since the

¹ Sucrogen was formerly CSR Sugar (Herbert) Pty Ltd. Sucrogen is a subsidiary of Sucrogen Limited, which is currently (pending a proposed demerger) a subsidiary of CSR Limited.

² And, in a relatively minor respect, the transport of raw sugar from mills to the shipping port at Lucinda.

Tram Network was first built over 100 years ago. For this reason, Sucrogen submits that NQBE is likely to be the only access seeker if the Tram Service was declared.

- 2.10 **Thirdly**, because the supply of sugarcane is constrained by the available land in the Herbert district. The Herbert district is geographically limited by rivers and mountains. There is only a limited supply of land that is suitable for the growing of sugarcane. Sucrogen's view is that a third mill in the Herbert region (in addition to Sucrogen's Victoria and Macknade mills) would not be economically viable. However, even if NQBE was to satisfy the Council that its proposed Factory would be economically viable, Sucrogen submits that a fourth mill (which any other access seeker would need) would certainly not be economically viable. For this reason too, Sucrogen submits that NQBE is likely to be only access seeker if the Tram Service was declared.
- 2.11 For these reasons—in particular the reason that any problems that face NQBE will be faced by any other access seeker—Sucrogen focuses in this submission on the merits and specific details of NQBE's application. Sucrogen submits that the Council should do likewise.

3 Increased access to the Tram Service will not promote a material increase in competition in any relevant market

- 3.1 Section 44G(2)(a) provides that, to recommend declaration of the Tram Service, the Council must be satisfied:

that access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service.

- 3.2 The Full Court of the Federal Court has held:³

all [this criterion] requires is a comparison of the future state of competition in the dependent market with a right or ability to use service and the future state of competition in the dependent market without any right or ability or with a restricted right or ability to use the service.

- 3.3 In this criterion, "access" is not a synonym for "declaration under Part IIIA"; it has its ordinary English meaning, in the sense of a right of access being obtained.⁴
- 3.4 Sucrogen submits that NQBE cannot satisfy the Council that this criterion is satisfied.

³ *Sydney Airport Corporation Ltd v Australian Competition Tribunal* (2006) 155 FCR 124 at [83] per French, Finn, and Allsop JJ; [2006] FCAFC 146.

⁴ *Sydney Airport Corporation Ltd v Australian Competition Tribunal* (2006) 155 FCR 124 at [83] per French, Finn, and Allsop JJ; [2006] FCAFC 146.

NQBE's enterprise is unlikely to come into existence

- 3.5 As quoted in paragraph 3.2 above, criterion (a) requires the Council to consider a counterfactual: what would be the likely state of competition in relevant markets with a right to access the Tram Service.
- 3.6 Sucrogen submits that the highly speculative nature of NQBE's enterprise prevents the Council from being satisfied about this criterion.
- 3.7 In its submission, NQBE states:⁵
- Apart from access to the Tram Service, there are no other major barriers to NQBE's plans to operate a Factory in competition with [Sucrogen].*
- 3.8 To the contrary, Sucrogen understands there are several "other major barriers" to NQBE's plans to operate a Factory in competition with Sucrogen, as set out below. These types of barriers are significant and would be faced by any access seeker proposing to build a similar factory for the processing of sugarcane in the Herbert district using the dedicated Tram Network.
- 3.9 **Development approval.** Though Sucrogen understands NQBE has acquired the land for the Factory, it still needs development approval. This has not yet been granted, and there is no guarantee that it will be. A review undertaken by Sucrogen and experts engaged on its behalf of the development application lodged by NQBE with the Hinchinbrook Shire Council reveals significant deficiencies in the development application. The matters in relation to which Sucrogen submits NQBE's development application is deficient include:
- (a) a lack of detail in the environmental impact statement submitted with the application in respect of erosion and sediment control, land contamination, the storage and handling of flammable and hazardous materials, and toxicity from pesticides within timber and/or waste feeds;
 - (b) impacts on residences and sites surrounding the proposed factory site;
 - (c) a complete absence of flood studies and mitigation strategies for adjoining properties despite a concession that the land is significantly flood prone;
 - (d) a traffic impact assessment;
 - (e) hydro-geological investigations to determine the source of water and the impact on storm water run off and groundwater yields given that the proposed plant will apparently require 800 cubic metres of water each hour of operation;⁶

⁵ NQBE's submission, par 2.14.

⁶ According to Sucrogen's expert advisers, this represents enough water to service the daily water requirements of a large town with a population of 40,000. By comparison, the population of Hinchinbrook Shire is currently approximately 12,500.

- (f) noise impact assessments; and
 - (g) air quality.
- 3.10 **Other products.** NQBE states that it intends to process sorghum and timber (among other things) at its proposed Factory. However, Sucrogen understands that:
- (a) sorghum is not currently planted in commercial quantities in the area covered by the Tram Network; and
 - (b) it has not been demonstrated that the timber from the State forest that NQBE intends to process at its proposed Factory is suitable for the intended purpose or that it is economic to supply such timber given the significant logistical costs involved.
- 3.11 **Water rights.** On 18 January 2010, the relevant Minister issued a moratorium notice under section 26 of the *Water Act 2000* (Qld) for the Wet Tropics catchment area,⁷ which includes the site of NQBE's proposed Factory.⁸ It provides that new applications for a water licence (which NQBE will need for its proposed Factory) will not be accepted. Therefore, until the moratorium notice is revoked, NQBE does not have, and cannot obtain, access to the water it needs to operate its Factory. Even after the moratorium notice is revoked, NQBE will need to demonstrate that its use will comply with the Wet Tropics Water Resource Plan, which the Minister has proposed to prepare.⁹
- 3.12 **Cane supply.** NQBE states that it "has secured Cane Supply Agreements with sugar cane growers in the Herbert River district for the supply of approximately 2.1 million tonnes of sugar cane."¹⁰ Putting to one side that NQBE does not state when the cane will be supplied, nor the terms on which it will be supplied, Sucrogen understands that the cane supply agreements to which NQBE refers were subject to conditions precedent (including a condition that "NQBE obtain legal access to Sucrogen's existing rail network"¹¹) that have not been met. These agreements are by their terms¹² unenforceable and Sucrogen understands that NQBE has encouraged growers who signed cane supply agreements with it to sign cane supply agreements with Sucrogen for at least the 2012 growing season.

⁷ More information about the Wet Tropics catchment area is available at <http://www.derm.qld.gov.au/wrp/wet_tropics.html>.

⁸ The moratorium notice is available from <<http://www.derm.qld.gov.au/water/management/moratoriums.html>>.

⁹ *Water Act 2000* (Qld) s 40. See <http://www.derm.qld.gov.au/wrp/wet_tropics.html>.

¹⁰ NQBE's submission, par 2.12.

¹¹ See clause 19(b) of NQBE's Agreement, which is **Annexure C** to this submission.

¹² *Ibid.*

- 3.13 It is currently not known what cane supply commitments NQBE has secured. NQBE's application for declaration is silent on this topic which is fundamental to the feasibility of its project.
- 3.14 **Land access.** As set out in section 4 below, Sucrogen submits that NQBE cannot obtain under the Part IIIA process the benefit of the Tram Network Easements. It is apparent from NQBE's submission that this is a critical issue; indeed, NQBE candidly submits that it is "virtually impossible, or prohibitively expensive" to obtain land access itself.¹³ Unless NQBE can demonstrate that it can obtain access to the Tram Network Land sufficient to allow it to operate trams on the Tram Network, on NQBE's own submission it cannot operate its Factory.
- 3.15 **Financing.** The capital costs to NQBE in building and commissioning the Factory will be significant. Though NQBE provides no detail about this in its submission to the Council,¹⁴ NQBE's development application described the project as a \$400,000,000 plant. Sucrogen considers the costs will likely be higher.¹⁵ Additionally, NQBE will need to purchase locomotives and rolling stock for use on the Tram Network.¹⁶ Given the very narrow gauge of the Tram Network, the locomotives and rolling stock will need to be specially ordered. Additionally, under the terms of any access agreement, NQBE will need to pay for passing loops and sidings (see paragraphs 7.29–7.31 below). Yet NQBE has provided no information about its financial substance. It has provided no evidence that it either has sufficient capital itself¹⁷ or that it has financiers who are prepared to lend NQBE the money to engage in this enterprise on terms that will lead to its likely success.
- 3.16 **Connection, offtake and other agreements.** NQBE has not provided any evidence that it has secured or even begun to negotiate a range of agreements that would be fundamentally important to the feasibility of the project it has described in its Application. These agreements include:
- (a) connection and access agreements with Ergon Energy for access to and use of Ergon's electricity transmission infrastructure (Sucrogen understands from its own investigations that connection to Ergon's infrastructure would require significant system upgrades to cater for

¹³ NQBE's submission, par 7.12; see also pars 2.13, 7.32.

¹⁴ NQBE only states that its Factory will be "state of the art": NQBE's submission, par 1.2.

¹⁵ Sucrogen's estimate is that the cost of the project could well exceed \$500,000,000. In this regard, the construction of a 63 MW cogeneration facility at Sucrogen's Pioneer Mill, which was completed in 2005, cost Sucrogen over \$160,000,000.

¹⁶ NQBE states that it intends to operate its own locomotives and rolling stock on the Tram Network: NQBE's submission, pars 2.11, 5.4; see also par 8.29, attachment 2 (letter from NQBE to Sucrogen dated 7 July 2009).

¹⁷ NQBE's share capital is \$128,000, which is fully paid. The relevant ASIC search extract is **Annexure G**.

the increased electrical load arising from a cogeneration facility such as that proposed by NQBE);

(b) power supply agreements for the sale of the electricity NQBE says it will generate; and

(c) offtake agreements for the ethanol which NQBE says it will produce.

- 3.17 Without these agreements in place (even on a conditional basis) it is very unlikely that Financiers will be willing to commit funding for the project.
- 3.18 Sucrogen submits these are significant, and formidable, barriers that NQBE faces. They are barriers that will be faced by any other person wishing to use the Tram Network (and, to date, NQBE is the only person who has seriously requested access).
- 3.19 Sucrogen submits that, in light of these barriers, and in particular the complete lack of information from NQBE about how it intends to overcome the barriers, the Council cannot be satisfied that increased access to the Tram Service would promote competition in any relevant market. Put another way, Sucrogen submits that NQBE—like any other access seeker—cannot demonstrate they are likely to sustainably operate a facility that will affect any relevant market.
- 3.20 Sucrogen submits that NQBE’s application is premature. The declaration of a service under Part IIIA of the *Trade Practices Act* is a fundamental interference with property rights, which is justified in the national interest (not anyone’s private interest). An application for the declaration of a service should only be granted if all other barriers have been overcome.¹⁸ It should not be granted on the basis of an inherently speculative enterprise, such as that described in NQBE’s application.

NQBE’s feasibility study

- 3.21 It is apparent from NQBE’s application that a critical document for its application is a feasibility study commissioned in July 2008.¹⁹ This study underpins NQBE’s application—if NQBE’s proposed Factory is not feasible, there would be no utility in the application for declaration of the Tram Service and no basis upon which the Council can be affirmatively satisfied as to criterion (a) in section 44G(2) that access to the service would promote a material increase in competition in a market.
- 3.22 It is not apparent to Sucrogen whether the feasibility study has been provided to the Council. It has not been provided to Sucrogen and it has not been made available on the Council’s website as part of the Council’s consultation process. NQBE states that it is a “commercial in confidence” document.²⁰

¹⁸ NQBE appears to accept this—it submits that “there are no other major barriers to NQBE’s plans”: NQBE’s application, par 2.14.

¹⁹ See NQBE’s application, par 1.3.

²⁰ NQBE’s application, par 1.3.

- 3.23 If NQBE has not provided the Council with a copy of the feasibility study, Sucrogen submits that the Council cannot be satisfied that NQBE's proposed Factory would be feasible, and therefore constructed. In those circumstances, and given that there are no other access seekers known to Sucrogen (or in Sucrogen's view likely to emerge), the Council cannot be affirmatively satisfied within the meaning of section 44G(2).
- 3.24 If NQBE has provided the Council with a copy of the feasibility study:
- (a) Sucrogen submits that it has been denied natural justice because it has been denied the opportunity to make a meaningful submission as contemplated by section 44GB of the *Trade Practices Act*; and
 - (b) the Council should give the feasibility study little weight because it has not been tested by being made available for comment or submissions (even subject to a confidentiality undertaking).
- 3.25 In any event, Sucrogen submits to the Council that a competent feasibility study for a project of this size would entail a substantial amount of engineering, commercial, and financial analysis. Even at an early stage, a feasibility study would require a significant investment of time and money and input from a number of specialist consultants.
- 3.26 Sucrogen knows from its own experience that the cost of legal, commercial and technical investigations required to complete a bankable feasibility study would typically represent at least 5% of the total installed project cost. Based NQBE's stated capital cost estimate of \$400m (Sucrogen believes the cost is likely to exceed \$500m) a bankable feasibility study would require expenditure of at least \$20m. From Sucrogen's observation of NQBE's Development Application and other general observations of the project status, it is estimated that NQBE's feasibility study expenditure to date is at most, an order of magnitude less than this (i.e. less than \$2m). Consequently, any project proposal at this time by NQBE must be considered very immature and therefore highly speculative
- 3.27 In the absence of any evidence of an independent, professional, multidisciplinary approach to studying the feasibility of NQBE's project, Sucrogen submits that the Council cannot be satisfied of the viability of the proposed development.
- 3.28 The lack of any evidence of finance for NQBE's project is also an objective standard against which the value of NQBE's feasibility study can be judged
- 3.29 Sucrogen notes that its concerns about the feasibility of NQBE's proposal are long-standing. They are reflected in Sucrogen's letter to NQBE dated 27 July 2009, which is part of attachment 2 to NQBE's application.

Specific markets identified by NQBE²¹

- 3.30 Sucrogen has commissioned a report from Synergies Economic Consulting regarding economic issues associated with NQBE's application (**Synergies Report**). A copy of the Synergies Report is **annexure E**. (Sucrogen notes that NQBE has not provided any economic analysis.)
- 3.31 In section 6 of the Synergies Report, Synergies analyses each market identified by NQBE and concludes that access (or increased access) to the Tram Service will not promote competition in any of the markets.
- 3.32 Sucrogen relies on the Synergies Report, and makes further comments below.

Competition in the sugarcane-related markets

- 3.33 NQBE's application effectively assumes that because Sucrogen is a monopsonist in relation to sugarcane in the Herbert district that Sucrogen is not competitively constrained in the market.
- 3.34 Sucrogen disagrees.
- 3.35 In addition to the reasons set out in the Synergies Report, Sucrogen asks the Council to note that there is no material difference in the price formula applicable under the cane supply agreements employed by Sucrogen in the Herbert area (where there are no competing sugar mills in operation) and the price formula applicable in the Plane Creek area (where Sucrogen competes for sugarcane with Mackay Sugar).
- 3.36 Sucrogen submits that this further demonstrates that NQBE's underlying premise—that more sugar mills in the Herbert area will lead to more price competition—is not well founded

The market for the supply of electricity in north Queensland²²

- 3.37 As Synergies notes in the Synergies Report, there is a national market for electricity. This has been previously judicially determined: in *Australian Gas Light Company v Australian Competition and Consumer Commission*, French J held "there is one NEM-wide geographic market for the supply of electricity".²³
- 3.38 Sucrogen submits that a 50–55 MW²⁴ generator would have no noticeable effect on the competitive dynamics of the NEM.
- 3.39 The Australian Energy Market Operator publishes information about existing and committed scheduled and semi-scheduled generation capacity.²⁵ It separates the demand into winter and summer. As sugarcane is harvested

²¹ NQBE's application, pars 8.16–8.81.

²² NQBE's submission, pars 8.79–8.81.

²³ (2003) 137 FCR 317 at 430 [387]; [2003] FCA 1525.

²⁴ NQBE's submission, par 8.10, 8.30, 8.79.

²⁵ See <<http://www.aemo.com.au/data/gendata.shtml>>.

and milled in winter, Sucrogen submits that the winter figures are the most appropriate to use.

Region	Winter 2010	Winter 2019
QLD	12,381 MW	12,966 MW
NSW	14,863 MW	15,903 MW
VIC	10,410 MW	11,328 MW
SA	4,159 MW	4,182 MW
TAS	2,460 MW	2,560 MW
Total	46,283 MW	48,958 MW

- 3.40 Thus, excluding non-scheduled generation capacity (ie generation capacity that is not centrally dispatched)²⁶ and any proposed generation projects,²⁷ NQBE's proposed Factory would amount to less than 0.12% of winter generation capacity in the NEM both now and in 10 years' time (based on committed projects).
- 3.41 In these circumstances, Sucrogen submits that the Council cannot be satisfied that NQBE's proposed 50–55 MW generator would have any noticeable effect on the operation of the NEM, let alone promote competition in the NEM.
- 3.42 French J accepted that the regions in the NEM may occasionally be “temporally limited sub-markets which can be referred to for the purposes of competition analysis”.²⁸ Here, the relevant region is Queensland (north Queensland is not a separate region in the NEM). In this regard, existing and committed generation capacity in Queensland until 2018–19 is over 12,500 MW.²⁹ The generation capacity of NQBE's proposed Factory is therefore less than 0.5% of the existing and committed generation capacity for Queensland for the next 10 years.
- 3.43 Sucrogen submits the Council cannot be satisfied that NQBE's proposed 50–55 MW generator would affect competition in the Queensland region of the NEM, even if the Council accepted it was a separate market.
- 3.44 NQBE relies³⁰ on a document entitled, “A pathway to achieving investment in industrial development in the Northern Economic Triangle: Options for competitive energy pricing”, which is attachment 11 to NQBE's submission. Putting to one side the fact that the document does not appear to have been

²⁶ See <http://www.aemo.com.au/data/gendata_exist.shtml>, <http://www.aemo.com.au/data/gendata_comm.shtml>.

²⁷ See <http://www.aemo.com.au/data/gendata_prop.shtml>.

²⁸ (2003) 137 FCR 317 at 430 [387].

²⁹ See <<http://www.aemo.com.au/data/gendataqld.shtml>>.

³⁰ See NQBE's submission, par 8.81.

prepared by economists (the identified authors are regional development organisations³¹), the document describes the benefits of “a large base load power station [being] develop[ed] in North Queensland”.³² On any view, NQBE’s proposed Factory is not a large base load power station (or, indeed, a base load power station at all).

- 3.45 Further, a report commissioned by Sucrogen from ROAM Consulting concludes that NQBE’s proposal to connect to the transmission network could be difficult to manage without upgrading the Ingham Substation capacity and the proposal generally, if implemented, would result in “relatively low levels of benefit to the market”.³³

4 Sucrogen cannot provide an integral part of the Tram Service

- 4.1 Sucrogen assumes that the service NQBE seeks be declared is the Tram Service as defined in paragraph 2.6 of NQBE’s application and extended in paragraph 2.7 of NQBE’s application.³⁴
- 4.2 Sucrogen notes that NQBE has taken the same approach as that taken by Fortescue Metals Group Ltd (**Fortescue**) in its application for the declaration of rail services in the Pilbara in also seeking the declaration of “associated infrastructure”.³⁵ However, Sucrogen submits that NQBE’s application goes further than the Fortescue application in one critical respect. Fortescue sought the declaration of:³⁶

roads and other facilities which provide access to the railway line route.

- 4.3 However, the corresponding part of NQBE’s application refers to:
- easements and other facilities which provide access to the tram route.*
- 4.4 Sucrogen understands this to be a reference to the easements over which the Tram Network runs. (This is the only context in which easements are mentioned in NQBE’s application.³⁷)
- 4.5 By way of background, except for areas around Sucrogen’s Mills and approximately 100 freehold or Crown leasehold land parcels, Sucrogen does

³¹ NQBE’s submission, attachment 11, page 2.

³² NQBE’s submission, attachment 11, page 6.

³³ The ROAM Consulting report can be found at annexure H.

³⁴ The definition given in those paragraphs is different from that given in paragraphs 1.1 and 2.1 of NQBE’s application.

³⁵ NQBE’s application, par 2.7. See *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2008) 236 CLR 145 at 152 [3]; [2008] HCA 45.

³⁶ Fortescue’s application, cl 5.1(2)(g), quoted in *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2008) 236 CLR 145 at 152 [3] and *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2007) 162 FCR 234 at 256 [100]; [2007] FCAFC 157.

³⁷ NQBE’s application, pars 2.5, 7.7.3, 7.8, 7.9, 7.10, 7.11, 7.12, 7.14.

not own the land over which the Tram Network runs (**Tram Network Land**). The arrangements under which Sucrogen has access to the Tram Network Land fall into one of three categories:

- (a) an informal licence with the owner of the land (or, often, a predecessor in title of the owner of the land);
- (b) a “permit to pass” under sugar industry legislation;³⁸
- (c) a formal easement, either under sugar industry legislation³⁹ or under the general law.

4.6 For the purpose of this submission, it is convenient to refer to Sucrogen’s arrangements with landowners relating to the Tram Network Land as **Tram Network Easements**.

4.7 In order to operate trams over the Tram Network, NQBE would need to have the benefit of the Tram Network Easements. Without the benefit of the Tram Network Easements (or similar access rights), it would be illegal for NQBE to operate trams on the Tram Network; it would (at least) be committing the tort of trespass.

4.8 To the extent that NQBE seeks a declaration that, in effect, it has the benefit of the Tram Network Easements, Sucrogen submits:

- (a) first, Sucrogen is neither the owner nor operator of the Tram Network Easements and does not have the legal right to permit NQBE to have the benefit of the Tram Network Easements; and
- (b) secondly, that it is beyond the power of the Council to recommend the declaration of, and beyond the power of the Minister to declare, the Tram Service including the benefit of the Tram Network Easements because an easement is not a “facility” and therefore the benefit of an easement is not a “service” within the meaning of Part IIIA of the *Trade Practices Act*.

4.9 Sucrogen’s reasoning supporting those submissions is set out below.

Sucrogen is not the “provider” of the easement and cannot permit NQBE to have the benefit of the easement

4.10 Sucrogen is not the “provider” of service of the benefit of the Tram Network Easements, ie “the entity that is the owner or operator of the facility that is used (or to be used) to provide the service”.⁴⁰

4.11 Sucrogen submits that the relevant legal “owner or operator” for the Tram Network Easements is not Sucrogen, but rather the landowners (or potentially lessees from time to time) of the Tram Network Land. In some cases

³⁸ See *Sugar Industry Act 1999* (Qld) s 63(2), (3), (4).

³⁹ See *Sugar Industry Act 1999* (Qld) s 63(5), (6).

⁴⁰ *Trade Practices Act 1974* (Cth) s 44B.

Sucrogen does not even have an interest in the land (eg where Sucrogen has a licence from the landowner). Sucrogen's rights under the Tram Network Easements are not, as a matter of law, legally equivalent to ownership rights.

Sucrogen has limited rights which it cannot sublicense

- 4.12 However, even if Sucrogen could be considered to be the "owner or operator" of the Tram Network Easements, the terms of the Tram Network Easements do not permit Sucrogen to licence others to access the land. That is, Sucrogen cannot legally permit NQBE (or, for that matter, anyone else) to have the benefit of the Tram Network Easements.
- 4.13 The Tram Network Easements are many and varied in nature. Some are registered on the title to the land; others are by agreement with the landowner (in some cases, unwritten); others are registered under provisions of sugar industry legislation. The terms of the easements or rights of access also vary.
- 4.14 **Annexure D** contains sample grants of easement and access which are typical of those held by Sucrogen. In summary, they are:
- (a) personal to Sucrogen;
 - (b) granted to Sucrogen for a specific purpose only, namely the transport of cane to Sucrogen's Mills (or sugar from Sucrogen's Mills to the Lucinda terminal);
 - (c) commonly for a limited term.
- 4.15 Each of those restrictions prohibits Sucrogen from sublicensing its rights to NQBE (or anyone else):
- (a) NQBE is not Sucrogen (and cannot be considered to be Sucrogen's agent or invitee for the purpose of operating its own trams over the Tram Network); and
 - (b) NQBE will be using the Tram Network for different purposes, including:
 - (i) to transport cane to NQBE's proposed Factory, not Sucrogen's Mills;⁴¹
 - (ii) to transport "other feedstock, such as timber and sorghum" to NQBE's proposed Factory; and⁴²
 - (iii) to transport bio-fertilizer from NQBE's proposed Factory to "the field".⁴³
- 4.16 These restrictions can be shown by reference to the specific terms of some of the Tram Network Easements included in **annexure D**. For example:

⁴¹ NQBE's application, par 2.10(a).

⁴² NQBE's application, par 2.10(b).

⁴³ NQBE's application, par 2.10(c).

- (a) The Girgenti easement is granted to Sucrogen⁴⁴ “for the use in delivery of harvested cane supplied by cane growers ... into containers supplied by [Sucrogen]”. On any view, NQBE will not be using containers supplied by Sucrogen in connection with the harvesting of sugarcane for its operations.
- (b) The Casale, Rapisarda, and Hobbs easements are granted to Sucrogen⁴⁵ as owner of the Victoria mill “to facilitate harvest of cane and supply of cane to the mill” (ie the Victoria mill only).
- (c) The Kemp and Brush easements are granted to Sucrogen as owner of the Macknade and Victoria mills “to facilitate harvest of cane and supply of cane to the mill” (ie the Macknade and Victoria mills only).
- (d) The Zatta easement is granted to Sucrogen⁴⁶ as owner of the Victoria mill “for delivery of cane to the mill” (i.e. the Victoria mill only).
- (e) Under paragraph 6 of the Casale, Rapisarda, Kemp, Brush, and Zatta easements, the landowner “shall not ... use the Easement Land in any manner which may interfere with the exercise by [Sucrogen] of [Sucrogen’s] rights under” the easement. The granting of rights to NQBE would interfere with the exercise of Sucrogen’s rights under the easement, and would therefore be prohibited under the easement.
- (f) Under paragraph 4 of the Hobbs easement, “the grantor shall not ... use the land in any manner which may substantially interfere with the enjoyment by [Sucrogen] of [Sucrogen’s] right hereunder nor shall he interfere with safe operating procedures of [Sucrogen] the said land [*sic*]”.
- (g) The Crown leases require “the lessee” (i.e. Sucrogen) to use the land for the specified purpose. NQBE’s proposed use of the Tram Network cannot be seen as Sucrogen using the Tram Network. The Crown leases contain no right to sublease or sublicense.

4.17 Another issue is that some of the Tram Network Easements have a limited term, and will expire before the end of the period for which NQBE seeks declaration of the Tram Service. For example:

- (a) the Crown lease with title reference 40019206 expires on 17 February 2029;
- (b) the Crown lease with title reference 40006782 expires on 31 July 2026;
- (c) Special Lease No 45817 expires on 31 December 2013.

⁴⁴ Originally the easement was granted to CSR Limited who was the owner of the mill at the relevant time. The easements bind CSR Limited’s successors in title, which include Sucrogen.

⁴⁵ The easements were originally granted to CSR Limited,

⁴⁶ The easement was originally granted to CSR Limited.

- 4.18 Sucrogen submits that NQBE cannot, through the Part IIIA process, obtain a better or broader right to access the Tram Network than Sucrogen has. If Sucrogen is required to give the benefit of the Tram Network Easements to NQBE, NQBE must take it subject to the same restrictions that are imposed on Sucrogen. In relation to the Tram Network, the restrictions are such that, even if Sucrogen could sublicense its rights to NQBE, those rights do not meet the requirements of NQBE.
- 4.19 Against the background of the specific terms of the leases, Sucrogen submits that, even if the benefit of the Tram Network Easements could be declared, the specific terms of the Tram Network Easements do not permit NQBE to use the Tram Network. Indeed, the terms of at least some of the Tram Network Easements specifically prohibit the landholder from granting NQBE access to the Tram Network Land, at least to the extent that it would interfere with Sucrogen's operations.

An easement is not a "facility"

- 4.20 In any event, Sucrogen submits that the Tram Network Easements are not a "facility", and therefore the Council cannot recommend the declaration of, and the Minister cannot declare, the Tram Service including the benefit of the Tram Network Easements.
- 4.21 Section 44B, relevantly, defines a "service" (which can be declared) to be "a service provided by means of a facility". Sucrogen submits that the benefit of an easement or other right to access land cannot be a service provided by means of a facility.
- 4.22 In *Re Australian Union of Students*, the Tribunal noted:⁴⁷

The word "facility" is not defined; but the dictionary definitions may be of some help. For example, the Shorter Oxford Dictionary defines "facility" as "equipment or physical means for doing something"; but the Macquarie Dictionary adopts a broader concept, namely, "something that makes possible the easier performance of any action; advantage: transport facilities; to afford someone every facility for doing something".

- 4.23 In *Re Sydney Airports Corporation Ltd*, the Tribunal wrote (Sucrogen's emphasis):⁴⁸

*a facility for the purposes of the Act is a **physical asset (or set of assets)** essential for service provision and which also exhibits the features of a natural monopoly.*

- 4.24 Sucrogen submits that the term "facility" should be understood as being synonymous with physical infrastructure: ie something that is built. This is

⁴⁷ (1997) 140 FLR 167 at 171 (Lockhart J, Dr M Brunt, Dr B Aldrich).

⁴⁸ (2000) 156 FLR 10 at 37 [82]; [2000] ACompT 1 (Goldberg J, Dr B Aldrich, M Waller); see also 18 [16].

consistent with the second reading speech for the Bill that introduced Part IIIA,⁴⁹ in which it was said (Sucrogen's emphasis):⁵⁰

*A new legal regime will be created which facilitates businesses obtaining access to the services of certain essential **infrastructure facilities**.*

- 4.25 Sucrogen submits that a definition of facility meaning physical infrastructure is also consistent with the text and structure of Part IIIA. In particular, the way in which facility is referred to in Part IIIA suggest that a "facility" is intended to have a physical existence.
- (a) Sections 44F(4), 44G(2)(b), 44H(2), and 44H(4)(b) refer to the development of a facility.
 - (b) Sections 44G(1A), 44H(3A), and 44PA(1) refer to "the construction and operation of a facility".
 - (c) Sections 44V(2)(d) and 44W(1)(e) refer to extensions of a facility.
 - (d) Sections 44V(2)(da), 44W(1)(f), and 44X(1)(ea) refer to interconnections to the facility.
 - (e) Section 44W(1)(d) refers to "any part of the facility, or ... extensions of the facility".
 - (f) Section 44X(1)(f) refers to "the safe and reliable operation of the facility".
 - (g) Section 44X(1)(g) refers to "the economically efficient operation of the facility".
- 4.26 For these reasons, Sucrogen submits that a definition of "facility" that effectively means physical infrastructure is consistent with Part IIIA.⁵¹
- 4.27 Indeed, in the *Australian Union of Students* case, despite the Tribunal noting the potential breadth of the term "facility" (as quoted in paragraph 4.22 above), the Tribunal doubted whether a special-purpose computer network was a "facility" for the purposes of Part IIIA of the *Trade Practices Act*.⁵² As a special-purpose computer network can be described as a physical asset or physical infrastructure, the case therefore tends to suggest a **narrow** definition of "facility" rather than a broad one.

⁴⁹ See also *Sydney Airport Corporation Ltd v Australian Competition Tribunal* (2006) 155 FCR 124 at 125–132 [2]–[21] per French, Finn, and Allsop JJ; [2006] FCAFC 146.

⁵⁰ Australia, Senate, *Parliamentary Debates (Hansard)*, 29 March 1995, p 2435, quoted in *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2008) 236 CLR 145 at 154 [13].

⁵¹ See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381–382 [69]–[71] per McHugh, Gummow, Kirby, and Hayne JJ; [1998] HCA 28.

⁵² *Re Australian Union of Students* (1997) 140 FLR 167 at 174 (Lockhart J, Dr M Brunt, Dr B Aldrich).

- 4.28 Adopting this definition, Sucrogen submits that the Tram Network Easements cannot be described as a “facility” (or as “facilities”). They are interests in land, not physical infrastructure.

5 The Tram Network is not nationally significant

- 5.1 Section 44G(2)(c) provides that, to recommend declaration of the Tram Service, the Council must be satisfied:

that the facility is of national significance, having regard to:

- (i) the size of the facility; or*
- (ii) the importance of the facility to constitutional trade or commerce; or*
- (iii) the importance of the facility to the national economy.*

- 5.2 This is considered in section 7 of the Synergies Report, on which Sucrogen relies.

- 5.3 As set out in the Synergies Report, the Council should not adopt the position that because it has previously declared a service involving 210 km of railway, it is therefore obliged to declare a service involving approximately 550 km of tramway.

- 5.4 Here, having regard to the nature of the Tram Network and the amount of constitutional trade and commerce affected by the Tram Network, Sucrogen submits that the Council cannot be satisfied that the Tram Network is of national significance.

6 It is economical to develop another facility

- 6.1 Section 44G(2)(b) provides that, to recommend declaration of the Tram Service, the Council must be satisfied:

that it would be uneconomical for anyone to develop another facility to provide the service.

- 6.2 In this regard, section 44F(4) provides:

In deciding what recommendation to make, the Council must consider whether it would be economical for anyone to develop another facility that could provide part of the service.

- 6.3 This is considered in section 5 of the Synergies Report, on which Sucrogen relies.

- 6.4 Synergies concludes that road transport is a source of supply-side substitution in the sugar haulage market in the Herbert district and that consequently, in the absence of further assessment, there is a strong element of doubt about whether the declaration application satisfies the uneconomical to duplicate test”. At least in the absence of any contrary economic evidence, Sucrogen submits that the Council cannot be satisfied about this criterion.

- 6.5 Sucrogen further submits that in considering this criterion, the Council should have particular regard to the fact that road transport is currently used to transport sugarcane as a complete substitute for rail by **24% of Australian sugar mills** and by **all** sugar millers in the largest sugar producing country, Brazil.⁵³
- 6.6 The lack of any substantive analysis by NQBE regarding the possible alternative of road transport – it relies on a three line email from a trucking contractor and only considers diesel costs when looking at the cost of rail – are other factors that Sucrogen submits operate to prevent the Council from being satisfied in relation to this criterion.
- 7 Increased access to the Tram Service would be contrary to the public interest**
- 7.1 Section 44G(2)(f) provides that, to recommend declaration of the Tram Service, the Council must be satisfied:
- that access (or increased access) to the service would not be contrary to the public interest.*
- 7.2 Sucrogen accepts that the Council does not need to be affirmatively satisfied that NQBE's application is in the public interest.⁵⁴ However, "it requires consideration whether there are circumstances other than those raised for consideration by section 44H(4)(a) to (e) which demonstrate that increased access ... would be contrary to the public interest."⁵⁵
- 7.3 Sucrogen submits that the Council cannot be satisfied in relation to criterion (f) for the following reasons.
- The Council should not recommend a declaration with no utility*
- 7.4 Sucrogen submits that it is not in the public interest for the Council to recommend the declaration of, and the Minister to declare, a service that is unlikely to be utilised. This would cause unnecessary regulatory uncertainty and inefficiency (the infrastructure owner would be obliged to negotiate with potential access seekers and participate in an arbitration process) for no discernable benefit.
- 7.5 An application to the Council, and a decision by the Minister, does not give rise to any res judicata or issue estoppel. If circumstances later change and a potential access seeker can demonstrate a real likelihood of acquiring the service, then the access seeker can make a new application to the Council

⁵³ A number of Australian millers including Sucrogen also use road transport to supplement their rail haulage operations.

⁵⁴ *Re Virgin Blue Airlines Pty Ltd* (2005) 195 FLR 242 at 352 [587]–[588] (Goldberg J, G F Latta, J S Marsden); [2005] ACompT 5, citing *Re Duke Eastern Gas Pipeline Pty Ltd* (2001) 162 FLR 1 at 33 [145] (Hely J, M J Messenger, M M Starrs); [2001] ACompT 2.

⁵⁵ *Re Virgin Blue Airlines Pty Ltd* (2005) 195 FLR 242 at 352 [588] (Goldberg J, G F Latta, J S Marsden); [2005] ACompT 5.

under Part IIIA, the Council can make a new recommendation, and the Minister can make a new decision.

- 7.6 Sucrogen submits that there are several reasons why NQBE is unlikely to ever acquire the Tram Service, should it be declared. Though a declaration will not solely be for NQBE, Sucrogen is aware of no other party that intends to acquire the Tram Service if it was declared. Therefore, Sucrogen submits that the utility of the declaration (at least in relation to NQBE's application) can be judged solely by reference to NQBE's circumstances.
- 7.7 The reasons why Sucrogen submits that NQBE's application has no utility are set out below.

No utility: Access to the Tram Network Land

- 7.8 In section 4 above, Sucrogen submitted that NQBE cannot, through the declaration process in Part IIIA of the *Trade Practices Act*, obtain the benefit of the Tram Network Easements. In its submission, NQBE states that it would be "virtually impossible, or prohibitively expensive" for it to obtain rights equivalent to the Tram Network Easements.⁵⁶ However, as Sucrogen cannot legally provide access to the Tram Network Easements, this negotiation process is exactly what NQBE (or any other access seeker) will be required to do if it were otherwise able to gain access to the Tram Service.
- 7.9 Sucrogen submits that if NQBE cannot obtain the benefit of the Tram Network Easements, and it cannot obtain equivalent rights itself, there is no utility in the Minister declaring (and therefore Council recommending the declaration of) the Tram Service. Sucrogen submits that it is not in the public interest for the Council to recommend the declaration of a service that will never be acquired.

No utility: speculative nature of NQBE's proposal

- 7.10 In paragraphs 3.5–3.18 above Sucrogen listed a number of barriers that it considered NQBE faces in its proposal in addition to obtaining access to the Tram Network. NQBE has not demonstrated how it will overcome those barriers. Unless it can overcome each of them, it will not actually acquire the Tram Service.

No utility: likely outcome of access disputes: capacity issues

- 7.11 In *Sydney Airport Corporation Ltd v Australian Competition Tribunal*, the Full Court of the Federal Court of Australia held:⁵⁷

In any given inquiry, there may be room in deciding whether or not to declare the service, to analyse the question whether the engagement of the regime under Part IIIA by the declaration will have an effect on the competitive process in the dependent market.

⁵⁶ NQBE's submission, par 7.12; see also pars 2.13, 7.14, 7.32.

⁵⁷ (2006) 155 FCR 124 at 148 [89] per French, Finn, and Allsop JJ.

- 7.12 Sucrogen submits that this is such an application.
- 7.13 The Full Court held in *Sydney Airport Corporation*:⁵⁸
- [The Tribunal in that case] correctly recognised that access (or increased access) may not be achieved by the operation of Pt IIIA. Even if the parties cannot agree on the terms of access or increased access, there is no guarantee that an arbitration will bring about access, or access on any particular terms.*
- 7.14 This is particularly so in relation to NQBE’s application. To adapt the High Court’s comments in *BHPBIO*:⁵⁹
- It appears that if [the Tram Service is a] service[] within the meaning of Pt IIIA, then [Sucrogen] would properly be regarded as providing that service to itself. Therefore it would be an “existing user” whose interests would be afforded the protection given by paragraph (a) of section 44W(1).*
- 7.15 The relevant “protection” is that the Australian Competition and Consumer Commission, in the arbitration of an access dispute, cannot make a determination that would have the effect of “preventing [Sucrogen] obtaining a sufficient amount of the service to be able to meet [Sucrogen’s] reasonably anticipated requirements, measured at the time when the dispute was notified”.⁶⁰
- 7.16 If there was sufficient spare capacity on the Tram Network for NQBE’s proposed use, as NQBE submits,⁶¹ this would not be problematic. There is however no available spare capacity during the cane season when both Sucrogen and NQBE require access.
- 7.17 The available capacity of the Tram Network can be best analysed in two parts: during the sugarcane milling season, and outside of the sugarcane milling season.
- 7.18 **Outside sugarcane season.** NQBE asserts that “the available capacity of the Tram Network is fairly large, particularly during December to May [ie outside sugarcane season]”.⁶²
- 7.19 Sucrogen agrees with this. Aside from maintenance, the Tram Network is not used outside sugarcane season.

⁵⁸ (2006) 155 FCR 124 at 147 [82] per French, Finn, and Allsop JJ. See also

⁵⁹ *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2008) 236 CLR 145 at 157 [19] per Gummow, Kirby, Hayne, Heydon, Crennan, and Kiefel JJ.

⁶⁰ *Trade Practices Act 1974* (Cth) s 44W(1)(a).

⁶¹ NQBE’s submission, pars 7.15, 7.16, 7.24.

⁶² NQBE’s submission, par 7.24.

7.20 However, it is not clear from NQBE's submission what (if any) use NQBE intends to make of the Tram Network outside sugarcane season. In particular, NQBE states:⁶³

NQBE plans to transport approximately 2.1 million tonnes of sugar cane on the Tram Network during the period June to November.

7.21 In other words, none of NQBE's proposed primary use of the Tram Network will occur outside sugarcane season. Sucrogen submits that the capacity of the Tram Network outside sugarcane season should not affect whether the Council recommends the declaration of the Tram Service.

7.22 **During sugarcane season.** NQBE's analysis in relation to the capacity of the Tram Network during sugarcane season is:⁶⁴

Depending on seasonal conditions, NQBE plans to transport approximately 2.1 million tonnes of sugar cane on the Tram Network during the period June to November. NQBE will be purchasing this cane from growers who currently sell to [Sucrogen]. Accordingly, if NQBE secures this amount of cane, it will mean that [Sucrogen] will lose approximately 2.1 million tonnes of cane from their mills. As a result, [Sucrogen's] use of the Tram Network will diminish. The total amount of cane that will be transported in the district by [Sucrogen] and NQBE collectively will remain at approximately 4.0 to 4.5 million tonnes annually.

7.23 Sucrogen agrees that, if NQBE's proposed Factory is built and operates, it is unlikely to lead to additional sugarcane being grown in the Herbert River region, and the sugarcane grown would be shared between Sucrogen and NQBE. On a seasonal basis, therefore, the total amount of sugarcane transported would remain at current levels.

7.24 However, Sucrogen submits that this not the correct way in which to view the capacity of the Tram Network. Instead, Sucrogen submits that the correct way is **daily** capacity during the sugarcane season.

7.25 Sucrogen operates its mills on a continuous basis during the crushing season. If Sucrogen was only crushing approximately 2,000,000 tonnes of sugarcane (say, because NQBE had agreements to acquire the remainder of sugarcane grown in the district), Sucrogen would likely reduce the length of its crushing season.

7.26 Therefore, during the middle of the sugarcane season—which is presumably when NQBE (or any other access seeker seeking access for the processing of sugarcane) would principally be seeking to use the Tram Network—the daily use of the Tram Network by Sucrogen would be unchanged, and therefore the

⁶³ NQBE's submission, par 7.22.

⁶⁴ NQBE's submission, par 7.22.

reduction of cane supply to Sucrogen would not give rise to any additional capacity for NQBE to use.⁶⁵

- 7.27 As mentioned in **annexure B**, Sucrogen fully utilises the Tram Network during the sugarcane season as part of a continuous crushing process.
- 7.28 Sucrogen therefore does not agree with NQBE's unsubstantiated assertion that "excess capacity exists on the existing Tram Network".⁶⁶
- 7.29 If the Tram Service was to be declared, to use the Tram Network during the sugarcane season the existing capacity of the Tram Network would need to be increased by an estimated 45% to cater for Sucrogen's and NQBE's concurrent use. This results from the fact that NQBE's requirement of up to 15,000 tonnes of cane per day would be in excess of Sucrogen's requirement for up to 35,000 tonnes of cane per day.
- 7.30 However this is not the only consideration. If access were granted it would increase end delivery points (mills) in the network from 2 to 3, it would increase the number of bins in delivery sidings to be jointly used and cause these bins to be segregated into two groups. There would also be an increase in the frequency of train movements which are required to pass each other on the single track Tram Network. That increase is estimated to be by more than an order of magnitude as each section of rail will need to support two independent mill operations rather than one; the regional network is presently operated as two radial transport operations with two hubs and minimal overlap. Access by NQBE would superimpose on this a third radial transport system having a third hub, overlapping the existing two operations. This would mean that:
- (a) NQBE would need to (at the least) construct a significant number of passing loops so that NQBE's trains could safely pass Sucrogen's trains and track section duplications. (The Tram Network is mostly single-track.) In an arbitration (assuming Sucrogen and NQBE could not reach agreement about the terms of NQBE's access to the Tram Network), the ACCC could not require Sucrogen to bear any costs of building or maintaining those passing loops and duplications.
 - (b) NQBE would need to construct a significant number of new sidings and siding expansions and upgrades as the current sidings cannot efficiently and safely support additional harvest crews, the cane bins that would be needed to supply two mills or the operation of two trains concurrently.
 - (c) NQBE would need to fund significant new signalling and communication systems.⁶⁷

⁶⁵ It should also be noted that as sugar yields (CCS) diminish towards the back end of a cane season, NQBE's access to the Tram Service after the peak CCS period would fundamentally alter the revenue it and its suppliers would receive from the milling of sugarcane. This again brings into question the viability of NQBE's project.

⁶⁶ NQBE's submission, par 7.16.

7.31 As NQBE accepts in its application, the cost of constructing the tramway is significant.⁶⁸ It will likely amount to many millions of dollars. Moreover, NQBE's Application fails to address the fact that, if it were to obtain access to the Tram Network, it would be required to fund the construction of the expansion of the network including the additional passing loops, and additional and expanded sidings, and the new signalling and communication systems. There is no material on which the Council can be satisfied that NQBE has the financial wherewithal to meet all of these various and significant costs.

No utility: likely outcome of access disputes: cost of access

7.32 In its submission, NQBE appears to have given no consideration as to the likely cost it would need to pay for the Tram Service.⁶⁹ These costs are likely to be significant.

7.33 Assuming Sucrogen and NQBE do not agree on the terms of access, when making a final determination the ACCC must take into account "the legitimate business interests of [Sucrogen] and [Sucrogen's] investment in the [Tram Network]".⁷⁰

7.34 When considering the costs of rail transport should NQBE gain access to the Tram Service, at least the following costs should be considered:

- (a) DORC based Capital Asset value contribution on shared assets;
- (b) Maintenance cost contribution on shared assets;
- (c) Operating cost contribution of shared scheduling, traffic control costs;
- (d) Overheads contribution of shared assets including legal and other costs for easement management;
- (e) Depreciation of NQBE incremental below rail capital expenditure;
- (f) Depreciation of NQBE assets above rail – rolling stock, cane and sugar and locos;
- (g) Maintenance of NQBE above rail assets – rolling stock, cane and sugar and locos; and
- (h) Operating costs – materials, being primarily fuel, and labour;

⁶⁷ *Trade Practices Act 1974* (Cth) s 44W(1)(e).

⁶⁸ NQBE's submission, pars 7.8–7.10.

⁶⁹ See NQBE's application, pars 7.35–7.41 (which relate only to operational costs, which would be borne by NQBE in any event, and not the cost of access that NQBE would need to pay to Sucrogen).

⁷⁰ *Trade Practices Act 1974* (Cth) s 44X(1)(a). See *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2008) 236 CLR 145 at 161 [43] per Gummow, Kirby, Hayne, Heydon, Crennan, and Kiefel JJ.

A review of NQBE's application reveals that the only cost considered by NQBE is the fuel cost for operation of its locos.

Interaction with other legislation

- 7.35 As NQBE notes in its submission, the Herbert River cane railway (or tramway) system has a long history.⁷¹ As set out below, specific provision is made in Queensland legislation for cane railways, including the Tram Network.
- 7.36 Sucrogen considers that these specific provisions may cease to apply if the Tram Network is not used for its original purpose, namely the transportation of cane from Growers to a mill. If so, this is likely to have significant adverse consequences to Sucrogen.
- 7.37 **First**, Sucrogen is concerned that the declaration of the Tram Service would mean that the Tram Network would become subject to the operation of the *Transport Infrastructure Act 1994* (Qld). This arises in the following way.
- 7.38 Section 107(2)(e) of the *Transport Infrastructure Act* provides:
- This chapter [ie Chapter 7, which relates to railways] does not apply to ... a cane railway[.]*
- 7.39 The term "cane railway" is defined in schedule 6 as:
- cane railway** means a tramway or railway—
- (a) operated, entirely or partly, on an access right under the *Sugar Industry Act 1999*, chapter 2, part 4; and
 - (b) used, or proposed to be used, to transport sugarcane, sugar or sugarcane by-products; and
 - (c) that does not transport passengers or other freight for reward.
- 7.40 If the declaration sought by NQBE was made and NQBE obtained access to the Tram Network, Sucrogen is concerned that:
- (a) the Tram Network would no longer be used to transport only sugarcane, sugar, or sugarcane by-products, and would instead also be used to transport other goods including timber, sorghum, and bio-fertiliser;⁷² and
 - (b) the Tram Network could be characterised as "transport[ing] ... other freight for reward".
- 7.41 If the Tram Network ceases to be a cane railway within the meaning of the *Transport Infrastructure Act*, then Sucrogen is no longer exempt from the requirements in chapter 7 of the Act. This is an outcome which the Queensland legislature did not intend. It will mean that Sucrogen will be

⁷¹ NQBE's application, pars 2.3–2.5.

⁷² See NQBE's application, par 1.2, 2.10, 8.28.

subject to increased regulation in relation to the operation of the Tram Network. The increased regulation would expose Sucrogen to significantly greater costs, capital expenditure requirements and increased legal obligations and liabilities as compared to its current exempted operations.

- 7.42 A brief outline of the benefits of exemption under the *Transport Infrastructure Act* is contained in **Annexure F**.
- 7.43 **Secondly**, for the Tram Network, Sucrogen has the benefit of access to land under Queensland sugar industry legislation. Currently, Sucrogen's entitlement is set out in section 63 of the *Sugar Industry Act 1999* (Qld), which provides, relevantly:
- (2) A permit (a **permit to pass**) may be granted to—
- (a) a grower to facilitate harvest of cane and supply to a mill;
or
- (b) a mill owner to facilitate harvest of cane and supply of cane to any mill or between any mills or to service a cane railway easement.
- (3) A permit to pass authorises the person to whom it is granted and a person acting on the person's behalf to use another person's land under the permit's conditions.
- ...
- (5) An easement (a **cane railway easement**) may be granted to a mill owner to facilitate harvest of cane and supply of cane to any mill or between any mills.
- 7.44 Sucrogen is a mill owner. The Tram Network is currently used to facilitate the harvest of cane and supply of cane to its mills. However, if the Tram Service is declared, Sucrogen is concerned that it will no longer be able to use these provisions.
- 7.45 In relation to permits to pass, putting aside any additional conditions on the grant of the permit,⁷³ because the Tram Network will no longer be used only to facilitate the harvest of cane and the supply of cane to a mill or between mills, the permit may cease to operate.
- 7.46 Even if the Council accepts that NQBE's proposed Factory will be a "mill" for the purpose of the *Sugar Industry Act*⁷⁴ (and it may not be because NQBE proposes to more than merely milling sugarcane at its Factory⁷⁵), if the Tram

⁷³ This is expressly contemplated by section 63(3) of the *Sugar Industry Act 1999* (Qld).

⁷⁴ The term "mill" is defined in the schedule to the *Sugar Industry Act 1999* (Qld) to mean "a building or other structure that is equipped for the manufacture of sugar from cane."

⁷⁵ See NQBE's submission, pars 1.2, 1.3, 2.10(b), 2.10(c), 7.23, 8.28.

Service is declared any person can seek access to it, even those who do not have a mill and do not propose to process sugarcane at all.⁷⁶

- 7.47 In relation to cane railway easements, the same concerns apply: they can only be granted to mill owners to facilitate the harvest of cane and supply of cane to a mill or between mills.
- 7.48 If Sucrogen is denied access to the provisions of the *Sugar Industry Act*, this will adversely affect its future operations. For example, it will no longer be able to use the permit to pass procedure in the *Sugar Industry Act*,⁷⁷ which the legislature intended Sucrogen was entitled to use.

*Regulatory costs*⁷⁸

- 7.49 Sucrogen refers to the Council's draft recommendation in March 2010 regarding the application for a no-coverage determination for the proposed QCLNG pipeline under the National Gas Law. One of the criteria the Council was required to consider was similar to criterion (f):
- that access (or increased access) to the pipeline services provided by means of the pipeline would not be contrary to the public interest.*
- 7.50 In relation to this criterion, the applicant in that matter referred the Council to the increased regulatory costs it would be likely to incur if the pipeline was subject to regulation. The estimated costs in that matter were "of the order of \$3.9–4.9 million (at 2010 prices)".⁷⁹
- 7.51 Similarly, in relation to NQBE's application, if the Tram Service was declared, Sucrogen would be faced with increased costs, including scheduling costs and the cost of negotiating and arbitrating access agreements (at least with NQBE), which are likely to be significant because of the difficult issues involved.⁸⁰
- 7.52 Sucrogen submits that the Council should have regard to these costs given the modest (at best) benefits that NQBE submits would flow from the declaration it seeks.⁸¹

⁷⁶ See *Sydney Airport Corporation Ltd v Australian Competition Tribunal* (2006) 155 FCR 124 at 147 [84] per French, Finn, and Allsop JJ ("Once a declaration is made any potential user can take advantage of it.").

⁷⁷ *Sugar Industry Act 1999* (Qld) ss 65, 68.

⁷⁸ See National Competition Council, *Declaration of Services: A guide to Declaration under Part IIIA of the Trade Practices Act 1974 (Cth)*, par 8.19–8.22 (pages 68–69).

⁷⁹ National Competition Council, *No coverage determination for the proposed QCLNG Pipeline: draft recommendation*, par 6.94 (page 32), available at <<http://www.ncc.gov.au/images/uploads/NCQGCDR-001.pdf>>.

⁸⁰ See paragraphs 7.11.–

⁸¹ See National Competition Council, *No coverage determination for the proposed QCLNG Pipeline: draft recommendation*, pars 6.97, 6.104 (pages 32, 33–34), available at <<http://www.ncc.gov.au/images/uploads/NCQGCDR-001.pdf>>.

8 The Tram Service is the use of a production process

- 8.1 Section 44B provides that the definition of “service” in Part IIIA of the *Trade Practices Act* “does not include ... the use of a production process ... except to the extent that it is an integral but subsidiary part of the service”.
- 8.2 Sucrogen submits that the Tram Service, at least insofar as it does apply to those parts of the Tram Network that are not exclusively used for the transport of sugar from Sucrogen’s Mills to the Lucinda bulk sugar terminal,⁸² is the use of a production process.
- 8.3 Sucrogen’s submissions on this issue involve a detailed consideration of the sugarcane harvesting, collection, transportation, and crushing process. These details, and Sucrogen’s submissions on the production process point, are contained in **Annexure B**.

9 Other declaration criteria

Criterion (d)—Health and safety

- 9.1 Section 44G(2)(d) provides that, to recommend declaration of the Tram Service, the Council must be satisfied:
- that access to the service can be provided without undue risk to human health or safety.*
- 9.2 Sucrogen accepts that health and safety issues, of themselves, do not prevent the Council from declaring the Tram Service, provided that an appropriate investment in sidings, passing loops, signalling, control and communication systems is made to address the numerous increased safety risks arising from simultaneous use of the Tram Network by more than one user.
- 9.3 However, Sucrogen is not saying that no health and safety issues would arise as a result of NQBE’s application. The introduction of a second operator on the Tram Network would, as stated in paragraph 9.2, require a number of measures to be taken to address increased health and safety risks, including signals.
- 9.4 Though these are matters that could be dealt with in an access agreement between Sucrogen and NQBE (or in a final determination by the ACCC),⁸³ this does not mean they are irrelevant to the Council’s assessment of NQBE’s application.⁸⁴ Addressing these increased safety risks would require a significant investment of time and capital and would be likely to materially

⁸² This is a relatively small part of the Tram Network. Rail lines dedicated to raw sugar use a total only 4.5 km of main line and 5.9 km of sugar bin access and storage lines. Sugar locos also use another 16.6 km of track in conjunction with sugarcane traffic.

⁸³ See National Competition Council, *Declaration of Services: A guide to Declaration under Part IIIA of the Trade Practices Act 1974* (Cth), August 2009, par 6.9 (page 60).

⁸⁴ See paragraphs 7.29, 7.31.

increase the complexity and cost of operation of and access to the Tram Network. None of these matters have been addressed in NQBE's application.

Criterion (e)—Effective access regime

9.5 Section 44G(2)(e) provides that, to recommend declaration of the Tram Service, the Council must be satisfied:

that access to the service is not already the subject of an effective access regime.

9.6 Sucrogen accepts that access to the Tram Service is not already the subject of an effective access regime.

10 Duration of declaration

10.1 NQBE seeks a declaration for 30 years.⁸⁵

10.2 NQBE provides no reasons for seeking a declaration for this period. Sucrogen notes that the declarations sought in the Pilbara railway cases were only for a period of 20 years.

10.3 Sucrogen submits that in the absence of evidence from NQBE going to the period of the declaration, the Tram Service should be declared for only a modest period of time.

11 Conclusion

11.1 For the above reasons, Sucrogen submits that:

- (a) the Council cannot recommend the declaration of, and the Minister cannot declare, the Tram Service;
- (b) alternatively, the Council should not recommend the declaration of, and the Minister should not declare, the Tram Service.

⁸⁵ NQBE's application, par 13.1.