

## **EXPLANATORY STATEMENT**

### **Issued by authority of the Treasurer**

#### *Competition and Consumer Act 2010*

#### *Competition and Consumer (Industry Code—Sugar) Regulations 2017*

Section 172 of the *Competition and Consumer Act 2010* (the Act) provides that the Governor-General may make regulations under the Act, provided they are not inconsistent with the Act.

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

The purpose of the *Competition and Consumer (Industry Code—Sugar) Regulations 2017* (the Regulations) is to regulate the conduct of growers, mill owners and marketers (of grower economic interest sugar) in relation to contracts or agreements for the supply of cane or the on-supply of sugar. This includes establishing a process for pre-contractual arbitration where the parties fail to agree to terms of contracts or agreements.

In addition, the Regulations ensure that supply contracts between growers and mill owners have the effect of guaranteeing a grower's choice of the marketing entity for the sale of sugar for which the grower bares the price exposure risk.

The Australian Government has an interest in maintaining the sustainability and effective operation of Australia's raw sugar export industry. The Senate Rural and Regional Affairs and Transport References Committee considered arrangements for the marketing of Australian sugar and tabled a report on 24 June 2015. The Government backbench Sugar Marketing Code of Conduct Taskforce reported on 25 June 2015. Both the Senate Committee and Taskforce recommended the Government prescribe a mandatory code.

The sugar export industry is primarily in Queensland and has recently experienced pre-contractual disputes involving cane growers, mill owners and marketers. While State legislation exists to address some of the issues (such as the *Sugar Industry Act 1999* (Qld)), there is not a consistent Federal framework that addresses key issues in the sugar export industry.

The Prime Minister has granted an exemption from the need to complete a Regulation Impact Statement due to special circumstances. Urgent and unforeseen events have occurred in the export sugar industry. The stalemate in commercial negotiations between the parties has created significant uncertainty for regional families and the export sugar industry. The Government is taking immediate action in order to provide certainty regarding regulatory arrangements in the industry.

To ensure the Sugar Code of Conduct (the Code) operates efficiently and effectively as intended, the Regulations also require a review of the Code to take place within 18 months after its commencement.

## **Application**

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003* and commence on the day after they are registered. The Regulations will be subject to disallowance under that Act.

As a mandatory code, it binds cane growers, mill owners and those marketers involved, or proposing to be involved, in the export of grower economic interest sugar.

## **Details**

An overview of the Regulations is set out in Attachment A, with the details of the Regulations set out in Attachment B.

## **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### **Competition and Consumer (Industry Code—Sugar) Regulations 2017**

The Regulations are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Legislative Instrument**

The Regulations allow for prescription of a mandatory industry code to regulate the conduct of cane growers, mill owners (of grower economic interest in sugar) and marketers (of that sugar). The Regulations require cane growers, mill owners and marketers to engage in pre-contractual arbitration of the terms of cane supply contracts or sugar on-supply agreements, if the parties fail to agree those terms. The Regulations also guarantee a grower's choice of the marketing entity for the grower economic interest sugar manufactured from the cane they supplied.

#### **Human rights implications**

The Regulations do not engage any of the applicable rights or freedoms.

#### **Conclusion**

The Regulations are compatible with human rights.

### **Overview of the Competition and Consumer (Industry Code—Sugar) Regulations 2017**

#### **Section 1 — Name**

This section provides that the name of the instrument is the *Competition and Consumer (Industry Code—Sugar) Regulations 2017*.

#### **Section 2 — Commencement**

This section provides that the instrument commences the day after it is registered.

#### **Section 3 — Authority**

This section provides that the instrument is made under the Act.

#### **Section 4 — Code of Conduct**

This section provides that the Code, set out in Schedule 1, is prescribed as a mandatory industry code for section 51AE of the Act.

#### **Section 5 — Authorisation of certain conduct**

This section provides that anything done in accordance with the Code is authorised for the purpose of the Act.

#### **Section 6 — High Court’s jurisdiction unaffected**

This section provides that the Code, as set out in Schedule 1, is not intended to affect the jurisdiction of the High Court under section 75 of the Constitution.

#### **Section 7 — Review of Code**

This section requires the Minister administering section 51AE of the Act to cause a review of the operation of the Code to be undertaken. The review must commence before 18 months after the commencement of this section.

#### **Schedule 1 — Sugar Code of Conduct**

There are four parts to the Code:

- Part 1—Preliminary;
- Part 2—Obligation to act in good faith;
- Part 3—Supply contracts; and
- Part 4—Arbitration of terms of intended on-supply agreements.

### Part 1—Preliminary

This part sets out the name and purpose of the Code and definitions of terms used in the Code. The purpose of the Code is to regulate the conduct of growers, mill owners and marketers (of grower economic interest sugar) in relation to contracts or agreements for the supply of cane or on-supply of sugar, including requiring and providing for pre-contractual arbitration of the terms of an agreement. It also ensures that supply contracts between growers and mill owners have the effect of guaranteeing a grower's choice of the marketing entity for the grower economic interest sugar manufactured from the cane they supplied. This is the share of exported sugar that the grower has to bear the price exposure risk.

### Part 2—Obligation to act in good faith

Part 2 sets out the obligation for cane growers, mill owners and marketers to act in good faith in all their dealings with each other, including when undertaking arbitration under the Code. While the term 'good faith' takes its meaning from within the unwritten law, there are certain additional requirements to assist parties to understand their obligation.

### Part 3—Supply contracts

This Part sets out the application of the Code in the context of cane supply contracts between sugar cane growers and mill owners. A number of conditions must be met, including that the parties are not related bodies corporate.

This Part establishes the requirement for cane growers and mill owners to have a supply contract, the minimum terms about the sale of on-supply sugar provided for in those supply contracts, and the dispute resolution process.

It further establishes a process for either party to initiate arbitration by giving written notice to the other party – referring a dispute about a proposed term of the intended cane supply contract to an independent arbitrator appointed by the parties. The arbitration process for cane growers and mill owners is the same process that applies to mill owners and marketers, as outline in Part 4.

### Part 4—Arbitration of terms of intended on-supply agreements

This Part sets out the application of the Code to disputes between parties (marketers and mill owners) negotiating an on-supply agreement and the process for the parties to undertake arbitration of terms of on-supply agreements. It establishes a process for either party to initiate arbitration by giving written notice to the other party – referring a dispute about a proposed term of the intended on-supply agreement to an independent arbitrator appointed by the parties. If the parties fail to agree on an arbitrator within 10 days after the notice is given, this Part provides a process for an arbitrator to be appointed.

This Part also outlines the time limits for the arbitrator to decide the term(s) in dispute and resolve the dispute between the parties. Further, it provides for when an on-supply agreement will be taken to have been made between the parties. This Part also sets out: how the arbitration should be conducted; the circumstances in which it can be terminated; and how the arbitration costs are to be allocated between the parties.

**Details of Schedule 1 to the Competition and Consumer (Industry Code— Sugar) Regulations 2017 ('the Code')**

**Part 1—Preliminary**

This Part contains provisions setting out the name and purpose of the Code (items 1 and 2) and definitions of terms used in the Code (item 3).

**Item 1—Name of code**

This item provides that the name of the code is the *Sugar Code of Conduct*.

**Item 2—Purpose of code**

This item provides that the purpose of the Code is to regulate the conduct of growers, mill owners and marketers (of grower economic interest sugar) in relation to contracts or agreements for the supply of cane or on-supply of sugar. This item also requires and provides for pre-contractual arbitration of the terms of a contract or agreement if the parties fail to agree to those terms.

In addition, this item ensures that supply contracts between growers and mill owners have the effect of guaranteeing a grower's choice of the marketing entity for the sale of sugar for which the grower bears the price exposure risk.

Further, it is made clear that the Code only seeks to regulate the conduct of constitutional corporations and parties' dealing with those corporations.

**Item 3—Definitions**

This item includes a number of definitions of terms used under the Code. Some of the key defined terms include:

- ***grower economic interest sugar*** is defined in subparagraph 10(1)(c)(ii) as sugar manufactured by a mill owner from cane supplied under an agreement under which the amount to be paid for the cane by the mill owner to the person who supplied the sugar cane is to be worked out in a stated way by linking that amount to the sale price for the on-supply of the sugar.
- ***marketer*** is defined as an entity that has made an agreement with a mill owner, or is negotiating an agreement with a mill owner, for the mill owner to supply the entity with sugar manufactured by the mill owner, but does not include an entity that supplies or will supply the cane from which the sugar is or will be manufactured.
- ***sugar*** does not include any by-products of sugar (such as molasses).

Other defined terms include Agriculture Minister, bargaining representative, cane, crushing season, grower, mill, mill owner, mill-related entity, on-supply agreement, on-supply sugar, related body corporate, sugar cane, and supply contract.

## **Part 2—Obligation to act in good faith**

### **Item 4—Application of this Part**

This item outlines how the Part applies to parties, or proposed parties, to a supply contract or on-supply agreement where at least one of them is a corporation. The term corporation takes its meaning from section 4 of the *Competition and Consumer Act 2010* (the Act).

### **Item 5—Obligation to act in good faith**

This item establishes that parties or proposed parties to a supply contract or on-supply agreement must act in good faith, within the meaning of the unwritten law. This obligation extends to all dealings between the parties, including when they are engaged in arbitration under the Code.

Without limiting the obligation to act in good faith, there are a number of particular behaviours that parties must display, including acting reasonably and fairly and not misleading or harassing any other party or proposed party. It is expected that any arbitration would take into account the actions of the parties with respect to this item of the Code.

## **Part 3—Supply contracts**

This Part outlines how the Code applies to the supply of cane from a grower to a mill owner (item 6). It contains provisions requiring a cane grower and mill owner to have a contract in place in order to supply cane (item 7) and outlines the forms these contracts may take (items 8 and 9).

This Part also outlines the application of the arbitration provisions for disputed terms of an intended supply contract (item 11) and the arbitration framework (item 12). The framework is the same as that in Part 4, except 14(1) does not apply.

### **Division 1—Entering into supply contracts**

#### **Item 6 — Application of this Division**

This item states that this Division only applies to a supply of cane from a grower to a mill owner if:

- a) at least one of the parties is a corporation (as defined in the Act); and
- b) the grower is not a related body corporate of the mill owner; and
- c) no other Australian law that specifically relates to supply contracts would apply.

### Item 7 — The requirement for supply contracts

This item states that a grower may only supply cane to a mill in a crushing season where they have a supply contract in place with the mill owner. It provides that a supply contract may be either an individual contract or a collective contract. It further provides that an interested third party, such as a marketer or representative body, may be a party to a supply contract between a mill owner and a grower.

### Item 8 — Individual contracts

This item states that an individual contract is a supply contract made directly between a grower and a mill owner and may be for all or part of the cane grown by a grower.

### Item 9 — Collective contracts

This item states that a collective contract is a supply contract made between a group of growers and a mill owner, though each grower must sign the contract. It provides that a grower group may appoint a bargaining representative to negotiate a collective contract.

### Item 10 — Terms of supply contract about sale of on-supply sugar

The item states that a supply contract between a grower and mill owner must include a set of minimum terms unless they agree otherwise. These include: a term clarifying the amount that growers will be paid for their cane, or the formula to determine the amount; a term providing growers with economic interest in a proportion of the sugar; and a term providing for a nominated marketer for the grower economic interest sugar of the grower's choice.

## **Division 2—Arbitration of disputed terms of intended supply contracts**

### Item 11 — Application of this Division

This item outlines that this Division applies to a supply of cane from a grower to a mill owner if at least one of the parties is a corporation and the cane grower and mill owner are not related bodies corporate.

### Item 12 — Arbitration of dispute terms of intended supply contract

This item states that a party in a dispute about the terms of an intended supply contract may give the other party written notice to refer a dispute about any proposed term(s) of the intended agreement to be decided by an independent arbitrator.

Where arbitration is to be initiated, it is required to be undertaken in accordance with items 14 to 19 of the Code which outlines, amongst other things, the timing of the process, the appointment, obligations and powers of the arbitrator and the costs of the arbitration.

A dispute that may be referred to arbitration under Division 2 is not to be referred to arbitration under any other law of the Commonwealth, a State or a Territory. This means that where applicable, the arbitration process provided in the Code takes precedent over arbitration processes provided by other laws.



#### **Part 4—Arbitration of terms of intended on-supply agreement**

This Part outlines the application of the Code to the negotiation of an on-supply agreement between a mill owner and marketer (item 13). It also outlines the provisions for how an arbitrator is to be appointed (item 14), how a term in dispute is to be determined (item 15), how the arbitration is to be conducted (item 16), when on-supply agreements are taken have been made (item 17) and how the arbitration can be terminated by the parties (item 18). Lastly, it details the allocation of arbitration-related costs between the parties (item 19).

##### **Item 13— Application of this Part**

This item states that the Code applies to the negotiation of an agreement (an on-supply agreement) between a mill owner and a marketer for the supply of grower economic interest sugar manufactured by the mill owner if:

- (a) both the mill owner and the marketer are bodies corporate; and
- (b) at least one of the parties is a corporation (as defined in the Act); and
- (c) the sugar is intended ultimately to be exported from Australia; and
- (d) the mill owner and the marketer have not entered into such an agreement; and
- (e) if a person who supplied some or all of the cane from which the sugar is manufactured is a body corporate—that body corporate and the mill owner are not related bodies corporate.

##### **Item 14—Appointment of an independent arbitrator**

This item states that either a mill owner or marketer negotiating an on-supply agreement may give the other party written notice to refer a dispute about any proposed term(s) of the intended agreement to be decided by an independent arbitrator. The parties can agree on a suitable arbitrator to be appointed for the dispute.

If the parties cannot come to an agreement on the person(s) to be appointed as the arbitrator within 10 days after the notice is given, then this item allows the first party to make a request to the Treasurer to appoint an independent arbitrator for the parties. The Treasurer may then appoint an independent arbitrator in consultation with the Minister for Agriculture.

##### **Item 15—Determining a term in dispute**

This item states that the arbitrator must determine the proposed term(s) in dispute and notify the parties of their determination. It provides that the arbitrator must decide the term(s) within 30 days after appointment.

However, this time period can be extended by the arbitrator for a further period of up to 30 days, if the arbitrator considers it to be reasonably required – for example, due to the

complexity of the issues or unforeseen delays in obtaining expert reports. The arbitrator must also give written notice of the extension, and the reasons for it, to the parties. The arbitrator must not determine a term that would result in the acquisition of property otherwise than on just terms.

#### Item 16—Conduct of the arbitration

This item states that in making the determination, the arbitrator may take into account written representations made by a person, if the arbitrator considers that the person has sufficient interest in the terms of the agreement.

For example, this may allow growers or bargaining representatives that have a sufficient interest in the terms of the on-supply agreement to make submissions to the arbitrator. The arbitrator has the discretion as to whether or not they take these submissions into account (and the extent to which they do so) when arriving at a final decision.

It further states that arbitration must be conducted in accordance with the Resolution Institute Arbitration Rules 2016, to the extent that those rules are not inconsistent with the Code.

#### Item 17—On-supply agreements taken to have been made

This item states that once the arbitrator has decided the term(s) in dispute between the parties, then the parties are taken to have entered into an on-supply agreement that include those term(s) decided by the arbitrator, and any other terms already agreed between the parties.

For the purposes of item 17(a) – ‘terms agreed between the parties’ are taken to be terms within the intended on-supply agreement that neither party have raised as being in dispute during the course of arbitration.

#### Item 18—Terminating the arbitration

This item states that the parties may terminate arbitration if they have entered into an on-supply agreement before being notified of the arbitrator’s determination.

#### Item 19—Costs of the arbitration

This item states that the parties must bear their own costs of attending arbitration. The costs of arbitration, including the cost of the arbitrator, are to be equally shared between the parties unless they agree otherwise. Parties are also liable for any other costs determined by the arbitrator.