

Sugar Industry (Real Choice in Marketing) Amendment Bill 2015

Explanatory Notes - revised as at July 2015

Title of the Bill

The short title of the Bill is the Sugar Industry (Real Choice in Marketing) Amendment Bill 2015.

Policy Objectives

The object of the Sugar Industry (Real Choice in Marketing) Amendment Bill 2015 is twofold:

- To ensure that a grower has real choice in terms of nominating the marketing entity for on-supply sugar in which they have an economic interest.
- To facilitate the fair and final resolution of any commercial disputes that arise between a grower or bargaining representative and a mill owner including by arbitration.

Reasons for the Bill

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

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

This is consistent with deregulation and competition policy objectives.

When the Queensland sugar industry was deregulated in 2006, the process and associated agreements made it clear that all stakeholders envisaged partnerships between growers and miller owners and marketing entities as applicable to the marketing of on-supply sugar as defined in the Bill. This essentially involved growers entering into supply contracts with mill owners and miller owners entering into Raw Sugar Supply Agreements (RSSAs) with QSL. In compliance with respective RSSAs, the mill owners supplied QSL with 100 per cent of their raw sugar production intended for bulk export. As a result of this arrangement QSL became the marketing entity for more than 90 per cent of on-supply sugar exported from Australia.

It is important to distinguish that unlike commercial stakeholders in the Queensland sugar industry, QSL is a not-for-profit company with no traditional ownership interests in mills. This removes the risk of monopsony power. For example, a mill owner (i.e. single buyer), also participating as a marketing entity, and misusing bargaining power to unduly influence and exploit growers (i.e. multiple sellers) in the process of negotiating supply contracts.

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

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

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

Again this is consistent with deregulation and competition policy objectives.

The Bill supports a robust but fair supply chain relationship between mill owners and growers and, vitally, it contributes toward the long term sustainability of the Queensland sugar industry. It recognises that both mill owners and growers must achieve mutually beneficial gains from trade, otherwise trade and exchange will break down.

In the event of a commercial dispute arising between a grower or bargaining representative and a mill owner, the Bill, among other things, is to facilitate the fair and final resolution of such commercial disputes including by arbitration.

Accordingly the Bill does not re-regulate the Queensland sugar industry, rather it is to safeguard growers' economic interest. It provides both growers and miller owners with the right to determine how their respective economic interest in on-supply sugar is taken to the market. In doing so it supports a robust but fair supply chain relationship that contributes toward the long term sustainability of the Queensland sugar industry.

To remove any doubt whatsoever, the Bill is to prevent anti-competitive behaviour and promote pro-competitive outcomes. Overall the Bill is to ensure economic viability for both growers and mill owners, among others, in the Queensland sugar industry.

The Bill is consistent with the objects of the *Sugar Industry Act 1999* (Qld), *Commercial Arbitration Act 2013* (Qld) and the *Competition and Consumer Act 2010* (Cth):

- The principal object of the *Sugar Industry Act 1999* (Qld) is to facilitate an internationally competitive, export oriented sugar industry based on sustainable production that benefits those involved in the industry and the wider community, (refer *Sugar Industry Act 1999* (Qld) s 3).

- The paramount object of the *Commercial Arbitration Act 2013* (Qld) is to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense, (refer *Commercial Arbitration Act 2013* (Qld) s 1AC(1)).
- The object of the *Competition and Consumer Act 2010* (Cth) is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection, (refer *Competition and Consumer Act 2010* (Cth) s 2).

Achievement of the Policy Objectives

The Sugar Industry (Real Choice in Marketing) Amendment Bill 2015 will accommodate alternative marketing options for on-supply sugar arising in the Queensland sugar industry. It will also prevent anti-competitive behaviour and promote pro-competitive outcomes for the Queensland sugar industry.

Fundamentally this will be achieved by ensuring that growers have real choice in terms of nominating the marketing entity for on-supply sugar in which they have an economic interest. It will also be achieved by facilitating the fair and final resolution of any commercial disputes that arise between a grower or otherwise a bargaining representative and a mill owner including by arbitration.

Alternative Ways of Achieving Policy Objectives

There is no alternative way of achieving the policy objectives of the Sugar Industry (Real Choice in Marketing) Amendment Bill 2015.

Estimated Cost of Government Implementation

It is anticipated that there will be no cost to Government, although in the event of costs being incurred it is reasonably expected that these will be met by existing agency resources.

Consistency with Fundamental Legislative Principles

It is recognised that Fundamental Legislative Principles (FLPs) are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law. FLPs include the requirement that legislation has sufficient regard to the rights and liberties of individuals and further the institution of Parliament.

The Sugar Industry (Real Choice in Marketing) Amendment Bill 2015 is consistent with FLPs and has sufficient regard to rights and liberties of individuals. The Bill does not adversely affect rights and liberties, or impose obligations retrospectively. Furthermore, the Bill is consistent with principles of natural justice by facilitating the fair and final resolution of any commercial disputes including via impartial arbitral tribunals, without unnecessary delay or expense.

Consultation

Consultation and has been conducted with cane growers and growers' representatives, commonly concerned with the economic interest and welfare of Queensland cane growers.

The position of mill owners as relevant has been ventilated in the Commonwealth Parliament's (June 2015) Senate report by the Rural and Regional Affairs and Transport References Committee, (refer *Current and future arrangements for the marketing of Australian sugar*). Additionally all parties and the public in general were invited to make submissions on the Bill through the Queensland parliamentary committee system.

Consistency with other Jurisdictions

The Bill is specific to the Queensland sugar industry. It does not introduce uniform or complementary legislation however it is consistent with current laws enacted by the Queensland and Commonwealth Governments.

Notes on provisions

Clause 1 Short title

Clause 1 states that if enacted the Bill may be cited at the *Sugar Industry (Real Choice in Marketing) Amendment Act 2015*.

Clause 2 Commencement

Clause 2 states that subject to enactment of the Bill, the *Sugar Industry (Real Choice in Marketing) Amendment Act 2015* will commence on a day to be fixed by proclamation.

Clause 3 Act amended

Clause 3 states that subject to enactment of the Bill, the *Sugar Industry (Real Choice in Marketing) Amendment Act 2015* will amend the *Sugar Industry Act 1999*.

Clause 4 Amendment of s 29 (Purpose of pt 2)

Clause 4 makes a consequential amendment to s 29 of the *Sugar Industry Act 1999* as required for a proposed amendment to the definition of supply contracts. It still ensures however that the supply by growers of cane to a mill and the payment to growers in return is governed by supply contracts.

Clause 5 Amendment of s 30 (Definitions for pt 2)

Clause 5 omits the definition of supply contract from s 30 of the *Sugar Industry Act 1999*.

Clause 6 Insertion of new ss 33A and 33B

Clause 6 provides for two new sections, (i.e. ss 33A and 33B), in the *Sugar Industry Act 1999*.

It inserts new s 33A to address disputes about supply contracts including by arbitration. It creates a process including timeframes to refer disputed terms of an intended supply contract to arbitration. It confirms that the *Commercial Arbitration Act 2013* applies to the arbitration. In addition, it sets out what is taken to be an arbitration agreement, despite s 7 of the *Commercial Arbitration Act 2013*. It confirms that the arbitral tribunal may decide each disputed term of an intended supply contract. It upholds that any terms agreed between the grower and mill owner along with any decisions made by the arbitral tribunal about disputed terms is to be taken as a supply contract made by the grower and mill owner.

It also inserts new s 33B specifying terms to be included in a supply contract between a grower and mill owner, except if the grower is a related body corporate of the mill owner. The mandatory terms are concisely as follows:

- the amount of payment to the grower, which is to be worked out in a stated way, for supply of cane;
- the proportion of on-supply sugar for which the mill owner must bear the sale price exposure;
- the proportion, if any, of on-supply sugar for which the grower must bear the sale price exposure, (also known as **grower economic interest (GEI) sugar**);

- the requirement for a mill owner to have an agreement with a GEI sugar marketing entity to sell the quantity of on-supply sugar in which a grower has an economic interest; and
- if the grower and mill owner cannot agree about the GEI sugar marketing entity, the grower must nominate a GEI sugar marketing entity and the mill owner must accept the nomination.

Furthermore new s 33B sets out that certain terms do not apply if the supply contract states that the mill owner will sell the on-supply sugar. In particular, the terms about the mill owner having an agreement with a GEI sugar marketing entity (refer s 33B(2)(d)), and the grower having to nominate a GEI marketing entity (refer s 33B(2)(e)) do not apply.

Clause 7 Amendment of s 34 (Parties must use dispute resolution process stated in supply contract)

Clause 7 sets out that supply contracts must state a process for dispute resolution including by arbitration. It also inserts new s 34(3) to uphold that the *Commercial Arbitration Act 2013* applies to such arbitration.

Clause 8 Insertion of new s 238

Clause 8 inserts new s 238 in the *Sugar Industry Act 1999* to authorise specific things under new s 33B (refer *Clause 6*) for competition legislation. In particular it authorises:

- the making of supply contracts between a grower and mill owner in accordance with the prescribed terms of new s 33B(2)(d) or (e);
- the mill owner and GEI sugar marketing entity making an agreement to sell on-supply sugar in which the grower has an economic interest; and
- the GEI sugar marketing entity selling on-supply sugar under such an agreement.

Clause 9 Insertion of new ch 10

Clause 9 inserts new Chapter 10 and s 298 in the *Sugar Industry Act 1999* to set out transitional provisions. These apply to continuing supply contracts and/or arbitration, initiated before the commencement of the *Sugar Industry (Real Choice in Marketing) Amendment Act 2015*.

Unless such a supply contract is sooner terminated, new s 298(1) to 298(5) confirms that new s 33B does not apply to a current contract period. It is affirmed that s 34 as in force immediately before commencement does apply. That said, new s 33B does apply if there is any extension or renewal of a supply contract after the commencement. Furthermore any arbitration proceeding started but not completed before commencement is similarly subject to s 34 as in force immediately before commencement and until the arbitration is completed.

Definitions for the terms *current contract period* and *pre-amended section 34* as relevant are also provided in new s 298(6).

Clause 10 Amendment of schedule (Dictionary)

Clause 10 amends the schedule (Dictionary) to omit the definition of supply contract and insert new definitions for *GEI sugar marketing entity*; *on-supply sugar*; *sell*; and *supply contract*.