Competition and Consumer (Cane Sugar Processing Industry Code) Regulation 2015

Select Legislative Instrument No. ***, 2015
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1 Name of regulation

This regulation is the *Competition and Consumer (Cane Sugar Processing Industry Code) Regulation 2015*.

2 Commencement

This regulation commences on ** Month 2015.

3 Authority

This regulation is made under section 51AE of the *Competition and Consumer Act 2010*.

4 Code of conduct

For section 51AE of the *Competition and Consumer Act 2010*, the code set out in Schedule 1:

(a) is prescribed; and
(b) is a mandatory code of conduct.

5 Review of operation of this regulation

(1) The Minister administering section 1 of the *Farm Household Support Act 2014* must cause a review of the operation of this regulation to be undertaken.

(2) The review must start before the end of the period of 5 years after the commencement of this section.

(3) The review must identify opportunities to ensure well-managed deregulation to free and open competition in the Australian sugar export market, while maintaining Australia’s international reputation for quality and reliability. In particular, the review must consider whether there are appropriate alternative mechanisms to achieve this outcome.

(4) In conducting the review, consideration must be given to the following:
Section 6

(a) whether the code should be repealed and the timing of any such repeal;
(b) whether the code should be amended and the timing of any such amendment;
(c) the availability and transparency of relevant market information to participants in the supply chain;
(d) the promotion of the economically efficient operation of, use of and investment in canegrowing, sugar milling and sugar milling facilities;
(e) the promotion of competition in upstream and downstream markets;
(f) the ongoing appropriateness of sugar bulk port facilities being subject to Part IIIA of the Competition and Consumer Act, and whether there is merit in incorporating access to sugar bulk port facilities within this code;
(g) The effectiveness of, and level of competition for, Sugar Milling Services and marketing services in contributing to a sustainable supply chain from farm gate to sale;
(h) whether there is ongoing justification to continue the operation of the code over and above what is provided under Part IIIA of the Competition and Consumer Act 2010;
(i) Any other relevant matters

(5) In conducting the review, the following matters must be taken into account:

(a) the negotiation of Cane Supply Agreements (within the meaning of the code) during the 5 years preceding the commencement of the review;
(b) Any changes to market conditions in the sugar supply chain, including economic trends that may have impacted in the operation of the sugar export market;
(c) the legitimate interest of all relevant stakeholders.

6 Further review of operation of this regulation

(1) If this regulation continues in operation for 10 years or more after the commencement of this section, the Minister administering
section 1 of the *Farm Household Support Act 2014* must cause a further review of the operation of this regulation to be undertaken.

(2) The review must start not earlier than 10 years and not later than 12 years after the commencement of this section.

(3) The review must take into account the matters set out in subclauses 5(3), (4) and (5).
Schedule 1—Cane Sugar Processing Industry Code of Conduct

Note: See section 4.

Part 1—Preliminary

1 Name of code

This code is the Cane Sugar Processing Industry Code of Conduct.

2 Purpose of code

The purpose of this code is to regulate the conduct of Sugar Millers, Sugar Port Owners and Cane Producers to ensure fair and transparent access to Sugar Milling Services, choice regarding Marketing Services and to provide for mechanisms to negotiate disputes.

3 Definitions

In this code:

ACCC means the Australian Competition and Consumer Commission.

Act means the Competition and Consumer Act 2010.

Associated Entity has the meaning given by section 50AAA of the Corporations Act 2001.

Cane Producer means an entity seeking access to, or using, Sugar Milling Services and includes any bargaining representatives appointed to negotiate a collective contract on the behalf of a group of growers.

Cane Supply Agreement means an agreement between a Sugar Miller and a Cane Producer for the delivery of sugar cane and Sugar Milling Services and may include marketing services.
Clause 3

**Condemned Cane** means, for a crushing season, cane which the Sugar Miller rejects or does not pay for, according to conditions agreed to in a Cane Supply Agreement.

**Dispute Resolution Body** means the body appointed by the Minister to handle dispute resolution matters under this code. Until otherwise appointed by the Minister, the body will be LEADR & IAMA.

**Entity** has the meaning given by section 64A of the *Corporations Act 2001*.

**Grower Economic Interest (GEI) Sugar** is the amount of raw sugar produced from cane supplied by a Cane Producer to the Sugar Miller (excluding Condemned Cane) based on the relevant parts of the formula agreed to in a Cane Supply Agreement.

**Marketing Services** means pricing, sale of sugar and logistics through a sugar milling facility to the Cane Producer for the Grower Economic Interest Sugar.

**Mill Economic Interest (MEI) Sugar** is the total of raw sugar that a mill produces for which the mill bears the price exposure. For the avoidance of doubt, this excludes any Raw Sugar for which a Grower (other than a Grower that is a Related Body Corporate of the mill) has the pricing exposure.

**Sugar Marketer** means the provider of Marketing Services to a Cane Producer.

**Sugar Mill** means a mill that receives sugar cane and undertakes a Sugar Milling Service.

**Sugar Miller** means the owner or operator of a sugar mill that is used, or is to be used, to provide Sugar Milling Services.

**Sugar Milling Service** means the crushing of sugar cane and production or part-production of raw sugar being a service (within the meaning of Part IIIA of the *Competition and Consumer Act 2010*) provided by means of a sugar mill.
Clause 4

4 Application of code

Application of certain parts and clauses

This code applies to all Cane Supply Agreements for the supply of Sugar Milling Services provided by a Sugar Miller on or after 15 April 2017.
Clause 5

Part 2—General obligations of Sugar Millers and Cane Producers

5 Obligation to deal in good faith

A Sugar Miller and a Cane Producer must at all times deal with each other in good faith.
Clause 6

Part 3—Access to Sugar Milling Services provided by a Sugar Miller

Division 1—General matters

6 Sugar Miller not to unreasonably discriminate or hinder Cane Producers’ access to Sugar Milling Services

   (1) In providing a Sugar Milling Service to a Cane Producer, a Sugar Miller must not discriminate in favour of itself, or a Cane Producer which is an associated entity.

   (2) A Sugar Miller must not engage in conduct for the purpose of preventing or hindering a Cane Producer’s access to Sugar Milling Services.

   (3) For the purposes of subclause (2), the withdrawal or suspension of services by a Sugar Miller in accordance with the terms of a Cane Supply Agreement with a Cane Producer is not regarded as hindering that Cane Producer’s access to Sugar Milling Services.

7 Cane Producer to have access to Sugar Milling Services provided by a Sugar Miller

   Access to Sugar Milling Services to be provided under a Cane Supply Agreement

   (1) A Sugar Miller must enter into a Cane Supply Agreement or enter into negotiations about the terms of a Cane Supply Agreement with a Cane Producer if the Cane Producer has applied to the Sugar Miller to enter into a Cane Supply Agreement.

8 Terms of a Cane Supply Agreement

   (1) The terms of a Cane Supply Agreement between a Sugar Miller and a Cane Producer (the parties) must be either:

      (a) the terms negotiated and agreed by the parties; or
Clause 8

(b) the terms determined by an arbitrator under clause 10.

(2) Unless otherwise agreed between all parties, the terms of a Cane Supply Agreement must:

(a) contain a mechanism by which the quantity of Grower Economic Interest Sugar and Mill Economic Interest Sugar can be identified; and
(b) contain a mechanism that provides a link between the price for cane paid to a Cane Producer to the selling price for sugar; and
(c) permit a Cane Producer to access Marketing Services of their choice from a third party entity other than the Sugar Miller in respect of the Grower Economic Interest Sugar; and
(d) not discriminate between a Cane Producer accessing Marketing Services from a third party entity other than the Sugar Miller and a Cane Producer accessing Marketing Services from the Sugar Miller; and
(e) agree to procedures for managing the crushing capacity of the mill, scheduling, season length, weather interruptions and quality controls for the acceptance of cane.

(3) A Cane Supply Agreement may include Marketing Services.

(4) Without limiting the generality of clause 8(2)(d) a Cane Supply Agreement will be discriminatory if it has the effect that a Cane Producer accessing Marketing Services from a third party entity unreasonably pays more for Sugar Milling Services than a Cane Producer who accesses Marketing Services from the Sugar Miller.

(5) A Cane Supply Agreement must include an agreement on the delivery of Grower’s Sugar to the agreed Marketing Service as directed by the Cane Producer promptly with no unreasonable additional cost.

(6) The terms of a Cane Supply Agreement must not purport to restrict a party from disclosing information to the ACCC.

(7) A Cane Supply Agreement may require a party to the agreement to retain records in addition to those required by Part 4 of this Code.
9 Dealing with disputes during negotiations

(1) A party negotiating a Cane Supply Agreement may request, in writing, the other party to resolve a dispute about one or more of the following:
   (a) a decision made under clause 11;
   (b) the proposed terms of the Cane Supply Agreement.

(2) The request must be made before the negotiations end under clause 12.

(3) Within 5 business days after receiving the request, senior representatives from each party must meet and use reasonable endeavours to resolve the dispute.

(4) If the dispute is not resolved, the parties may mutually agree to undertake mediation.

(5) If mediation is required under subclause (4), the party that requested resolution of the dispute under subclause (1) (the first party) must tell the other party in writing:
   (a) the nature of the dispute; and
   (b) what outcome the first party wants; and
   (c) what action the first party thinks will settle the dispute.

(6) Either party may ask the Dispute Resolution Body to appoint a mediator.

(7) In conducting mediation, the mediator must take into account written representations made by a person, if the mediator considers that the person has a sufficient interest in the terms of the Cane Supply Agreement concerned.

10 Arbitration of terms of agreements

(1) A party negotiating a Cane Supply Agreement may, by notice in writing to the other party, refer the terms of the agreement to be determined by an independent arbitrator appointed by the parties.
Clause 10

(2) If a notice is given to the other party under subclause (1), the party that gave the notice (the first party) must notify the ACCC, in writing, of the following matters when the notice is given:
   (a) the first party’s intention to proceed to arbitration;
   (b) the nature of any dispute between the parties;
   (c) whether the parties have agreed on the appointment of an arbitrator.

(3) If the parties fail to agree on the appointment of an arbitrator within 10 business days after the notice is given, the first party must request the Dispute Resolution Body to appoint an independent arbitrator.

(4) The arbitrator must be:
   (a) An accredited arbitrator; and
   (b) Have extensive arbitration experience; and
   (c) Must either:
      (i) Have extensive agricultural industry experience; or
      (ii) Be a legal practitioner who is eligible for appointment to the Supreme Court of a State or Territory, with considerable litigation experience.

(5) The arbitrator must determine the terms of the Cane Supply Agreement and notify the parties of the terms within 60 business days of appointment under either subclause (2) or subclause (3). Both parties concerned must enter into a Cane Supply Agreement on the terms determined by the arbitrator within 5 business days of being notified of the terms.

(6) In determining the terms of the Cane Supply Agreement, the arbitrator must take into account the following principles:
   (a) The terms of the Cane Supply Agreement should promote the efficient milling of cane and efficient milling costs on the part of the Sugar Miller, including all variables regarding the quality of the produced product;
   (b) The terms of the Cane Supply Agreement should reward and encourage the production of the highest quality sugar cane on the part of the Cane Producer; and
Part 3  Access to Sugar Milling Services provided by a Sugar Miller

Division 1  General matters

Clause 11

(c) The historical allocation of reward as between Sugar Miller and Cane Producer as reflected in the traditional cane payment formula or other formula’s previously agreed to.

(7) In determining the terms of the Cane Supply Agreement, the arbitrator must take into account written representations made by a person, if the arbitrator considers that the person has a sufficient interest in the terms of the agreement.

(8) The parties to arbitration under this clause:

(a) must bear their own costs of attending the arbitration; and

(b) are equally liable for the following costs of arbitration unless they agree otherwise:

(i) the cost of the arbitrator;

(ii) the cost of room hire;

(iii) the cost of any additional input (including expert reports) agreed by both parties to be necessary to the conduct of the arbitration; and

(c) are liable for any other costs determined by the arbitrator.

(9) An arbitrator appointed under this clause is authorised to vary the default position with respect to costs in clause 10(8) where the arbitrator is satisfied that either party has conducted themselves in bad faith during the arbitration.

11 Cane Producer may request information to be provided during negotiations

(1) A Cane Producer may request a Sugar Miller to provide information held by the provider for the purpose of negotiating the terms of a Cane Supply Agreement.

(2) The Sugar Miller must comply with a request mentioned in subclause (1), within 10 business days of receiving the request, if:

(a) the information requested is not confidential or commercially sensitive; and

(b) the information does not relate to another Cane Producer; and
Clause 12

(c) providing the information would not be unduly onerous for the Sugar Miller having regard to the following:

(i) the operational, commercial and logistical information that an Cane Producer may require to use a sugar milling facility;

(ii) whether the Sugar Miller has access to and control of the information and whether a third party would need to be engaged to gather, collate or present the information;

(iii) the staffing, technical and financial capability of the Sugar Miller to obtain and provide the information;

(iv) the volume of information and time-frame within which it is requested.

12 When negotiations are taken to end

(1) Negotiations between a Cane Producer and a Sugar Miller end on the earliest of the following days:

(a) the day the Cane Producer and Sugar Miller enter into a Cane Supply Agreement;

(b) the day the Cane Producer provides written notification to the Sugar Miller that it no longer wishes to enter into a Cane Supply Agreement;

(c) the day that is 80 business days after the negotiation request concerned was made, or such later day as is agreed by the Cane Producer and the Sugar Miller.

(2) For the purpose of calculating the number of days for paragraph (1)(c), the days during the period commencing on the day a notice is given under subclause 10(1) and ending on the day the Cane Producer and provider enter into an agreement on the terms determined by the arbitrator under subclause 10(5) are to be disregarded.
Clause 12

(3) If negotiations between a Cane Producer and a Sugar Miller end without the Cane Producer and provider entering a Cane Supply Agreement, the Cane Producer may make a new application under clause 7 to the provider to enter into a Cane Supply Agreement.
Division 2—Mediation

13 General rules applicable to mediation

(1) The rules in this clause apply to mediation conducted under clause 9.

(2) If the parties cannot agree on who should be the mediator, either party may request the Institute of Arbitrators and Mediators Australia to appoint the mediator.

(3) The mediator may decide the time and place (which must be in Australia) for mediation.

(4) The parties must attend the mediation and try to resolve the dispute.

(5) For subclause (3), a party is taken to attend mediation if the party is represented at the mediation by a person who has the authority to enter into an agreement to settle the dispute on behalf of the party.

(6) For subclause (3), a party will be taken to be trying to resolve a dispute if the party does all of the following:
   
   (a) attends and participates in meetings at reasonable times;
   
   (b) at the beginning of the mediation process, makes the party’s intention clear as to what the party is trying to achieve through the mediation process;
   
   (c) observes any obligations relating to confidentiality that apply during or after the mediation process;

14 Termination of mediation

(1) This clause applies if:
   
   (a) at least 20 business days have elapsed after the start of mediation of a dispute; and
   
   (b) the dispute has not been resolved.

(2) If either party asks the mediator to terminate the mediation, the mediator must do so.
Clause 15

(3) Subject to subclause (2), the mediator may terminate the mediation at any time unless satisfied that a resolution of the dispute is imminent.

(4) If the mediator terminates the mediation of a dispute under this clause, the mediator must issue a certificate to each party stating:

(a) the names of the parties; and
(b) the nature of the dispute; and
(c) that the mediation has finished; and
(d) that the dispute has not been resolved.

(5) If the mediation was in relation to a dispute mentioned in subclause 9(1) and the mediation is terminated, the party that requested resolution of the dispute under subclause 9(1) must notify the ACCC that the mediation has been terminated.

15 Costs of mediation

(1) The parties to mediation under this code:

(a) must bear their own costs of attending mediation; and
(b) are equally liable for the following costs of mediation unless they agree otherwise:

(i) the cost of the mediator;
(ii) the cost of room hire;
(iii) the cost of any additional input (including expert reports) agreed by both parties to be necessary to the conduct of the mediation; and
(c) are liable for any other costs determined by the mediator.

16 Right to take legal proceedings not affected

Nothing in this Part affects the right of a party to a Cane Supply Agreement to institute legal proceedings under the agreement.
Part 4—Record keeping

17 Sugar Miller to retain Cane Supply Agreements and variations to those agreements

(1) A Sugar Miller must retain the following documents in accordance with this clause:
   (a) Cane Supply Agreements entered into by the miller;
   (b) documents evidencing variations made to Cane Supply Agreements mentioned in paragraph (a).

(2) A Cane Supply Agreement entered into by a Sugar Miller that has not been varied since the agreement was entered into must be retained by the Sugar Miller for at least 10 years after the agreement was entered into.

(3) A Cane Supply Agreement entered into by a Sugar Miller that has been varied since the agreement was entered into must be retained with the documents evidencing the variations to the agreement for at least 10 years after the variations to the agreement commenced.

18 Records about disputes in relation to a Cane Supply Agreement

(1) A Sugar Miller and a Cane Producer involved in a dispute about the proposed terms of a Cane Supply Agreement must both retain records relating to the dispute for at least 10 years after the dispute is concluded.

(2) The obligation to retain records mentioned in subclause (1) applies regardless of how the dispute concluded.