



Competition and Consumer (Industry Code— Sugar) Regulations 2017

I, General the Honourable Sir Peter Cosgrove AK MC (Ret'd), Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulations.

Dated 04 April 2017

Peter Cosgrove
Governor-General

By His Excellency's Command

Scott Morrison
Treasurer

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1 Name

This instrument is the *Competition and Consumer (Industry Code—Sugar) Regulations 2017*.

2 Commencement

- (1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this instrument	The day after this instrument is registered.	5 April 2017

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

- (2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

3 Authority

This instrument is made under the *Competition and Consumer Act 2010*.

4 Code of conduct

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

- (a) is prescribed for the purposes of Part IVB of that Act; and
- (b) is a mandatory industry code.

5 Authorisation of certain conduct

For the purposes of subparagraph 51(1)(a)(ii) of the *Competition and Consumer Act 2010*, anything that is done in accordance with the code set out in Schedule 1 is specified, and specifically authorised by this regulation.

6 High Court's jurisdiction unaffected

The code set out in Schedule 1 is not intended to affect the jurisdiction of the High Court under section 75 of the Constitution.

7 Review of Code

- (1) The Minister administering section 51AE of the *Competition and Consumer Act 2010* must cause a review to be undertaken of the operation of the Sugar Code of Conduct.

Section 7

- (2) The review must start before the end of the period of 18 months after the commencement of this section.

Schedule 1—Sugar Code of Conduct

Note: See section 4.

Part 1—Preliminary

1 Name of code

This code is the Sugar Code of Conduct.

2 Purposes of code

The purposes of this code are:

- (a) to regulate the conduct of growers, mill owners and marketers of sugar in relation to contracts or agreements for the supply of cane or the on-supply of sugar; and
- (b) to ensure 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 the grower supplies; and
- (c) to require and provide for pre-contractual arbitration of the terms of agreements for the supply of cane or the on-supply of sugar if the parties fail to agree to those terms;

to the extent that those contracts or agreements have at least one party that is a corporation.

Note: **Corporation** is defined in section 4 of the *Competition and Consumer Act 2010*.

3 Definitions

In this code:

Agriculture Minister has the same meaning as in the *Biosecurity Act 2015*.

bargaining representative, for a group of growers, means a person with the written authority of each grower who is a member of the group.

cane means sugar cane.

crushing season means, for any calendar year, the season for the harvesting and crushing of cane starting in the year.

grower means a person who supplies, or proposes to supply, cane to a mill.

grower economic interest sugar has the meaning given by subparagraph 10(1)(c)(ii).

marketer means 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.

Clause 3

mill means a building or other structure that is equipped for the manufacture of sugar from cane.

mill owner means an entity owning or having control of a mill, and includes an entity controlling the business of a mill.

mill-related entity means:

- (a) a mill owner; or
- (b) a related body corporate of the mill owner.

on-supply agreement has the meaning given by clause 13.

on-supply sugar, to which a supply contract relates, means the raw sugar manufactured, or to be manufactured, from the cane supplied, or to be supplied, under the contract.

related body corporate: a body corporate is a related body corporate of another body corporate if they are related to each other within the meaning of section 50 of the *Corporations Act 2001*.

sugar does not include any by-products of sugar (such as molasses).

sugar cane means any plant or part of a plant, whether or not the part has been crushed, of the genus *Saccharum* or any hybrid of sugar cane.

supply contract means a written contract, complying with or otherwise consistent with Part 3, made between a grower and a mill owner for the supply of cane by the grower to the mill, and includes a supply contract taken to have been made because of subclause 12(2) and clause 17.

Part 2—Obligation to act in good faith

4 Application of this Part

This Part applies to:

- (a) the parties to a supply contract or an on-supply agreement; or
- (b) the proposed parties to a proposed supply contract or a proposed on-supply agreement;

if at least one of the parties or proposed parties is a corporation.

Note: **Corporation** is defined in section 4 of the *Competition and Consumer Act 2010*.

5 Obligation to act in good faith

- (1) Each party to a supply contract or an on-supply agreement must act towards another party with good faith, within the meaning of the unwritten law from time to time, in relation to:
 - (a) the contract or agreement; and
 - (b) this code.
- (2) Each person who proposes to become a party to a proposed supply contract or a proposed on-supply agreement must act towards another proposed party with good faith, within the meaning of the unwritten law from time to time, in relation to:
 - (a) any dealing or dispute relating to the proposed contract or agreement; and
 - (b) the negotiation of the proposed contract or agreement; and
 - (c) this code.
- (3) Without limiting subclauses (1) and (2), each party or proposed party:
 - (a) must act reasonably, fairly, honestly and co-operatively; and
 - (b) must not mislead, harass, intimidate or oppress any other party or proposed party.

Part 3—Supply contracts

Division 1—Entering into supply contracts

6 Application of this Division

This Division applies to a supply of cane from a grower to a mill owner if:

- (a) either the grower or the mill owner is a corporation, or both the grower and the mill owner are corporations; and

Note: **Corporation** is defined in section 4 of the *Competition and Consumer Act 2010*.

- (b) the grower is not a related body corporate of the mill owner; and
- (c) there is no other Australian law that specifically relates to supply contracts and that would apply to a supply contract between the grower and the mill owner for the supply of that cane.

7 Requirement for supply contracts

- (1) A grower may supply cane to a mill for a crushing season only if the grower has a supply contract with the mill owner for the season.
- (2) A supply contract may be for one or more crushing seasons.
- (3) A supply contract may be either:
 - (a) an individual contract (see clause 8); or
 - (b) a collective contract (see clause 9).
- (4) An interested third party may be a party to a supply contract between a mill owner and a grower.
- (5) Each of the parties to a supply contract must sign the contract.

8 Individual contracts

An individual contract:

- (a) is a supply contract made directly between a grower and a mill owner; and
- (b) may be for all or part of the supply of cane grown by the grower.

9 Collective contracts

- (1) A collective contract is a supply contract made between 2 or more growers (a **group of growers**) and a mill owner.
- (2) Each grower in a group of growers must sign the collective contract.
- (3) A group of growers may appoint a bargaining representative to negotiate a collective contract on behalf of the group.
- (4) There may be more than one collective contract in force at the same time for a mill.
- (5) A grower may be a party to more than one collective contract.

10 Terms of supply contract about sale of on-supply sugar

- (1) A supply contract for cane between a grower and a mill owner must include each of the following:
 - (a) a term providing for the amount, or the basis for working out the amount, of the payment to the grower for the supply of the cane (the *cane payment*);
 - (b) unless the grower and mill owner otherwise agree—a term (a *related sugar pricing term*) requiring the amount of the cane payment to be worked out in a stated way by linking that amount to the sale price of the on-supply sugar to which the supply contract relates;
 - (c) if the supply contract includes a related sugar pricing term, both of the following, unless the grower and mill owner otherwise agree:
 - (i) a term requiring the mill owner to bear the sale price exposure for the sale of a proportion of the on-supply sugar that is worked out in a stated way;
 - (ii) a term (a *GEI sugar price exposure term*) requiring the grower to bear the sale price exposure for the sale of the remaining on-supply sugar (the *grower economic interest sugar*);
 - (d) if the supply contract includes a GEI sugar price exposure term:
 - (i) a term (a *GEI sugar marketing term*) requiring the mill owner to have an agreement with a stated entity (the *GEI sugar marketing entity*) to sell the quantity of the on-supply sugar that is at least equal to the quantity of the grower economic interest sugar; and
 - (ii) unless the grower and mill owner otherwise agree, a term providing for an entity nominated by the grower to be the GEI sugar marketing entity;
 - (e) if the supply contract provides for an entity nominated by the grower to be the GEI sugar marketing entity—a term requiring the mill owner to deliver for sale the quantity of the on-supply sugar that is at least equal to the quantity of the grower economic interest sugar, as directed by the entity, within a stated reasonable period.
- (2) However, paragraph (1)(d) does not apply if the supply contract states that the mill owner will sell the on-supply sugar.
- (3) Without limiting paragraph (1)(e), the stated period must be reasonable having regard to the likely period in which the mill owner could deliver the on-supply sugar for sale to a related body corporate of the mill owner.

Division 2—Arbitration of disputed terms of intended supply contracts

11 Application of this Division

This Division applies to a supply of cane from a grower to a mill owner if:

- (a) either the grower or the mill owner is a corporation, or both the grower and the mill owner are corporations; and

Note: *Corporation* is defined in section 4 of the *Competition and Consumer Act 2010*.

- (b) the grower is not a related body corporate of the mill owner.

12 Arbitration of disputed terms of intended supply contract

- (1) A party negotiating a supply contract may, by written notice to the other party, refer a dispute about any proposed term of the intended agreement to be determined by an independent arbitrator appointed by the parties.
- (2) Subject to subclauses (3) to (5), if the grower or mill owner refers a dispute about a proposed term of the intended supply contract to arbitration, clauses 14 to 19 of this code (other than subclause 14(1)) apply to the arbitration as if the intended supply contract were an intended on-supply agreement.
- (3) Subclause (4) applies if a GEI sugar marketing term is a proposed term of the intended supply contract and the grower proposes to nominate an entity to be the GEI sugar marketing entity.
- (4) A term of the intended supply contract must not have the effect of unreasonably treating the grower less favourably than the grower would be likely to be treated if a mill-related entity were to be the GEI sugar marketing entity.
- (5) Without limiting subclause (4), a term of the intended supply contract would have the effect of unreasonably treating the grower less favourably for the purposes of that subclause if the effect were that the grower would unreasonably pay more for a service provided by the mill owner under the intended supply contract than the grower would pay for the service if a mill-related entity were the GEI sugar marketing entity.
- (6) Any dispute that may be referred to arbitration under this Division is not to be referred to arbitration under any other law of the Commonwealth, a State or a Territory.

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

13 Application of this Part

This Part applies to 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; and

Note: *Corporation* is defined in section 4 of the *Competition and Consumer Act 2010*.

- (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.

14 Appointment of an independent arbitrator

- (1) A party (the *first party*) negotiating an on-supply agreement may, by written notice to the other party, refer a dispute about any proposed term of the intended agreement to be determined by an independent arbitrator appointed by the parties.
- (2) The notice must state:
 - (a) which proposed term is in dispute; and
 - (b) the nature of the dispute about the term; and
 - (c) what outcome the first party wants.
- (3) If:
 - (a) the parties to the negotiation fail to agree on the appointment of an arbitrator within 10 days after the notice was given; and
 - (b) the first party requests the Treasurer to appoint an arbitrator; the Treasurer, in consultation with the Agriculture Minister, may appoint an independent arbitrator.
- (4) If an arbitrator is appointed, the first party must give the arbitrator a copy of the notice as soon as practicable after the arbitrator is appointed.

15 Determining a term in dispute

- (1) The arbitrator must, within 30 days after appointment or within that period as extended under subclause (2), determine the term in dispute and notify the parties to the negotiation accordingly.
- (2) The arbitrator may extend the 30 day period by a further period not exceeding 30 days if the arbitrator considers it to be reasonably required. The arbitrator must

Clause 16

give written notice of the extension, and the reasons for the extension, to the parties to the negotiation.

- (3) The arbitrator may only decide the dispute by deciding the term in dispute.
- (4) The arbitrator must not determine a term that would result in the acquisition of property otherwise than on just terms.
- (5) In this clause:

acquisition of property has the same meaning as in paragraph 51(xxxi) of the Constitution.

just terms has the same meaning as in paragraph 51(xxxi) of the Constitution.

16 Conduct of the arbitration

- (1) 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.
- (2) The arbitration must be conducted in accordance with the Resolution Institute Arbitration Rules 2016, except to the extent (if any) that those rules are inconsistent with this code.

17 On-supply agreement taken to have been made

If each term in dispute has been determined under clause 15, the parties to the negotiation are taken to have made an on-supply agreement that includes:

- (a) any terms agreed between the parties; and
- (b) each term determined under clause 15.

18 Terminating the arbitration

The parties to the negotiation may, before being notified of the arbitrator's determination, terminate the arbitration if they have entered into an on-supply agreement.

19 Costs of the arbitration

The parties to arbitration under this Part:

- (a) must bear their own costs of attending 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 all parties to be necessary to the conduct of the arbitration; and
- (c) are liable for any other costs determined by the arbitrator.