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Sugar Code of Conduct review
Department of Agriculture and Water Resources
GPO Box 858
CANBERRA ACT 2601

By email: sugarcodereview@agriculture.gov.au

Dear Sir/Madam

Re: Submission to the Review of the Sugar Code of Conduct

I write to provide the submission of the Australian Competition and Consumer Commission (ACCC) to the Review of the Sugar Code of Conduct (the Code).

The Code is a prescribed and mandatory Code for the purposes of section 51AE of the *Competition and Consumer Act 2010* (CCA).

Sugar industry complaints

Prior to the inception of the Code, and following de-regulation of the sugar industry in 2006, the ACCC received 21 industry related complaints of which 48% alleged conduct directly impacting sugarcane growers.

Since the commencement of the Code on 5 April 2017, the ACCC has received eight sugar industry related complaints. Each complaint alleges that a sugar mill operator has breached the Code, in addition to breaches of the Australian Consumer Law (ACL). These complaints are currently the subject of two, separate, investigations by the ACCC which are yet to be finalised.

The complaints each include an allegation that a mill operator has breached the Code by failing to act in good faith towards sugarcane growers in the negotiation of supply contracts. Further, allegations have been made that mill operators have, separately, engaged in conduct in contravention of various provisions of the ACL.

One of the complaints also alleges a failure on the part of a mill operator to provide sugarcane growers with choice in marketing the grower economic interest in the sugar produced by that mill operator (Grower Choice). Grower Choice is provided for by the *Sugar Industry Act 1999* (Qld) (SIA) and is discussed in further detail below.

Current sugar industry legislative arrangements

Under current legislative arrangements, the marketing of sugar is governed by the SIA which provides that sugarcane growers can exercise Grower Choice in marketing their portion of economic interest in sugar produced by a mill operator, with the remaining portion being marketed by, or on behalf of, the mill operator themselves. The Code mirrors the provisions of the SIA, and while containing a clause guaranteeing Grower Choice, it also contains a clause that renders this inoperable while ever Grower Choice is provided for in other legislation (as is currently the case under the SIA). This has implications for the ACCC in administering the Code, as discussed below.

Potential future industry scenarios

The ACCC has identified a number of potential, future industry scenarios which require consideration in reviewing the Code:

- A continuation in complaints resulting from perceived, or actual, impediments in the negotiation of supply contracts and on-supply agreements.
- An increase in competition for the marketing for export of raw sugar services by non-miller related marketing entities.

At present there is only one non-miller operator related entity offering marketing for export of raw sugar services, namely Queensland Sugar Limited. If Grower Choice becomes the industry norm, an increase in competition for these services may eventuate. The ACCC considers that, should the Code be amended to provide for Grower Choice, it may incentivise further competition in the market for the export of (Australian) sugar.

- Competition for the acquisition of sugarcane.

In most sugarcane growing regions in Australia, mill operators enjoy a position free from competition with respect to the acquisition of sugarcane. This is due to the fact that most sugarcane growers, for a number of practical reasons, do not have a choice of which mill operator they supply. Should alternative uses for sugarcane become more entrenched, such as the production of ethanol from molasses or bagasse, greater competition for the acquisition of sugarcane may arise.

Review of the Code

The Code was largely introduced to address an imbalance in market power between sugarcane growers and mill operators, which the ACCC understands to be problematic. In most instances, as a consequence of limitations in the distance that sugarcane can be transported after harvest, sugarcane growers have only one mill operator to which they can supply their sugarcane. Consequently, there is commonly limited or no competition for growers' sugarcane, and growers have limited bargaining power in negotiating prices or supply contracts. The ACCC considers the Code to be an appropriate vehicle to address these issues and that the Code should remain in place.

In addition, the ACCC wishes to highlight the following as areas for consideration in terms of this Review:

- The operation of the Grower Choice provisions of the Code.

As noted above, at present the Code does not actually provide Grower Choice, as it is currently provided for by the SIA. The Code provides a guarantee that, should the Grower Choice provisions of the SIA be repealed, the Code's mirror provisions will activate. This has implications in relation to the ability of the ACCC to investigate allegations that Grower Choice is being impeded or not provided. The ACCC submits

that the Grower Choice provisions of the Code should be amended to actively provide Grower Choice. By virtue of the operation of section 51AB of the CCA to prohibit contraventions of applicable industry codes, this would provide the ACCC with the ability to investigate instances where it is alleged that sugarcane growers are not being provided with Grower Choice.

- Penalty provisions

Currently the ACCC cannot seek civil pecuniary penalties, or issue infringement notices, for breaches of the Code. The ability to seek civil pecuniary penalties, and issue infringement notices, is a fundamental part of the ACCC's enforcement toolkit. The lack of consequences for breaching parts of the Code, undermines the ACCC's ability to ensure compliance with the Code.

Recommendation

Therefore, the ACCC recommends that:

- the obligation upon mill operators to provide sugarcane growers with Grower Choice be activated in the Code; and
- civil pecuniary penalties (and thereby infringement notices) be introduced for all breaches of the Code.

Should you wish to meet or discuss this matter further, please contact Rami Greiss, Executive General Manager, Enforcement Division on (02) 6243 1226 or Rami.Greiss@accc.gov.au.

Yours sincerely



Rod Sims
Chair
ACCC