Resolution Institute

Dairy Code of Conduct Review 2021

27 August 2021

Resolution Institute DRAFT Submission

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About Resolution Institute

Resolution Institute is the largest membership organisation of dispute resolution (DR) professionals within Australia and Aotearoa New Zealand. Being both a Mediator Standards Board (MSB) approved accreditor as well as a nominator of third-party mediators and arbitrators is an important aspect of Resolution Institute's work as a not-for-profit membership organisation that promotes and facilitates the development and use of dispute resolution.

Resolution Institute members engage in mediation, adjudication, arbitration, expert determination, facilitation, conflict coaching, conciliation and restorative justice and has a membership base of over 3,000 dispute resolution (DR) professionals, across a diverse range of industry sectors, including building and construction, finance, commercial, community, technology, mining, local government, insurance, environmental and family. Resolution Institute focuses on excellence in standards of DR practice, support services to members and developing an environment in which DR services are frequently used, aligned to our vision of *'enabling meaningful access to justice and dispute resolution, effectively resolving conflict in any situation'*.

Resolution Institute is committed to promoting and supporting the use of DR through education, training and accreditation of professionals, to contribute to the provision of quality DR services.

Resolution Institute is registered by the Australian Charities and Not-for-Profits Commission (ACNC) as a not-for-profit organisation.

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Executive Summary

Resolution Institute is the peak industry body for training, accreditation and nomination services across all dispute resolution disciplines in Australia and Aotearoa New Zealand and appreciates the opportunity to contribute to this review of the Dairy Code of Conduct. The recommendations made in this submission specifically addresses the areas relating to complaints, disputes, and dispute resolution generally (including both mediation and arbitration) raised in the discussion paper that accompanied the call for submissions.

Resolution Institute's position, as well as that of its members, is that the Dairy Code of Conduct (the Code) provides a great opportunity for parties in a Milk Supply Agreement (MSA) to resolve disputes in an efficient, cost effective and equitable manner.

This Code could, however, be improved in several ways:

First, the suitability and credibility of the procedures could easily be improved by requiring that all dispute resolvers hold nationally recognised accreditations, such as the National Mediation Accreditation Standards.

Second, introducing the option for multi-party disputes, instead of just one-on-one dispute resolution forums would both allow for more flexibility and cost savings in the Code with little to no disruption.

Third, to make the process of seeking to appoint a dispute resolver easier, a nominated dispute advisor(s) should be written directly into the regulations, clearly demonstrating to the public and disputing parties that they are the relevant adviser.

Finally, it is also recommended that the list of dispute resolvers on relevant panel(s) should be made public to support disputing parties who may wish to select their dispute resolver. This would allow for a more streamlined and accessible process with minimal impact on any reporting requirements of the Code.

More detailed information regarding these points is provided below in the answers to each of the questions outlined in the discussion paper.

Detailed Feedback and Discussion Paper Questions:

Question 1: Are the current complaint handling procedures under the Code fit for purpose or suitable to requirements?

Although Resolution Institute believes that the combination of internal complaint handling procedures, mediation and arbitration in principle are sufficient (in combination) to resolve disputes related to Milk Service Agreements (MSA's), it believes that more can be done to better integrate these systems into the Code.

Qualifications of dispute resolvers

Firstly, Resolution Institute recommends that there should be a minimum accreditation standard for the inclusion of any person to the lists of dispute resolvers, both mediators and arbitrators laid out in ss 44 and 45 of the Code. Resolution Institute recommend that for mediators, that this minimum accreditation be the National Mediation Accreditation System (NMAS) accreditation and for arbitrators, an official Resolution Institute accreditation grading or accreditation from an alternative professional body.

Although we trust that any person nominated by the appointed dispute resolution adviser is fit to perform their role at the time that they are nominated, requiring accreditation as a prerequisite for eligibility to join, and subsequently remain on the list provides two distinct advantages over the current model. First, the Continuing Professional Development (CPD) requirements for continued accreditation ensures that the list is continually up-to-date, and that each member on the list continues to be fit to resolve dairy code disputes. This is especially important, as there is no ongoing mechanism or requirement for the relevant advisor to curate the list of their own accord by adding or removing members. Second, requiring accreditation in this area is part of a goal to ensure that all people who hold themselves out to be mediators or arbitrators in an official, public context should have universally agreed upon qualifications, thus increasing public faith in the role.

Multi-party' or 'group' dispute resolution processes

Additionally, Resolution Institute believes that the code should include a 'multi-party' or 'group' dispute resolution process under the Dairy Code. This would follow the example of the ACCC, which has recommended a similar process be included under a revised Franchising Code. Having only two-party disputes available makes it even more difficult for dairy farmers with the same complaint against a single processor to engage in a dispute resolution procedure which provides a quick, inexpensive, and fair process to achieve a resolution.

Finally, Resolution Institute suggests that references to 'disputes under or in connection with the agreement' in the Act might be widened in light of the High Court's judgment in the *Rinehart & Anor v Hancock Prospecting Pty Ltd & Ors* [2019] HCA 13. We recommend that it should be expressed along the lines of 'disputes under or in connection with the agreement or arising out of the performance of the parties of their obligations under the agreement or under the Code'.

Question 2: Do I understand the process of seeking to appoint a mediator?

Resolution Institute believes the current process of seeking to appoint a mediator is too opaque and difficult to engage with. Information on the nature of the dispute advisor, whether a single person or an organisation, is not immediately apparent, either in the regulations or through a brief internet search. When the relevant body has been identified, there appears to be no clear way or format through which to lodge a request for the nomination of a dispute resolver.

The process is confusing and makes it difficult for disputing parties/claimants to find out who the dispute advisor is? Searches can often bring up a plethora of websites, such as https://dairycode.com.au/ which may lead the disputing parties to believe that individual mediators are the dispute advisor.

To rectify this, Resolution Institute recommends that a nominated dispute advisor or advisors should have their name written directly into the regulations if possible. This would allow the organisation(s) to hold itself out to the public as the relevant adviser under the Code on its website, allowing for an increased profile of the dispute resolution mechanism.

An alternative, cost-effective, option is to completely remove the notion of a dispute advisor, and enable the peak dispute resolution body, Resolution Institute, to directly support the industry to maintain a transparent and qualified panel of mediators that can be accessed directly by the parties, or if no agreement can be made, then Resolution Institute is well placed to nominate the most appropriate dispute resolver based on the details of the matter.

Further, as an experienced nominating body of dispute resolvers, we recommend that the dispute advisor or similar nominating authority should standardise an application form for disputants. This online form should be easily accessible and available online, gather relevant and detailed information about the dispute to inform the selection of the most appropriate mediator or arbitrator. Further, the form should be supported by a clear policy on how the selection of the dispute resolver is made according to the details of the dispute (i.e. quantum of claim, complexity of dispute, number of parties etc.). This level of transparency, in addition to a publicly available panel of approved dispute resolvers would not only allow easier access to the dispute resolution mechanisms, but also increase the confidence in, and efficiency of, the process.

Finally, s 46(2) of the Code provides that a dispute must not be resolved by arbitration unless the MSA provides for arbitration as a means for resolving disputes; or the parties to the MSA subsequent to a dispute occurring, agree in writing to use arbitration to resolve the dispute. In our experience as a nominating body of domestic arbitrators, this latter course is unlikely, or even practically impossible once the parties are already engaged in a conflict and especially where mediation has failed. Further, a matter does not proceed automatically to arbitration on the failure of an earlier process unless the parties have specifically provided for arbitration as part of the dispute resolution procedure in the milk supply agreement beforehand. Therefore, if parties want the opportunity to finally, fairly and inexpensively resolve a conflict that arises under or in connection with a milk supply agreement under

the Code, then they must include an arbitration clause in the milk supply agreement. This section should be improved by making arbitration and mediation clauses a standard and mandatory inclusion in MSA's.

To achieve this, Resolution Institute recommends the inclusion of a standard cascading dispute resolution clause which provides for mediation, then arbitration. Please note that if this course of action proceeds, Resolution Institute recommends that a different dispute resolver is appointed for mediation and then arbitration. There are significant challenges of having the same dispute resolver acting as both mediator and arbitrator and this should be avoided.

It is suggested that examples of such dispute resolution clauses should be listed on the website of the dispute advisor and/or other nominating bodies such as Resolution Institute to assist parties in preventing further conflict. Cascading dispute resolution clauses are readily available on websites of bodies such as Resolution Institute, and in legal databases such as the Australasian Legal Information Institute.

Question 3: Who is best placed to coordinate mediation and arbitration processes under the code?

Resolution Institute has always believed that the most solid foundation for the resolution of a dispute is two parties voluntarily agreeing to a dispute resolution procedure and choosing a dispute resolver between themselves. To this end, Resolution Institute recommends in the first instance, in addition to the current process related to the dispute advisor, that parties be allowed to choose their own dispute resolver if they are able to and inclined to do so.

Resolution Institute sees little downside in allowing parties to agree upon and appoint a dispute resolver from a public list of dispute resolvers identified in ss 44 and 45. Mediators often comment that the process of agreeing on a mediator to help resolve parties' disputes is an oftentimes useful step to getting parties to agree on larger issues further down the track. This is also another strong reason for making the list of approved mediators and arbitrators publicly available and easily accessible.

Potential reporting issues that may arise from parties choosing their own dispute resolver would be rectified by having the dispute resolver report to the relevant dispute adviser or nominating body that their dispute has begun, as is already their duty under ss 48(6) and 51(6). Finally, there would be no risk that a party would be delayed in accessing a dispute resolution mechanism, as they would at any time be free to approach the relevant adviser to nominate a dispute resolver under either ss 48 or 51.

Resolution Institute believes that as the largest provider of dispute resolution services across Australia and Aotearoa New Zealand, with long-term experience in the nomination of dispute resolvers through similar dispute resolution schemes, we are best placed to coordinate mediation and arbitration processes under the Code. Alternatively, should government decide to maintain the current arrangement, Resolution Institute would be able to assist the current dispute advisor to fulfil their role by ensuring appropriate accreditation is maintained for all mediators and arbitrators.

As a not-for-profit independent body, we are uniquely placed to assist in this area and it supports our organisational vision of *'Enabling meaningful access to justice and dispute resolution, effectively resolving conflict in any situation'*.

Resolution Institute points to its long-held role as an Authorised Nominating Authority (ANA) for the Building and Construction Security of Payments Acts in all states. The various Acts require that ANA's maintain a panel of specialised dispute resolvers in each state and territory, something that Resolution Institute has been able to do thanks to the deep pool of over 3000 professional members it is able to draw upon. Resolution Institute (and our predecessor organisation the Institute of Arbitrators and Mediators Australia) has been nominating third party neutrals since it was formed in 1975.

Question 4: What improvements could be made to complaints, mediation, and arbitration under the code?

The first improvement that can be made is to mandate a mandatory cascading dispute resolution clause (that includes an option for arbitration) in MSA's or the Code itself. Once a dispute has arisen, it is often difficult for parties to agree on a constructive path forward, and therefore court would become far more likely. It would be in the interests of all parties and stakeholders, therefore, for arbitration to be made the default procedure where mediation and internal dispute mechanisms have failed.

The second improvement that can be made to arbitration under the Code is that arbitrators should be empowered to allocate costs based on the merits. This process, of course, does not apply to mediation, as the mediator is an impartial party. Resolution Institute believes that the current system of allocating the costs of mediations and arbitrations under this Code as per ss 50 and 53 of the regulations is too rigid and may lead to unfairness. Splitting the costs of an arbitration in half, while seemingly the fairest method of allocation, may overlook the disparity between the resources available to milk processors and the farmers who are the subjects of the MSA. Disparity in resources may also lead to unfair outcomes, whereby the wealthier party coerces the less wealthy party into an agreement through costly delaying tactics. These potential pitfalls would be remedied immediately by giving the arbitrator the ability to allocate their costs as they see fit while leaving the ss 50 and 53 as the 'default option.' Other alternatives include capping the costs that could be recovered from the other party or allowing departure from a 50/50 split where there has been vexatious or unreasonable conduct by one of the parties. This change would not only preserve the goal of fairness laid out in the original scheme, but also empower the dispute resolvers, who have become intimately knowledgeable of the circumstances of the parties over the course of the process, to rectify situations where splitting costs evenly would not be a fair outcome. Arbitrators often allocate costs in private, commercial settings and are empowered to do so in similar schemes.

The third improvement that Resolution Institute recommends is the creation of a standard form that must be filled out when parties apply to the relevant adviser for the nomination of a dispute resolver. This would include information such as the quantum of the dispute, the location of the parties, the MSA itself and a brief description of the nature of the dispute. All this information is vital for the dispute advisor or nominating body to have when deciding on which dispute resolver is best equipped to resolve

the present dispute, and a standard form would make such vital information easily accessible, quickly and easily improving the efficiency of the dispute resolution process and the suitability of the chosen dispute resolver. This is especially relevant, as the dispute adviser is also expected to ascertain whether the application is 'frivolous or vexatious' before nominating a dispute resolver. A good example of the legislative implementation of such a form can be found in s 17(3) of the *Building and Construction Industry Security of Payments Act 1999* (NSW).

The final improvement that could be made is a provision specifically allowing mediators or arbitrators to choose the procedural rules to govern the conduct of the mediation or arbitration as there is no current provision for this in the MSA itself, or in any subsequent agreement by the parties currently. Domestic arbitrations and mediations are usually conducted according to institutional rules and procedures that create predictability and allow for the control of the time and cost of the process. Resolution Institute's own arbitration rules are a good example of such rules and are often used for domestic matters given Resolution Institute is the leading independent nominator of domestic arbitrators.

Question 5: Would there be a benefit to pre-contractual arbitration?

The source of arbitration's power as a dispute resolution practice is the consent of both parties beforehand to accept the outcome of an arbitration. The only reason parties would agree to arbitration in the future is if they have a pre-existing agreement in place from which disputes may arise, i.e. a contract. Resolution Institute therefore sees very few practical places where pre-contractual arbitration could even take place.

Further, Resolution Institute does not consider it appropriate to impose a third-party decision on the terms of a bargain before it is struck. The parties themselves can establish whether the potential agreement complies with statutory and policy provisions before entering into it.