

Grocery Code of Conduct Policy

8 August, 2022

THE ARBITRATORS' AND MEDIATORS' INSTITUTE OF NEW ZEALAND AND RESOLUTION INSTITUTE

1. AMINZ and Resolution Institute are the leading organisations for dispute resolution professionals. Collectively we have over 1800 members across New Zealand. The memberships include many of this country's leading DR professionals and academics.
2. AMINZ and Resolution Institute are internationally recognised. Both organisations train and credential dispute resolution professionals across a wide range of schemes. They have robust and long-standing ethics, CPD and complaints-management regimes.
3. AMINZ and Resolution Institute have a long history of working with Government on best practice dispute resolution.
4. AMINZ and Resolution Institute have extensive experience in establishing, administering and/or providing mediators for mediation schemes. Recent examples include:
 - (a) AMINZ is an Approved Dispute Resolution Organisation for credentialing of family mediators; and
 - (b) By agreement with the EQC, AMINZ independently administers, and provides mediators for, the EQC mediation scheme;
 - (c) The Farm Debt Mediation scheme, where AMINZ worked in partnership with Resolution Institute and the Ministry of Primary Industries to craft and implement the training and credentialing regime for the new scheme; and
5. AMINZ is the body nominated by the Minister of Justice to make appointments of arbitrators in the stead of the High Court, pursuant to the Arbitration Act 1996.

SUBMISSION

Do you have any comments about the current state of dispute resolution (for example, the processes that are used or the nature of disputes)?

The Consultation Paper identifies that there are issues with the current state of dispute resolution in relation to retailer-supplier issues, where the dispute resolution processes are left to the parties to negotiate on a contract-by-contract basis.

The Consultation Paper notes that one of the problems identified by the NZ Commerce Commission (the Commission) is the power imbalance between major grocery retailers and their suppliers. That power imbalance is likely to impact on the dispute resolution processes that are chosen by the parties and the way that those dispute resolution processes are implemented.

Where the contracts between the parties do not provide for any form of alternative dispute resolution, the default forum for any dispute is likely to be the courts of New Zealand. The costs and delays involved in court proceedings are likely to mean that individual suppliers do not choose to have claims resolved in that forum.

A further issue that arises with the current approach (allowing disputes to be negotiated on a contract-by-contract basis) is that the identity of the supplier raising a concern or seeking dispute resolution, will be known to the retailer. The Consultation Paper notes the importance of allowing suppliers to raise issues on a confidential basis or to ensure that there is a separation between the division of the retailer that deals with disputes raised by suppliers and the buying team of the retailer (with no information being shared between those divisions).

Do you have any comments on the particular criteria in Chapter 8.5 used to undertake the preliminary assessment of options for dispute resolution?

We note that one of the criteria mentioned by the Commission (and in the Consultation Paper) is the importance of confidentiality, particularly for a supplier raising a concern about conduct of a retailer.

We note that this is not listed as one of the criteria against which to evaluate the dispute resolution options.

It is not clear what level of confidentiality the suppliers are seeking in the proposed processes. For example, do they want to ensure that those who are not party to the dispute do not know about the details of the dispute? Any such requirement can generally be managed in an alternative dispute resolution process; mediations, adjudications and arbitrations are generally confidential to the parties. However, if the suppliers are seeking a level of anonymity in the determinative dispute resolution phase or assurances that information provided to one

part of the retailer will not be made known to other parts of the retailer, specific protections and obligations will need to be drafted into the dispute resolution provisions.

In relation to Chapter 8.6 The options for New Zealand, which of the three options do you think will work best, and why?

A good dispute resolution process should have two parts to it. Firstly, to aim for resolution via mutual agreement, usually facilitated by an independent person (a mediator/facilitator). Secondly, if agreement cannot be reached then a determinative process (adjudication or arbitration).

We consider that option three is the closest to this model. However, we would suggest that some modifications to the suggested process could be made.

In relation to the first stage, we consider that this should be through mediation, with an independent third party seeking to assist the parties to a resolution of the dispute (rather than a process of negotiation, just involving the parties - as is proposed in Option C).

It may be appropriate to allow the supplier to decide whether they want to go through the process of mediation, prior to referring the dispute to a determinative process. This is particularly important as, if the supplier chooses to engage in a mediation process, it will not be possible for them to remain anonymous in relation to their claim against the retailer.

We note that, in relation to identifying and credentialling the mediators for this process, it may be possible to adopt some of the processes from the recently established Farm Debt Mediation (FDM) process, established by MPI in consultation with AMINZ and Resolution Institute.

In particular, a panel of mediators has been assessed and accredited by AMINZ and/or Resolution Institute. The application form (to join the Panel) seeks information in relation to the applicant's experience and understanding of the rural sector and their mediation or dispute resolution experience. The members of the Panel are required to do continuing professional development relevant to farm debt disputes. MPI provide financing for the services provided by AMINZ and Resolution Institute.

As members of AMINZ or Resolution Institute, each mediator on the FDM panel is subject to the Code of Ethics/Conduct, the CPD requirements and the complaints processes of their applicable membership organisation.

We consider that the second stage determinative process could be by adjudication or arbitration. There are pros and cons with each option.

The adjudication process would need to be drafted in detail (potentially adopting the processes provided for in the Construction Contracts Act 2002- CCA,¹ with multiple entities authorised to appoint the adjudicators, including AMINZ). As noted in the Consultation paper, an adjudication process is generally binding but not final, with the parties having the option to effectively “relitigate” the issue in dispute in a further process (which may be in a court process or an arbitration process). The approach in the CCA is to require the parties to comply with the adjudication decision, unless and until it is overturned in a subsequent dispute resolution process (litigation or arbitration).

Although it is not the usual approach in an adjudication, it should be possible to conduct an adjudication process without the supplier disclosing their identity to the respondent. If that is to occur, in general it would be preferable for the adjudicator to also be unaware of the identity of the supplier. There would need to be a “registry body” that deals with the parties and receives all communications and engages the adjudicator and ensures that the documents are anonymised. However, once a decision is issued, it is likely that the retailer will become aware of the identity of the supplier (particularly if the decision is in favour of the supplier) as the retailer may be required to take action to compensate the supplier or change their practices in relation to that supplier.

If the second stage determinative process is arbitration, then it will not be necessary to draft detailed provisions for that process as, in general, all the provisions needed to conduct an effective arbitration in New Zealand, are in the Arbitration Act 1996. The Arbitration Act 1996 provides that if either party wants a hearing to be held, then a hearing must be held. That would mean that the supplier could not remain anonymous. It would be possible for the parties to agree (in a Code or similar) that arbitrations will be conducted on the papers and for agreements as to the supplier remaining anonymous if they wish to adopt that approach. Such provisions would need to be carefully drafted and considered for how they interact with other provisions of the Arbitration Act.

Do you have any comments on the preliminary assessment of the options against the criteria in Chapter 8?

As noted above, we consider that the first (consensual) phase of the dispute resolution process should be by mediation rather than negotiation. There are many advantages in having an independent third-party explore the issues in dispute and to assist the parties in finding an agreed resolution. The FDM processes provide an excellent template to develop a mediation process for retailer-supplier disputes.

We consider that the next stage should be a determinative process of either adjudication or arbitration. While adjudication would be faster and less costly than arbitration, it is not a final

process and therefore, in some cases, there may well be an additional level of dispute resolution (in the courts or at arbitration).

We consider that the two options of adjudication and arbitration need further consideration, particularly if the Panel seeks to allow the supplier to maintain some level of anonymity in the dispute resolution process (or a requirement that information provided to one part of the retailer will not be made available to another part of the retailer).

AMINZ and Resolution Institute would be happy to discuss this submission if further information is required.

Privacy of natural persons

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