Automotive Franchising Review 2021

Resolution Institute Submission

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Resolution Institute

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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's position, as well as that of its members, is that the impulse towards arbitration as an efficient, cost effective and equitable manner of solving disputes, is a good one.

Resolution Institute's position consists of three main propositions:

1. The Automotive industry should continue to operate under the Franchising Code and that its automotive-specific provisions should be updated as required
2. There should continue to be a mandatory code for the automotive industry, with voluntary arbitration, although this should be bolstered and given greater structure.
3. Much of the value envisioned by pre-contractual arbitration could be done better through expert determination.

On the first point, Resolution Institute's belief is that many of the principles of conflict resolution are fairly universal. As such, adding a new, separate code for the automotive industry would only serve to increase confusion, red tape and slow the process of reacting to shifts in the industry.

On the second point, Resolution Institute's belief is that the reason why voluntary arbitration in a mandatory code may be held back is that there is too little structure and ease of access. Improvements could include appointing a set panel of accredited arbitrators, from which parties may choose a resolver. If they cannot choose a dispute resolver, one might be chosen for them by a third party.

On the third point, Resolution Institute does not believe that pre-contractual arbitration is appropriate for the Automotive Franchising industry. Instead, Resolution Institute recommends expert determination, the merits of which are explained below.

Detailed Feedback and Discussion Paper Questions:

Question 1: Should there be a new, specialised code or remain part of the Franchising Code?

Resolution Institute recommends that the 'status quo' option be maintained in that the Automotive Code should remain part of the larger Franchising Code, for the reasons that are put forth in the discussion paper. This does now, however, imply that no changes should be made. In fact, many of the changes to arbitration that are recommended below could be more widely applied across different areas of dispute.

The current version of the Code requires that a franchise agreement *"… must provide for a complaint handling procedure that has the same effect as subclauses 40A(1) to (4) and clause 41A except for providing for imposition of a civil penalty*",[1] which in turn requires the parties to *"…try and agree how to resolve the dispute"*[2] and suggests that arbitration is one way the parties could agree to resolve the dispute.

If the parties fail to agree on how to resolve the dispute within 21 days of a party first giving written notice of the dispute, a party may refer the matter to an ADR practitioner agreed by the parties or, in the absence of agreement, as appointed by the Ombudsman.[3] 'ADR practitioner' is defined in the Code as a conciliator or mediator.[4]

However, mediation and conciliation do not bring finality to the dispute unless the parties agree to a settlement. Further, the discussion paper notes feedback stakeholders that manufacturers have the commercial upper and exploit that power imbalance to achieve a settlement knowing the franchisee could not afford a long court process. This could easily be rectified by adding "arbitrator" into the definition of ADR practitioner.

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

1 Schedule 1 cl 34.
2 Schedule 1 cl 40A(2).
3 Schedule 1 cl 40A(3)-(5).
4 Clause 4.

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 2: What form of dispute resolution should take place?

2.1 The merits of Arbitration:

Resolution Institute believes that arbitration is a powerful tool for addressing the power imbalance which the report accurately indicates is the core issue underlying the market failures and inability for self-regulation to provide solutions. The speed and cost effectiveness of arbitration provides a two-fold benefit for the less well-resourced party. First it avoids the immense time, cost and stress that a protracted legal case may bring, which may be difficult for franchisees. Second, is that the lower bar of legalistic formality and rules of evidence, which streamlines the process immensely. To achieve the purpose of addressing power imbalance, the time between appointment of the arbitrator and award should be limited as it is in other statutory arbitration schemes. Resolution Institute recommends following the model of the Sugar Code and using a 30 day deadline for an arbitration to reach its conclusion, with the option of a 30 day extension if both parties agree.

2.2 What type of Arbitration:

The discussion paper presented three options for the implementation of arbitration into the code; voluntary code with mandatory arbitration, mandatory code with voluntary arbitration and mandatory code for mandatory pre-contractual arbitration. As such, Resolution Institute will follow this tripartite structure in our answer.

First, we agree with the conclusion reached by the discussion paper that a mandatory arbitration in an optional code would not be optimal, for the same reasons as presented in the discussion paper.

Similarly, Resolution Institute believes that the “status quo” position of having voluntary arbitration in a mandatory code is well adapted and suited to industry codes such as this one. In the final analysis, both parties to the dispute are reliant on each other for their long-term survival, as pointed out in the body of the discussion paper. This necessarily means that even though there may be a power imbalance, both parties want to arrive at a solution in good faith, and both parties should prefer a time efficient and cost effective arbitration over a protracted legal case. The manufacturer also will likely want to solve the issue fairly and quickly for reasons of reputation within the industry.

The reason why this model does not seem to have solved the market failures that it aimed to, is not because of its voluntary nature, but instead due to a combination of novelty and a lack of structure. While the common law system has hundreds of years of precedent and well established, if slow, procedures in place, the arbitral system is reliant on the agreement of parties for the form that it will take. While this flexibility is one of arbitration’s strengths, it may also introduce a degree level of uncertainty that parties may choose to avoid.

In order to rectify this Resolution Institute recommends implementing the following:

- A panel of specialised arbitrators, who have been approved either by the government themselves or by a dispute resolution body, such as Resolution Institute, which has experience with maintaining such panels. The merits of this setup will be elaborated on below.
- Clear rules on the circumstances in which arbitration can be invoked and a set timeline, as mentioned above, which covers how much time a dispute can continue before arbitration is triggered, how long parties have to decide an arbitrator, and how much time an arbitrator has to arrive at their arbitral decision.
- A clear cost scheme which takes into account the power imbalances between parties. This may take the form of arbitral discretion as to allocation of costs, or a provision which takes into account frivolous or vexatious claims.
- A clear method for applying under the specialised scheme to a third-party nomination body such as Resolution Institute, that includes a pro-forma application form, which can be filled out easily by either party. It would also allow for easy reporting on the progress of individual arbitrations as well as the health of the scheme overall.

Pre- contractual arbitration

Resolution Institute disagrees with the concept of pre-contractual arbitration for the reasons which the discussion paper itself points out.. As a basic rule, 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 a potential agreement complies with statutory and policy provisions before entering into it. There are also other, better ways of determining what is and isn't appropriate in terms of statute and policy provisions, if the parties genuinely cannot determine this for themselves.

Pre contract arbitration but not post contract arbitration

Resolution Institute suggests this advice be reviewed as mandatory statutory arbitration exists in some legislation. The suggestion that by legislation an arbitrator can be imposed on non-consenting parties to determine the terms of an agreement they would then be obliged to enter into is permitted by the constitution, but an arbitrator cannot be imposed on parties to determine current contractual entitlements is prevented by the constitution is a distinction that is not immediately apparent to us.

2.3 Miscellaneous Arbitration analysis:

Relationship of Statutory Arbitration with arbitration under the CAA or IAA

Any statutory arbitration arrangement must carefully consider the Commercial Arbitration Acts of the States (the CAA) and the Federal International Arbitration Act (IAA) and Australia's treaty obligations under the New York Convention on arbitration. The latter is particularly so where overseas franchisor companies are involved. While the CAA expressly provides for statutory arbitration to be prescribed to fall within its terms (see Section 1(6) of the Commercial Arbitration Act 2011 (Vic)) the IAA (and the United Nations Model Law) does not. Under the CAA in the event a statute requires a dispute to be referred to arbitration then except insofar as the statute otherwise indicates or requires the CAA will apply to such an arbitration as if the

other statute were an arbitration agreement, the arbitration was pursuant to an arbitration agreement, and the parties to the dispute were parties to the arbitration agreement.

Resolution Institute cautions the Government legislative drafters that great care much must be taken to distinguish or incorporate into any statutory arbitration arrangement the operation of the Commercial Arbitration Acts of the States or the International Arbitration Act (IAA) (and the international Model Law it includes). Given a concern of Franchisees they are dealing with offshore companies, the operation of the IAA and Australia's agreement to the New York Convention on arbitration is particularly relevant. The central element of the CAA/IAA is the ability of parties to agree the dispute resolution mechanism within their contracts. The proposal does not appear to have dealt adequately with this. For example, under the CAA/IAA the parties can agree any arbitration procedures, the identity of the arbitrator and so on. These provisions may need to be limited in a scheme intended to address power imbalance.

The relationship of a statutory arbitration scheme to the CAA/IAA appears to require additional thought and legislation.

Where parties have agreed to arbitrator, which appears to be what is contemplated, the arbitration is not a statutory arbitration at all. The provisions of the IAA/CAA and the New York Convention on arbitration appear to directly apply.

Use of the term "Arbitration" when what is actually being referenced is a form of "Statutory Arbitration"

Any proposed statutory arbitration should be distinguished in terminology from an arbitration under an agreement between the parties to arbitrate a dispute and to which the CAA or IAA applies. Use of the term "arbitration" to apply to a statutory dispute resolution scheme is archaic and out of step with international nomenclature. The term arbitration, when used without a qualifier, should be reserved for an arbitration under an agreement made between the parties to arbitrate as recognised by the New York Convention on arbitration and given effect to by the CAA and IAA.

Selection of Panel of Arbitrators

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, that parties be allowed to choose their own dispute resolver if they are able to and inclined to do so.

Where the parties have not agreed on the arbitrator, however, a professional arbitrator properly trained and experienced should be appointed. 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 the conciliation, 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 qualifications and 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'*.

Arbitrators on the Resolution Institute panel are the only arbitrators in Australia that have undertaken an Australian University course in arbitration and its panel are the only panel of arbitrators in Australia subject to ongoing CPD requirements specifically for arbitrators. They submit to regular re-evaluation of their accreditation status. No other panel of arbitrators in Australia has similar standards.

In our view it should be a requirement that all ADR practitioners (defined as Mediators and Conciliators) and Arbitrators who are appointed by the Ombudsman should be accredited with the Resolution Institute.

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.

2.4 Beyond Arbitration:

Expert Determination

Many of the issues raised by the discussion on pre-contractual arbitration could be solved both more efficiently and with less through the mechanism of expert determination. An expert determiner would be well suited to deal with the complicated and industry-specific questions put before them, especially ones of fairness of contract when put in the context of the automotive industry.

To address the power imbalance and incorporate finality in the dispute resolution process, Resolution Institute recommends inserting expert determination as a mandatory next step if the parties fail to achieve a mediated or conciliated settlement and proposes the use of its Expert

Determination Rules for that purpose. expert determination can either be binding or non-binding, depending on what the parties agree to at the time.

The inclusion of expert determination would mean that:

1. the process would be conducted in accordance with a set of rules widely regarded in the industry as being fair and reasonable to both applicants and respondents;
2. determination of the disputed issues would be:
   (a) decided on the parties' written submissions and therefore more cost effective than arbitration or litigation; and
   (b) made by a third-party independent person with expertise in the field of the dispute; and
   (c) the determination could be binding on the parties and therefore bring finality to the dispute resolution process under the Code.

Unlike arbitration, an expert determiner can make judgments on pre-contractual arguments, such as whether terms are too onerous or unfair. In short, expert determination provides all of the benefits of arbitration without any of the drawbacks.

Multi-Party Disputes:

The discussion paper does not touch on multi-party disputes. Resolution Institute suggests that in a statutory arbitration structure a statutory arbitration mechanism for multi-party arbitration be created. This is because:

1. A number of franchisees will be involved with any one franchisor
2. The contracts between franchisors and franchisees will be similar
3. The issues in dispute are likely to be similar.