



**Resolution
Institute**

Excellence in dispute resolution
across Australia and Aotearoa

Independent Review of the Food and Grocery Code of Conduct 2024

Resolution Institute Submission following the Interim
Report by Dr Craig Emerson

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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. Resolution Institute is a not-for-profit membership organisation that promotes and facilitates the development and use of dispute resolution, is a Mediator Standards Board (MSB) approved accreditor, and a nominator of independent mediators and arbitrators.

Resolution Institute members engage in mediation, adjudication, arbitration, expert determination, facilitation, conflict coaching, conciliation and restorative justice. Resolution Institute 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 provide feedback to the Interim Report made by Dr Craig Emerson. The recommendations made in this submission specifically address the areas relating to complaints, disputes, and dispute resolution generally (including both mediation and arbitration) raised in the Interim Report in Draft Recommendation 7.

- *Recommendation 7: The mandatory Code should include informal, confidential and low-cost processes for resolving disputes, and provide parties with options for independent mediation and arbitration. This could be achieved by:*
 - *Adopting the dispute-resolution provisions of other industry codes, which provide for independent mediation and arbitration;*
 - *Allowing for supermarket-appointed Code Mediators to mediate disputes, where agreed by the supplier, and recommend remedies that include compensation for breaches and changes to grocery supply contracts; and*
 - *Allowing suppliers to go to the Code Supervisor (previously the Code Reviewer) to make a complaint; to seek a review of Code Mediator's processes; or to arrange independent, professional mediation or arbitration.*

Supermarkets are encouraged to commit to pay compensation of up to \$5 million to resolve disputes, as recommended by the Code Mediator and agreed by the supplier, or as an outcome of independent arbitration.

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

In summary, we support the dispute resolution principles proposed by Dr Emerson for replicating the processes for independent mediation and arbitration in other Codes while taking the best features of the voluntary Code, improving them, and importing them into the mandatory Code. However, there are some improvements that we suggest based on our extensive experience of administering disputes and dispute resolution rules, such as the Resolution Institute Mediation Rules 2015 and the Resolution Institute Arbitration Rules 2023.

We commend that the Interim Report recommends a best-of-both-worlds approach to dispute resolution which:

- Brings in the dispute-resolution options for independent mediation and arbitration that are used in other industry codes, such as the Dairy and Franchising Codes of Conduct; and

- Brings in the quick dispute-resolution provisions of the voluntary Code, while maintaining avenues for informal and confidential complaints.

This Code could, however, be improved in several ways which we expand on in this paper.

In summary, our most important suggestion for consideration is that Mediators should be independent. Currently the Interim Report proposes that Code Mediators, replacing Code Arbiters, would continue to be engaged by the supermarkets and would be available to help resolve disputes. In this sense, Resolution Institute is of the view that such a process is not independent and would create the appearance of maintaining the existing regulatory framework where the power balance between grocery retailers / wholesalers and their suppliers as noted by ACCC in the consultation paper;

“The dispute resolution provisions in the code do not achieve their purpose of providing suppliers with an independent and accessible avenue to resolve disputes when they arise, and the weaknesses in the dispute resolution provisions are inextricably linked to the fundamental weaknesses in the code as a voluntary code.”¹

And

“... a persistent and significant bargaining power imbalance between grocery retailers/wholesalers and their suppliers”.²

Whilst Code Mediators engaged by the supermarket would have deep knowledge of the systems and practices of the supermarket that engaged them, and have access to buyers, category managers and senior staff, this in itself does not provide for an independent process. We recognise that a supplier can request a fully independent mediator, that would be mandatory for the supermarket if requested, however it is our view that this should be the case for all disputes. Experienced commercial mediators have the skills to determine the appropriate witnesses and stakeholders and can engage where required in an independent manner.

More detailed information regarding these points, and others, is provided below in the answers to each of the questions outlined in the Interim Report.

¹ ACCC (2023), [ACCC submission to consultation, Review of the Dispute Resolution Provisions in the Food and Grocery Code, p. 1.](#)

² ACCC (2023), [ACCC submission to consultation, Review of the Dispute Resolution Provisions in the Food and Grocery Code, p. 1.](#)

Detailed Feedback and Interim Report Discussion Questions:

Question 3: Do the dispute-resolution arrangements outlined in this Interim Report allow for low-cost and quick resolution of complaints without fear of retribution? Provide reasons for your response.

In making the Code mandatory, we note that the Interim Report recommends that the dispute-resolution provisions of the Dairy Code and the Franchising Code be replicated in the mandatory Code, with a similar dispute-resolution option as available under the voluntary Code also incorporated. Resolution Institute commends this approach and agrees with AUSVEG and TasFarmers (as referenced in the Interim Report) that a multi-tiered dispute resolution approach is appropriate for a mandatory Code, effectively providing suppliers with multiple avenues for dealing with disputes that appropriate for the specific matters to be resolved.

However, we recommend the following be considered for inclusion when completing the final report.

1. Qualifications of dispute resolvers (mediators and arbitrators)

A list of independent mediators and arbitrators with relevant dispute-resolution expertise and grocery experience would be maintained by the Code Supervisor, who would replace the Independent Reviewer.

This is a sound approach. However, we believe it should go further and may be improved by requiring that all dispute resolvers hold nationally recognised dispute resolution accreditations.

Resolution Institute recommends that for mediators on the list, that this minimum accreditation be the National Mediation Accreditation System (NMAS) accreditation (soon to be replaced by Australian Mediation and Dispute Resolution Standards - AMDRAS - from 1st July 2024). The NMAS, and soon to be AMDRAS, is a well-established framework overseen by the Mediator Standards Board and is universally accepted in Australia as the minimum requirement for practicing mediators. Accordingly, all panel mediators should hold this accreditation, and this should be explicitly noted in the Code.

For arbitrators, an official Resolution Institute accreditation and grading, or that of an equivalent body should be explicitly included as the minimum requirement. Resolution Institute is the only Australian body that manages the accreditation of domestic arbitrators who hold post-graduate qualifications from an Australian University and are accredited through a rigorous framework managed by Resolution Institute. Further, the Resolution Institute accredited arbitrators are deeply familiar with the Resolution Institute Arbitration Rules 2023 that are referenced in the Interim Report.

Requiring accreditation as a prerequisite for eligibility to join a panel, and subsequently remain on that list, provides two distinct advantages over the current model. First, the Continuing Professional Development (CPD) requirements for continued accreditation ensures that the panel list is continually up-to-date, and that each member on the list continues to be fit to resolve Code disputes. Second, requiring accreditation in this area is part of a broader community 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. Unfortunately, there are practitioners who currently hold themselves out as mediators or arbitrators, yet do not hold any formal qualifications or accreditation. There is an opportunity within the mandatory Code to codify the accreditation requirements of panel dispute resolvers, and thus improve the efficiency and quality of dispute resolution processes, and outcomes for suppliers and supermarkets alike.

2. The panel list of mediators and arbitrators should be made public

Resolution Institute also recommends that the list of dispute resolvers on mediation and arbitration panel(s) should be made public, together with transparent information about their fees to support suppliers. This is particularly important for independent mediation given the Interim Report states that each party will be responsible for half of the mediator's costs for such arrangements. This approach is adopted for various Farm Debt Mediation Schemes across Australia to promote transparency and cost effectiveness such as in the NSW Rural Assistance Authority. <https://www.raa.nsw.gov.au/farm-debt-mediation/mediator-profiles>

Further, we recommend that the panel should be considered and refreshed on a regular basis to ensure that there is sufficient 'new blood' to ensure the independence of the panel is maintained on an ongoing basis.

3. Mediation is an independent, neutral process

The Interim Report notes that Code Mediators would:

- *Investigate confidential and informal complaints from suppliers, and mediate formal disputes;*
- *Be engaged and paid for by the supermarkets covered by the mandatory Code, such that their services would be provided at no cost to suppliers;³*
- *Have access to records and the buying team, and act independently of the supermarket;⁴ and*
- *Be experienced and qualified alternative dispute-resolution practitioners and have a good understanding of Code obligations and supermarket operations.*

The Review recognises that, owing to constitutional limitations,⁵ a mandatory Code cannot compel the supermarkets to resolve disputes through arbitration. However, the Interim Report strongly encourages Coles, Woolworths, ALDI and Metcash⁶ to agree to pay compensation of up to \$5 million and make changes to their contracts to resolve a dispute as and when:

- *Recommended by their Code Mediator and accepted by the supplier; and*
- *Determined by an independent arbitrator.⁷*

³ Consistent with clause 31(1) and 31(3), [Food and Grocery Code of Conduct](#).

⁴ Consistent with clause 31(4) and 31(5), [Food and Grocery Code of Conduct](#).

⁵ An explanation of the constitutional limitations is outlined in Chapter 3, pp. 25-26.

⁶ As well as any supermarkets covered by the Code in the future.

⁷ This would not prevent parties agreeing to independent arbitration to resolve matters involving compensation above \$5 million.

Under a mandatory Code, this agreement could be given effect by including these dispute-resolution mechanisms in grocery supply agreements.

Resolution Institute proposes that for mediation, the above process requires further re-work. Mediation by definition is a structured facilitation process in which the mediator, as a neutral and independent person, assists the parties to communicate effectively with each other, generate options, and reach agreement on the issues at hand. The range of possible solutions available in mediation is unlimited as they are not bound by case law or contracts and the solutions are consensual agreements which can then become binding by the agreement of the parties.

A critical element of this process is that the **mediator should not make decisions for the parties nor impose a solution** and it is inappropriate for a mediator to ‘recommend’ compensation of any amount.

Investigation of complaints, and mediation of disputes should be two separately defined processes in the Code. Whilst they can be undertaken at the same time, they should not be conducted by the same individual, otherwise the independent, neutral position of the mediator is inevitably lost.

Instead, it is suggested that informal complaints be managed through an internal complaints process that is separate from the Code Mediator(s) and the mediation itself. This could replicate the process included in the Dairy Code where the internal process outlined in milk supply agreements means that a processor must have a complaint handling officer to manage complaints. Similarly, internal dispute resolution processes and complaints may be managed and investigated by a supermarket’s internal complaint handling officer rather than a mediator. Should this not render a satisfactory result to both parties, then an independent mediator should be engaged to facilitate potential solutions such as compensation where it is agreed by the parties, NOT recommended by the mediator. **Mediators are strictly neutral – they do not take sides or represent either party involved in the dispute. Mediators must not provide legal advice, or act as a determiner or decision maker.**

It is however appropriate for an independent arbitrator to determine an award of compensation and to determine that changes to their contracts and this could be given effect in a mandatory Code by including these dispute-resolution mechanisms in grocery supply agreements.

To overcome these challenges, Resolution Institute proposes a multi-tiered dispute resolution process whereby internal complaints handling (including investigation) precedes mediation and arbitration.

4. Independence of dispute resolvers (mediators and arbitrators) is important to reduce fear of retribution

Mediators should always be independent. A model where Code Mediators, replacing Code Arbiters, would continue to be engaged by the supermarkets, erodes the notion of a mediator’s independence. In this sense, Resolution Institute is of the view that such a process is not independent and would maintain the existing regulatory framework where the power balance between grocery retailers / wholesalers and their suppliers as noted by ACCC in the consultation paper;

“The dispute resolution provisions in the code do not achieve their purpose of providing suppliers with an independent and accessible avenue to resolve disputes when they arise, and the weaknesses in the dispute resolution provisions are inextricably linked to the fundamental weaknesses in the code as a voluntary code.”

And

“... a persistent and significant bargaining power imbalance between grocery retailers/wholesalers and their suppliers”.

Even if the individuals involved were strictly independent, neutral and unbiased, the perception of the power imbalance would remain.

Whilst we agree that Code Mediators engaged directly by a supermarket would have deep knowledge of the internal systems and practices of the supermarket that engaged them, and have access to buyers, category managers and senior staff, this does not provide for an independent process when it comes to mediation.

We recognise that a supplier can request a fully independent mediator, that would be mandatory for the supermarket if requested. This is a positive inclusion. However, it is our view that this should be the case for all disputes. Experienced commercial mediators have the pre-existing skills to determine the appropriate information, experts and/or stakeholders to be engaged where required and in consultation with the parties. Provision of information necessary for the parties and mediator to engage in meaningful mediation could be made mandatory under the code.

Accordingly, Resolution Institute supports the recommendation that:

- **Independent mediation** would be available to suppliers.
 - If requested by the supplier, independent mediation would be mandatory for the supermarket.
 - Parties would share the costs of mediation equally, unless otherwise agreed. To give an example of costs, mediation under the Franchising Code of Conduct costs around \$4,000 (\$2,000 per party), although costs can vary depending on the complexity of the issue.
- **Independent arbitration** would be available to resolve disputes.
 - This option would be subject to agreement by both parties if mediation did not settle the dispute.
 - Any arbitration should be conducted in accordance with the rules of procedural fairness, to ensure the parties are fairly heard, and that the arbitrator is free from bias.

Resolution Institute recommends that independent mediation be offered in all circumstances, rather than utilising an internal Code Mediator. Further, we also recommend the inclusion of a pre-determined set of mediation rules to be referenced in the Code, such as the [Resolution Institute Mediation Rules 2016](#) so that the process to be followed is clear and transparent from the outset.

Resolution Institute agrees that the Interim Report allows for low-cost and quick resolution of complaints without fear of retribution by way of independent arbitration in that the speed and cost effectiveness of arbitration can provide 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 suppliers and small businesses. Second, is that the lower bar of legalistic formality and rules of evidence, which streamlines the process immensely. Accordingly, Resolution Institute supports the

continued inclusion of independent arbitration with a pre-determined process through the adoption of the [Resolution Institute Arbitration Rules 2023](#) in the mandatory Code.

4. The role of the Code Supervisor

Resolution Institute supports the notion of the Code Supervisor that would take on the functions of the existing Independent Reviewer.

A Code Supervisor would take on the functions of the existing Independent Reviewer. The Code Supervisor would:

- *Provide advice to suppliers about obligations under the Code and options for dispute resolution;*
- *Conduct a review of a Code Mediator's dispute-resolution processes if requested by a supplier.*
- *Be able to raise issues with supermarkets, Code Mediators or the ACCC, where confidential complaints indicate systemic breaches of the Code; and*
- *Appoint an independent mediator or arbitrator to help resolve a dispute, where requested by a supplier.*

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 independent mediator or arbitrator if they can and are inclined to do so.

Where the parties have not agreed on the mediator or arbitrator, however, Resolution Institute is uniquely positioned to act as an independent appointer to support the Code Supervisor. 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 currently manage various mediation and arbitration schemes, and establish specific panels for those schemes. Resolution Institute would be able to assist the Code Supervisor to fulfil their role in a cost-effective manner by managing the panels (and ensuring that appropriate qualifications and accreditation is maintained for all panel mediators and arbitrators) and providing an independent appointment service upon request. This would further bolster the integrity and independence of the proposed Code.

4. Reporting

Recommendation 8 states that:

A Code Supervisor (previously the Code Reviewer) should produce annual reports on disputes and on the results of the confidential supplier surveys.

To improve the responsiveness of the Code Supervisor (or equivalent) as well as transparency of outcomes, we suggest that annual reports should be replaced by summary reports with shorter frequencies for mediations. Additionally, a mediator could submit a summary report on the outcome of the dispute to the independent body. This should also include feedback from the parties and confirmation that they participated appropriately in the mediation process for the purpose of producing

statistics on outcomes, costs of mediation and importantly, did the parties participate and make genuine efforts to resolve the dispute. However, this should be considered in the context of any privacy and confidentiality requirements.

In the case of determinative processes such as arbitration, the findings themselves could be published. An example of this can be found through the Australian Financial Complaints Authority (AFCA) data cube, which provides '*An open and accessible visual comparative report about financial complaints in Australia*'. The datacube can be accessed here: <https://data.afca.org.au/resolution-process>

These suggestions aim to improve the confidence in the dispute resolution processes within the Code.

Question 4: Are there alternative or additional mechanisms that could improve dispute resolution under a mandatory Code?

Resolution Institute proposes that there are three further mechanisms that could be considered beyond mediation and arbitration as outlined in the Interim Report, to enhance the determinative dispute resolution options of the Code.

1. Fast track arbitration

Resolution Institute believes that arbitration is a powerful tool for addressing the power imbalance in a dispute which the Interim Report accurately indicates is a core issue in disputes between supermarkets and suppliers. As explained on page 9 the speed and cost effectiveness of arbitration can provide 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 suppliers and small businesses. Second, is that the lower bar of legalistic formality and rules of evidence, which streamlines the process immensely.

A further consideration that could improve the arbitration functions under a Mandatory Code, and further address the issue of power imbalance, is to include the principle of expedited arbitration whereby the time between appointment of the arbitrator and the delivery on an arbitral award is limited. An example of such a scheme is the model of the Sugar Code which provides for a 30-day deadline for arbitration to reach its conclusion, with the option of a 30-day extension if both parties agree.

Alternatively, the inclusion of Resolution Institute Arbitration Rules 2023 (as proposed in the Interim Report) could also achieve a similar time efficient arbitral procedure, due to the inclusion of expedited arbitration rules. Under the Resolution Institute Arbitration Rules 2023 (Rules 47 and 48), the expedited processes are automatically enacted when the amount in dispute, that is the amount of the claim plus counterclaim, is not greater than \$AU 2million (the Expedited Threshold). Disputes where the amount is less than the Expedited Threshold can also adopt the expedited process by agreements of the parties.

2. Beyond mediation and arbitration; Consider the inclusion of expert determination.

Many of the dispute resolution options raised in the Interim Report effectively provide for informal, confidential, and cost-efficient processes for resolving disputes, whilst at the same time providing parties with options. This could be further enhanced by the inclusion 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 food and grocery industry.

To address the power imbalance and incorporate finality in the dispute resolution process, Resolution Institute recommends the review considers inserting expert determination as a next step (before arbitration) if the parties fail to achieve a mediated 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 of contract, or as recommended by the Code.

A key benefit of expert determination is that, unlike mediation, the parties are provided with a reasoned decision based on the parties' written submissions and evidence in support of their submissions. This provides the parties with a likely decision in the event the matter proceeds to arbitration and in turn a

basis for the parties to reach a negotiated settlement (even if the expert determination process is conducted on a non-binding arrangement).

In addition, expert determination does not involve a hearing and therefore provides the parties with a faster path to the resolution of their dispute than arbitration (whether by way of a negotiated settlement following a non-binding expert determination process or binding determination).

It should be noted that optional expert determination has been included in the draft dispute resolution process for the AS 4000 contract as part of the 2024 update recently released by Australian Standards.

The inclusion of expert determination into the Code could 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 only on the parties' written submissions and therefore more cost effective than full 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.
 - (d) If not binding (or 'interim binding'), could then precede arbitration.

If expert determination is included, it is suggested that expert determination will become the second step of the formal (independent) dispute resolution procedure if mediation fails to resolve the dispute.

If expert determination is included in the Mandatory Code, it must specify whether the expert's determination will be interim or final and binding.

If it is interim, then either party may give notice that it is dissatisfied with the determination, in which event the dispute will proceed to arbitration.

If the expert's determination is final and binding, it becomes the final step of the process.

More information can be found about Expert Determination on the Resolution Institute website via this [link](#).

3. Standard dispute resolution clauses

In addition to the inclusion of dispute resolution rules (namely the Resolution Institute Mediation Rules 2016 and the Resolution Institute Arbitration Rules 2023), we suggest that the Resolution Institute standard dispute resolution clauses are included for use in the Code. This would support both recommendation 7 and 8 so that the dispute resolution processes are understood, followed, and enacted within the supply agreements made by supermarkets and suppliers. To suggest standard dispute resolution clauses for use will mean that supermarkets and suppliers are clear in their obligations from the outset should a dispute arise in the future, as well as the assurance they need to confidently navigate a dispute should one arise.

Resolution Institute recommends the inclusion of the standard Resolution Institute mediation and arbitration (and expert determination if applicable) clauses for this purpose as they are well established, tried and tested. Parties are free to adapt and insert such clauses into their supply agreement contracts with the assistance of their legal advisors.

The library of Resolution Institute standard dispute resolution clauses are easily accessible on the Resolution Institute website [here](#).