

# AMINZ

# Conciliation Protocol

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## CONCILIATION PROTOCOL

This protocol is in three parts:

- Part 1** Contractual arrangements in the New Zealand dairying industry;
- Part 2** The definition of conciliation;
- Part 3** A draft Conciliation Agreement.

### Part 1

#### Contractual Arrangements in the Dairying Industry in New Zealand

There are, in the main, three types of contracts operating into the dairying industry, namely:

1. Those regulated by the **Sharemilking Agreements Act 1937 and the Sharemilkers Agreements Order 2011**. In this instance the farm owner retains the herd ownership, the milker being remunerated by a share of dairy proceeds. This arrangement is known variously as a statutory, variable order, or lower order agreement.

Both the Act and the Order provide that conciliation is used in any dispute arising out of the agreement terms. In the event that the dispute is not resolved by way of conciliation the dispute will be submitted to arbitration pursuant to clauses 149 – 159 of the Order.

2. **A Herd Owning Sharemilking Agreement** Under this contract arrangement the milker has a direct investment in the ownership of livestock and plant, the farm owner providing the land and the milker the herd, the management and labour to directly operate the dairy farming business. The Sharemilker is paid based on an agreed share of the returns or profits derived from the dairy farm operation (typically 50% although the percentage can vary).
3. The third type of contract operating in the dairy industry is where a milker, working pursuant to a **Contract Milking Agreement**, is contracted to milk the dairy herd and is (usually) paid on the basis of an agreed dollar/cents per kilogram of

milk solids produced. Although viewed by some in the dairy industry as a variation to a typical employment arrangement, the contract milker is not an employee but a contractor similar to the other types of contracts referred to above.

## Note

- (a) The latter two forms of agreement are not subject to statutory oversight with the terms and conditions of same being an outcome of negotiations between the parties. There are, however, standard contracts that are in common usage throughout New Zealand such as the Federated Farmers of New Zealand agreements. These agreements adopt conciliation as a necessary step in any dispute resolution process.

In respect to the Herd Owning Sharemilking Agreement, in the event that the dispute is not resolved by way of conciliation the dispute will be submitted to arbitration pursuant to clause 39 (g) of that agreement, unless the parties agree otherwise.

- (b) It should be noted however that any changes to the statutory regime established by the Act/Order cannot disadvantage the sharemilker on the clause by clause basis.

## Part 2

### Definition of Conciliation

**Conciliation** is a confidential and consensual dispute resolution process, in which the parties to a dispute, with the assistance of a neutral conciliator, identify the issues, develop options and try to reach an agreement.

The objective of conciliation is to enable the parties to resolve the dispute fairly and promptly by agreement without legal proceedings.

Unlike mediation, a conciliator may have an advisory role in the content of the dispute or the outcome. However the parties may agree that the conciliator have a recommending role which may be binding on the parties if this is what is agreed by them. The parties may wish to go further and allow the conciliator to adopt a determinative role in respect to the matters in dispute.

A typical list of functions that a conciliator may be asked to perform by the parties in dispute during the course of the conciliation could include:

- Facilitating negotiation by the parties of their own solution to a dispute, by assisting them to systematically isolate the issues, to develop options, and to reach a mutual agreement that accommodates their interests and needs
- Making suggestions and recommendations as to settlement to the parties utilizing technical and dispute resolution expertise including expressing a view on work performed or services rendered
- In the event of continuing disagreement between the parties adopting a more interventionist role to the extent of putting forward views on outcomes if the matters in dispute proceed to arbitration
- Providing a written proposal to determine the matters in dispute which will be binding on the parties unless written objection to the determination is lodged within specified time periods found in the contract for determination on the matters in dispute or assessing damages.

## Part 3

### Conciliation Agreement

**Between:** \_\_\_\_\_ **Applicant**  
**And:** \_\_\_\_\_ **Respondent**

#### 1. PREAMBLE

The parties to this agreement will negotiate in good faith and co-operate and use their best endeavours to resolve their dispute expeditiously and without recourse to other dispute resolution methods.

#### 2 INITIATION OF CONCILIATION

- 2.1 If a dispute is not resolved by way of negotiation any party to the dispute may initiate conciliation within 10 working days of receipt of a notice of dispute (or any other period that may be agreed in writing) and the parties will proceed to conciliation.
- 2.2 The party initiating conciliation must, in its notice of dispute, define the dispute that is being referred to conciliation.
- 2.3 Others affected by the outcome of the dispute, such as subcontractors and insurers, may also be involved in the conciliation, if they are invited by any party (and agree in writing to abide by this agreement), and if the other parties agree to their involvement.

#### 3 APPOINTMENT OF CONCILIATOR

- 3.1 Unless otherwise provided for, the parties shall together appoint a conciliator within 5 working days of proceeding to conciliation pursuant to paragraph 2.1 of this agreement. The appointment shall not be complete until agreed in writing by the parties and accepted in writing by the conciliator.
- 3.2 If the parties are unable to agree on a conciliator the conciliator will be appointed from the National Panel of Conciliators and either party may request the Chairperson of the Panel to make an appointment.

- 3.3 The proposed conciliator shall have no personal interest in the matters in dispute and, prior to accepting the appointment, shall disclose any dealings with any of the parties, or acquaintance of the parties, or knowledge of the dispute.
- 3.4 Subject to clause 5 of this agreement the conciliator must convene a conciliation meeting as soon as practicable following appointment.
- a. If the conciliator is unable to convene a conciliation meeting within 20 working days of the notice of dispute (or any further period as may be agreed in writing by the parties) because of lack of response from either party or for any other reason, the conciliator must notify both parties that the conciliation has not been successful.

#### **4 ROLE OF CONCILIATOR**

- 4.1 The conciliator shall assist the parties in an independent and impartial manner with a view to reconciling the views of the parties on the dispute or difference to reach an amicable settlement or a solution.
- 4.2 In carrying out the conciliation function the conciliator may be asked by the parties to perform any or all of the following functions:
- Making informal proposals as to settlement
  - Giving an opinion on work performed or services rendered
  - Giving an opinion on the likely outcome of arbitration or litigation
- 4.3 If the parties are unable to reach an agreement or solution, the conciliator shall produce a written reasoned proposal for the determination of the dispute.
- 4.4 The conciliator's proposal for determination is binding on both parties unless within 5 working days of receiving the proposal at least one party notifies the other in writing that they reject the conciliator's proposal.
- 4.5 The conciliator shall not, unless by consent of the parties, act as arbitrator, witness, counsel, adviser, or representative of any party in any subsequent arbitration or judicial proceedings in respect of any dispute that has been the subject of the conciliation procedure where he or she has been the conciliator.

#### **5 REPRESENTATION AND ATTENDANCE**

- 5.1 A party may choose to be represented by one or more persons. The names and addresses of such persons shall be communicated in writing to the conciliator and to the other party.
- 5.2 The party personally, or a representative (who is the same person throughout) able to answer questions and co-operate in developing and agreeing to an acceptable solution to the dispute, shall be present at each meeting.
- 5.3 Other persons may attend meetings only with the consent of all parties. Consent would normally be given to advisors, such as legal, managerial, technical or resource persons.
- 5.4 By attending the conciliation the parties represent that they have full authority to settle the dispute and be bound by any agreement reached unless they declare otherwise.

## **6 SUBMISSIONS AND DOCUMENTS EXCHANGED PRIOR TO CONCILIATION MEETINGS**

- 6.1 Any party may send to the conciliator a written submission stating briefly the dispute, the relevant facts, and its interests and concerns.
- 6.2 The written submission may include written statements of factual or expert information.
- 6.3 Copies of relevant documents may be attached to any written submission.
- 6.4 Copies of all submissions and other documents sent to the conciliator are to be copied and sent to all other parties.
- 6.5 Parties may communicate confidential information to the conciliator on the condition that it is not communicated to the other party without permission.

## **7 CONDUCT OF CONCILIATION**

- 7.1 The conciliator may conduct the conciliation in the manner he or she thinks fit, including adopting an inquisitorial approach where necessary and appropriate, having regard however to the nature and circumstances of the dispute and the wishes of the parties.

- 7.2 The conciliator will arrange a timetable and meeting places to suit the convenience of the parties.
- 7.3 The parties shall co-operate in good faith with the conciliator and with each other in attempting to settle the dispute. They will comply with the conciliator's reasonable directions to attend meetings and to provide documents, information and submissions.
- 7.4 Except as otherwise provided in this agreement, the conciliator shall not be bound by any formal procedures or rules of evidence, and may become informed in relation to any matter in such manner as he or she thinks fit.
- 7.5 The conciliator may conduct joint and separate meetings with any one or more of the parties during the conciliation process.
- 7.6 During the course of the conciliation, the conciliator may ask questions of clarification and may request the parties to exchange or further explain their submissions.

## **8 SETTLEMENT**

- 8.1 Unless agreed otherwise by the parties the conciliator does not have the authority to impose a settlement on the parties, but will try to help them reach a mutually acceptable resolution of their dispute.
- 8.2 The scope and terms of settlement which the parties may develop are not necessarily limited by the subject matter of the dispute, by any contract, by any rights or obligations of the parties, or by any recommendation of the conciliator. The conciliator makes no representation that any such agreement between the parties will resemble or equate to any result which might be achieved in a contested arbitration or trial of the dispute.
- 8.3 It is preferable for the parties to make a binding commitment to the settlement of the dispute and all parties should take all necessary legal advice before the conciliation commences and have access to any legal advice during the conciliation process.
- 8.4 Being involved in conciliation shall not prejudice any existing legal right of the parties. However, any settlement agreement may change their legal rights and may be legally enforceable as a contract.



## **9 CONFIDENTIALITY**

- 9.1 Conciliation is a private procedure. The parties and the conciliator shall maintain the confidentiality of the process, and not discuss the dispute with others, who are not involved with the process.
- 9.2 At a separate meeting with a party, the conciliator may hear information which is to be kept confidential from other parties. If so, provided there is no apparent physical danger to any person or serious criminality involved, the conciliator shall keep the information confidential and may not disclose it without the consent of the party.
- 9.3 The conciliation shall be without prejudice to the dispute and shall not be referred to or relied upon in any other proceedings. The parties shall not, without the written consent of all other parties, introduce as evidence in any other proceedings:
- Documents prepared for the conciliation
  - Admissions made by a party in the course of the conciliation proceedings
  - Views expressed or suggestions made by a party with respect to a possible settlement of the dispute
  - Proposals made or views expressed by the conciliator
  - The fact that a party had or had not indicated willingness to consider a proposal for settlement.
- 9.4 Unless directed by a Court, the conciliator shall not divulge any aspect of the conciliation in any other proceeding. If subpoenaed to testify in any other proceeding, the conciliator shall immediately inform the other parties. Unless the parties waive confidentiality, the conciliator shall inform the Court or Tribunal of the situation, and shall not divulge any matters disclosed in the conciliation unless directed to do so.
- 9.5 The conciliator shall not subsequently accept appointment as advocate or expert witness or otherwise provide assistance to any of the parties in connection with any related proceedings, except for purposes of proving any settlement agreed to by the parties.

## **10 COSTS, FEES & PAYMENTS**

- 10.1 Each party shall pay, on an equal basis, their proportion of the costs of the conciliator as well as paying their own costs of the conciliation procedure.

- 10.2 Unless otherwise agreed between the parties and the conciliator, the conciliator's fees shall be charged as agreed in writing with the parties prior to commencing the conciliation, plus expenses at cost plus GST. The parties, jointly and severally, agree to pay the conciliator's fees.
- 10.3 The conciliator may from time to time invoice the parties for fees and expenses incurred and may require a payment by way of security for future fees and expenses. Any invoices shall be paid within 14 days.
- 10.4 The conciliator may require payments by way of security to be deposited into the stakeholder account of the Arbitrators' and Mediators' Institute of New Zealand Inc., PO Box 1477, Wellington 6140, New Zealand.
- 10.4 The parties undertake to pay equally the amounts invoiced or required by the conciliator. Alternatively, with the prior consent of the conciliator, one or more parties may agree to pay invoices in such unequal shares as to achieve payment in full. Failure to pay an invoice shall suspend the conciliator's obligations until payment in full is made.

## **11 EXCLUSION OF LIABILITY**

- 11.1 Any comments, suggestions or assessments by the conciliator are not intended to be relied upon as professional advice.
- 11.2. The Arbitrators' and Mediators' Institute of New Zealand Inc. shall not be liable to any person, including the parties, for any act or omission including negligence or breach of confidentiality or for any advice associated with the conciliation. Each of the parties agree to indemnify the Arbitrators' and Mediators' Institute of New Zealand Inc. in respect of any such claim.
- 11.3 The parties agree that while appointed pursuant to this agreement and working under the terms of the agreement and this protocol, the conciliator shall not be in any way liable to the parties for negligence or otherwise and the parties agree to indemnify the mediator in respect of any such claim.

## **12 TERMINATION**

- 12.1 The conciliation procedure terminates:
- (i) By the signing of a settlement agreement by the parties; or

- (ii). By a written declaration of one party to the other and to the conciliator that the conciliation is terminated; or
- (iii) By a written declaration by the conciliator to the parties that the conciliation has been unsuccessful; or
- (iv) By the parties not objecting to the conciliator's proposal for determination in writing within 5 working days of receipt of the conciliator's proposal; or
- (v). By the passing of the 20 working days or more from the date of service of the notice of dispute without a conciliated outcome and where the parties have not agreed to extend time for the conciliation process to continue.

12.2 Termination shall not relieve the parties from their obligation to pay the conciliator's fees and expenses.

12.3. In the event that the conciliation is unsuccessful the matter shall be referred to arbitration unless the parties agree otherwise.

### **13 VARIATION**

13.1 The parties may vary this agreement in writing.

**Dated at \_\_\_\_\_ this day of \_\_\_\_\_ 20XX**

#### **Signature of Parties**

\_\_\_\_\_  
**Applicant**

\_\_\_\_\_  
**Respondent**

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