

# SUBMISSION ON

# New Zealand Grocery Supply Code of Conduct

5 July 2023

**To:** Ministry of Business, Innovation and Employment

**Name of Submitter:** Horticulture New Zealand

**Supported by:** NZ Feijoa Growers Assoc., NZ Passionfruit Growers Assoc., NZ Persimmon Industry Council, NZ Tamarillo Growers Assoc., Potatoes NZ, Summerfruit NZ, Vegetables NZ Inc., Organics Aotearoa NZ

## Contact for Service:

Emily Levenson  
Environmental Policy Advisor  
Horticulture New Zealand

Privacy of natural persons

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# OVERVIEW

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## Our submission

Horticulture New Zealand (HortNZ) thanks the Ministry of Business, Innovation and Employment (MBIE) for the opportunity to submit on the Grocery Supply Code of Conduct and welcomes any opportunity to continue to work with MBIE and to discuss our submission.

The details of HortNZ's submission and decisions we are seeking are set out in our submission below.

# HortNZ's Role

## Background to HortNZ

HortNZ represents the interests of approximately 5,500 commercial fruit and vegetable growers in New Zealand who grow around 100 different fruit, and vegetables. The horticultural sector provides over 40,000 jobs.

There is approximately, 80,000 hectares of land in New Zealand producing fruit and vegetables for domestic consumers and supplying our global trading partners with high quality food.

It is not just the direct economic benefits associated with horticultural production that are important. Horticulture production provides a platform for long term prosperity for communities, supports the growth of knowledge-intensive agri-tech and suppliers along the supply chain; and plays a key role in helping to achieve New Zealand's climate change objectives.

The horticulture sector plays an important role in food security for New Zealanders. Over 80% of vegetables grown are for the domestic market and many varieties of fruits are grown to serve the domestic market.

HortNZ's purpose is to create an enduring environment where growers prosper. This is done through enabling, promoting and advocating for growers in New Zealand.



# Executive Summary

## Fairness and Transparency for Growers

HortNZ appreciates that the Exposure Draft of the Grocery Supply Code of Conduct incorporates feedback from our previous submissions on both the Code and the Grocery Industry Competition Bill.

The Code of Conduct could be even more protective against anticompetitive and unfair trade practices by taking the following policy recommendations:

1. Grocery Supply Agreements are the most important tool to ensure fair trade practices. The government should work in collaboration with the horticulture industry to design **template supply agreements**, which will likely be made up of a suite of documents, for consistency across the sector.
2. The government should also host **extensive workshops** with growers and retailers to ensure they understand their legal rights and obligations under the Code.
3. The Code should also require retailers to conduct **regular training** with their staff to ensure compliance with the regulations.
4. Regulators should **close loopholes** in the Code that allow retailers to slip unfair clauses allowing set-offs, payments toward retailers' business activities, and payments for wastage into Grocery Supply Agreements.
5. The Code should **prohibit the retailer requesting payments for non-supply** from the supplier. The supply of fresh fruits and vegetables is vulnerable due to weather events and pests and diseases that are not in the supplier's control.
6. The Code should enable **flexibility of supply** with clear expectations about how growers can supply their own independent labelled products as well as supplying retailer own-brands.

Any pricing or practice that under-values produce impacts growers' ability to invest in more efficient production methods and respond to regulatory change. The Code of Conduct must protect growers from anti-competitive practices to allow their businesses to thrive and grow over time.

# Submission

## 1. Our Previous Involvement

HortNZ previously filed submissions on the Grocery Code of Conduct in August 2022 and the Grocery Industry Competition Bill in December 2022. We presented to the Select Committee in February 2023. Throughout these consultation processes, we advocated for recognition of the complexity of the horticulture supply chain and that the regulations, as written, do not capture all of the potential unfair practices that take place at all first point of sale transactions that may not be with a retailer.

## 2. Wholesalers and Retailers

Growers experience most of their frustration at the first point of sale. This is most often a wholesaler, not a retailer, as illustrated in the supply chain diagrams in the Appendix of this submission. As written, the Grocery Supply Code of Conduct only covers retailers and transactions directly between a grower and applicable retailer.

HortNZ seeks that the Code of Conduct apply to all retailers for consistency across the sector. The consultation document and the Grocery Industry Competition Bill only include Woolworths and Foodstuffs. While these are the major players, fresh produce is also sold through smaller supermarkets, online grocery sales, green grocers and food box delivery services. Growers are at risk of exploitative supply agreements with any of these modes of sale.

A distinction also needs to be made at the point when ownership transfers from suppliers to retailers. Since there is often a multi-linked chain from farm gate to supermarket, the grower should no longer be responsible for the product after ownership has been signed off. Once a product is signed for at a wholesaler or distribution centre, that product is then the property of the wholesaler or retailer and should be treated as such.

The cost of further distribution from the retailer' wholesaler or distribution centre is the business cost of the retailer and should not be charged to the supplier.

## 3. Supply agreement workshops

HortNZ seeks that the government workshop supply agreements with retailers and suppliers, especially growers, to make sure that everyone knows their legal obligations and rights under the new Code of Conduct. HortNZ, United Fresh, and product groups like Vegetables NZ are well-positioned to assist in this extension. It is critical that supply agreements are well understood by growers, so that they are empowered to advocate for fair agreements under the new Code of Conduct.

Furthermore, retailers should be made responsible under the Code to train and regularly re-train their staff on their regulatory responsibilities. New staff should also be given training

soon after joining their role. Compliance obligations should be made clear to individual stores.

### **3.1. Supply agreement templates**

HortNZ seeks that the government develop supply agreement templates in close collaboration with industry groups (HortNZ, United Fresh, and product groups) to ensure consistency across the industry. Supply agreements may be made up of a suite of documents. Example supply agreements will give growers the confidence that they are getting fair trading terms.

## **4. Power imbalance**

We are still concerned that the inherent power imbalance between suppliers and retailers will be exploited through loopholes in the Code that allow retailers to put unfair trading practices in supply agreements. We support clauses requiring retailers to provide clear and written justification for set-offs, payments toward retailers' business activities, and payments for wastage.

This power imbalance is also why the workshops are so important, to ensure growers know their rights and can negotiate fair supply agreements.

## **5. Prohibit financial penalties for non-supply**

HortNZ seeks a prohibition on financial penalties from retailers to suppliers for non-supply. We believe this should be explicit. Special consideration needs to be given to the seasonal and vulnerable nature of the supply of fresh produce. Growers should not be penalised for factors outside of their control like extreme weather events or pests that destroy their product.

## **6. Branding**

Supermarket retailers stock both independent labels and produce or goods that are marketed under an own-brand. Some growers opt to supply an own-brand and continue their own brand of product. HortNZ believes growers should have the flexibility to supply products under their own independent label if they are able. A supply agreement may cover expectations in terms of running independent labels alongside own-brand products, such as having unique blends or a core-product range.

HortNZ seeks provisions to enable flexibility of supply and clear expectations about how growers can supply their own independent labelled products as well as supplying own-brands.

Under the current system, supermarkets have the ultimate say over the branding of fresh produce. They can strongarm growers into allowing their fruits or vegetables to fall under the own-brand (e.g. Pams) with threat of de-listing if they don't comply. Even if a grower has an award-winning product or a remarkable story attached to their business, consumers will only see the budget branding. This control over packaging creates consumer assumptions about quality and takes away an opportunity to fight for consumer loyalty through

storytelling. It also takes away consumer choice and information about the origin of their food.



## Consultation Questions

Most of our responses to the consultation questions are covered by the clause-by-clause table in Part 5 of this submission. Those questions not answered by the table are answered in this section.

**Q. 3** Are there any ways that clause 6 could be improved to be more effective in supporting fair conduct between suppliers and retailers?

### AGREE

Good faith is not possible without fair trade. Clause 6 should be amended to require fair trading practices between retailers and suppliers. Growers are generally price takers due to the nature of fresh seasonal produce. Retailers creating profit through under-valuing fresh produce does not support a relationship based on good faith. Growers operate under an information vacuum as they do not have access to the same real-time pricing and sales information as the retailer buyers.

Arguably, there would be no need for the Grocery Code of Conduct if there had been an environment of good faith in all transactions.

Clause 6 should be amended to require fair trade.

**Q. 12** Do you think a maximum payment period should be set by the Code?

### AGREE

HortNZ agrees that a maximum payment period would provide more certainty to growers about when they can expect payment, allowing them to plan accordingly. Current business practice is to expect invoices paid by the 20<sup>th</sup> of the following month.

**Q. 13** If a maximum payment time is set, do you think 20 calendar days from receipt of the invoice is appropriate?

### DISAGREE

Current business practice is to expect invoices paid by the 20<sup>th</sup> of the following month.

**Q. 15** Is the six-month timeframe set out in clause 14(2)(g) appropriate? Do you consider that this timeframe should be shorter (for example, 30 days) or longer (for example, 12 months)?

### DISAGREE

Six months is an inappropriate amount of time to check for wastage from fresh fruit and vegetables. A retailer's produce manager should know immediately whether a product has quality control issues. It is the responsibility of the retailer's produce manager to check for wastage before signing for produce. The retailer or the retailer's agent should not be allowed to claim wastage from fresh produce after taking effective control of the product.

This is clarified in Clause 21(4), which specifies a 24-hour time period for the retailer to reject fresh produce after delivery and that the retailer cannot reject fresh produce after



accepting it. Therefore, wastage payments should be prohibited for fresh fruits and vegetables.

**Q. 17** Should payments as a condition of supply be allowed in cases other than for new products?

**DISAGREE**

No, HortNZ strongly disagrees that payments as a condition of supply should be allowed.

**Q. 18** Is the description of what constitutes a new product, set out in clause 15(2)(ii), appropriate?

**AGREE**

Yes, this is an appropriate description.

**Q. 19** Should clause 17 include an additional restriction which prohibits retailers from requiring suppliers to fully fund the cost of promotions?

**AGREE**

Yes, retailers should be prohibited from requiring suppliers to fully fund the cost of promotions.

**Q. 22** Will requiring a range review, ahead of any delisting decisions, be an effective way of ensuring fair and transparent delisting decisions?

**AGREE**

Yes, HortNZ agrees that a range review ahead of delisting decisions is essential for fairness and transparency.

**Q. 23** Does providing six-month notice of delisting fresh fruit and vegetables provide sufficient warning for such suppliers?

**AGREE**

HortNZ agrees that six months is sufficient notice for delisting fresh fruit and vegetables. At least six months is required given the seasonality of fresh produce and planting schedules.

**Q. 24** Will there be any issues in complying with the process requirements set out in clause 19?

**DISAGREE**

Clause 19 is adequately protective of growers. The retailer should give reasonable notice with clear communication before delisting a product. An exemption for food safety-related recalls is appropriate.

**Q. 31** Does clause 21 effectively address issues faced by suppliers of fresh fruit and vegetables?

**SOMEWHAT AGREE**

HortNZ is supportive of the special consideration this clause gives to the vulnerable and seasonal nature of fresh fruits and vegetables. Recommended changes to the subclauses of Clause 21 and additional changes to protect growers are laid out in the table in Part 5 of this submission.

**Q. 32** Is the 24-hour cut off proposed for accepting fresh produce appropriate? If not, why not?

**AGREE**

24 hours is appropriate given the short shelf-life of fresh fruits and vegetables. After more than 24 hours, damage could occur to the fresh produce that is out of the control of the supplier.

Transport time is often outside of a retailer and growers' control and is dictated by transport routes. For fresh produce, this can be three days in transit in some cases.

**Q. 33** Is the 48-hour cut off for notifying suppliers of the rejection of fresh produce appropriate? If not, why not?

**AGREE**

48 hours is appropriate given the short shelf-life of fresh fruits and vegetables. This window gives suppliers sufficient time after rejecting the produce to notify the supplier.

**Q. 34** Should similar protections apply to suppliers of other perishable produce, such as seafood and meat?

**NEUTRAL**

This falls outside the scope of Horticulture New Zealand's membership, but we support the meat and seafood industries in arguing for the fairest trade practices for their sectors.

**Q. 43** Is the timeframe for responding to a price increase appropriate? Are there classes of produce which may justify shorter time periods for response?

**SOMEWHAT AGREE**

While we agree with Clause 27(1)(c) which provides special provisions for fresh fruit and vegetables, it should be clear that Clause 27(1)(d) does not apply to fresh produce. More frequent price negotiations are required for fresh fruits and vegetables given their seasonality and market shifts related to unforeseen events like weather or pests and diseases. Growers are generally price takers, so retailers are typically the ones informing growers of price changes.

Given the variability of supply of fresh fruits and vegetables due to events out of the grower's control like weather, price increase timelines are inappropriate. An extreme weather event could require an immediate price change due to drastically reduced supply.

**Q. 49** Will requirements to provide written statements when relying on exceptions improve compliance and transparency in relation to the use of such exceptions?

**AGREE**

HortNZ agrees that written statements will improve compliance and transparency when it comes to exemptions, although we are concerned that this option provides a loophole for retailers to continue with unfair practices. In the table below, we provide alternate text to close these loopholes.

**Q. 51** Do you agree with the decision not to include restrictions from the Australian Code relating to payments for shelf allocation?

**NEUTRAL**

No specific comments.

**Q. 53** Do you agree with the decision not to include protections from the Australian Code relating to changes in supply chain procedures?

**AGREE**

Clauses 8 and 9 of the Exposure Draft cover these concerns.

**Q. 54** Are you aware of any issues relating to changes to supply chain procedures which may require specific protections in the Code, beyond those included at clauses 8 and 9?

**AGREE**

The Code, as written, does not cover the vast majority of the supply chain from farm gate to retailer, as is illustrated by the diagrams in the Appendix. We believe the Code of Conduct needs to consider the whole supply chain - from farm gate to retail shelf, as the wholesale markets play a pivotal role in facilitating the supply of fresh produce across New Zealand. Furthermore, for most growers, the first point of sale for their produce is through a wholesale market rather than direct to a retailer.

**Q. 59** Are there any issues connected with supply of groceries to major retailers which are not addressed by the Code? If so, do you have any suggestions for how they should be addressed?

**AGREE**

Government and the public need better understanding of the flow of produce from grower to the consumer's fridge. The price of produce is impacted by the number of transactions between farm gate and retail shelf. Price gouging can happen when there is a lack of transparency and understanding about what costs are built into a consumer's price. We have noted in previous submissions that the price a grower receives has not changed in 15+ years for some produce items. There has, however, been a steady increase in the price consumers pay for the same produce. This pricing model contributes to shrinkage and wastage in store. We believe consumers need better information about where the price of their produce comes from, including price transparency throughout the supply chain.

## Submission on Draft Grocery Supply Code of Conduct

Without limiting the generality of the above, HortNZ seeks the following decisions on the Draft Grocery Supply Code of Conduct, as set out below, or alternative amendments to address the substance of the concerns raised in this submission and any consequential amendments required to address the concerns raised in this submission.

Additions are indicated by bolded underline, and deletions by strikethrough text.

Provision	Support/oppose	Reason	Decision sought
Clause 6: Obligation to deal with suppliers in good faith	Support	We support the specificity which gives the term "good faith" practical and actionable meaning.  Good faith is not possible without fair trade, however.	(1) The retailer must at all times deal with suppliers in good faith <b><u>with fair trading practices</u></b> .
Clause 7: Grocery supply agreement must be in writing and retained	Support in part	We support the need to keep supply agreements in clear writing and on record.  We further recommend that there is a standardised supply agreement template developed through workshopping with suppliers. This will ensure consistency and provide further protection from unfair agreements.	Retain as drafted.
Clause 8: Matters to be covered by agreement	Support	We support standardised requirements for supply agreement contents.	Retain as drafted.
Clause 9: Unilateral variation of agreement	Support	We support the protections against unreasonable or unexpected variations.	Retain as drafted.

Clause 10: Retrospective variation of agreement	Support	We strongly support prohibition on retrospective variations.	Retain as drafted.
Clause 11: Transport or logistics services	Support	We support the prohibition on retailers requiring suppliers to use particular transport or logistics services. We further recommend that service standards on the supplier should not cover transport or logistics that occurs after ownership has transferred to the retailer. Otherwise, growers are held liable for potential damage during transport that is out of their control.	(1) The retailer must not directly or indirectly require a supplier to use a particular transport or logistics service. (2) Subclause (1) does not prevent a retailer imposing service standards in respect of transport or logistics. <b><u>(3) The retailer must not impose service standards on a supplier in respect of transport or logistics that occurs after ownership has transferred to the retailer or if the goods are otherwise within the control of the retailer or an agent of the retailer.</u></b>
Clause 12: Payments to suppliers	Support	We support disallowing set-offs or adjustment except when a supplier agrees to do so in writing, without duress. The loophole to include set-offs in grocery supply agreements should be closed.	(2) The retailer must not– (a) set off any amount against a supplier’s invoice or remittance unless the supplier has consented in writing to the set-off of the amount; or (b) require a supplier to consent to set off such an amount; <b><u>or</u></b> <b><u>(c) have a grocery supply agreement under which a supplier is required to consent to such set-offs.</u></b> <del>(3) Subclause (2) does not apply if– (a) the grocery supply agreement provides for the amount to be set off; and</del>

			(b) the set-off is reasonable in the circumstances.
Clauses 13: Payments for shrinkage	Support	We support the prohibition on retailers requiring payment for shrinkage.	Retain as drafted.
Clause 14: Payments for wastage	Support in part.	<p>We support restricting the circumstances in which a retailer can require payment for wastage once the retailer has taken possession of the product.</p> <p>Clause 21, however, prohibits retailers from rejecting fresh fruits and vegetables after the retailer has accepted the produce. It is the responsibility of the retailer's produce manager to check for wastage before signing for produce. The retailer or the retailer's agent should not be allowed to claim wastage after taking effective control of the product.</p>	<p>(2) Subclause (1) does not apply if–</p> <p><b><u>(ai) the payment is not in respect of fresh fruits and vegetables; and</u></b></p> <p>(a) the relevant grocery supply agreement sets out expressly and unambiguously the circumstances, which could include negligence, in which the supplier will be required to make payments to cover wastage...</p>
New Clause X: Payments for non-supply	New	Insert a new clause prohibiting financial penalties to the supplier for non-supply. Growers should not be penalised for factors outside of their control like extreme weather events or pests that destroy their product. This is discussed further in Section 5 of the general comments above.	<p><b><u>XX. Payments for non-supply</u></b></p> <p><b><u>(1) The retailer must not–</u></b></p> <p><b><u>(a) directly or indirectly require a supplier to make any payment as compensation for non-supply; or</u></b></p> <p><b><u>(b) have a grocery supply agreement under which a supplier is required to make such payments.</u></b></p>



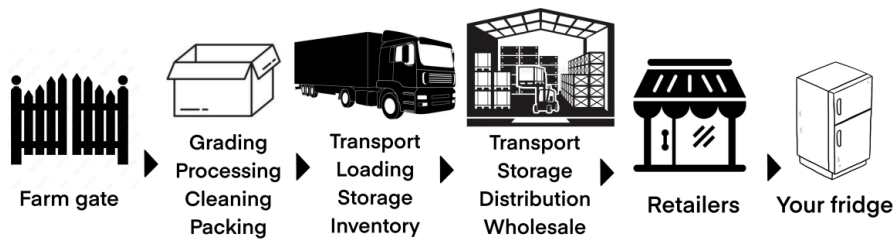
Clause 16: Payments for retailer's business activities	Support	We support the restrictions on retailers charging suppliers for the retailer's business activities.  We also support that the retailer is required to give a clear and full written explanation as to why a payment might be reasonable, and the payment can only be required if it was included in the supply agreement.	Retain as drafted.
Clause 18: Delisting products	Support	We support the need for transparency and range reviews in delisting decisions.	Retain as drafted.
Clause 19: Process requirements relating to delisting	Support	We strongly support the requirement to give 6 months' notice to suppliers of fresh produce before delisting due to the length of growing seasons and the need to plan for planting in the following season.	Retain as drafted.
Clause 21: Fresh produce standards and quality specifications (4) (c) the retailer does not reject the produce after the retailer has accepted the produce	Support	HortNZ supports this clause but wonders how this will be enforced in practice.	Retain as drafted.
Clause 21: Fresh produce standards and quality specifications (6) The retailer must communicate any labelling, packaging, or preparation...	Support in part	This clause should reference existing food legislation with legal requirements for labelling, packaging and preparation, namely the Food Act 2014 and the Australia New Zealand Food Standards Code (FSANZ).	The retailer must communicate any labelling, packaging, or preparation requirements for a grocery product to a supplier in clear, unambiguous, and concise written terms <b>in alignment with</b>

			<b><u>the Food Act 2014 and the Australia New Zealand Food Standards Code.</u></b>
<p>Clause 21: Fresh produce standards and quality specifications</p> <p>(8) The retailer must make any claim for damaged grocery products or shortfalls...</p>	Support in part	Clause 21 is only relevant to fresh produce standards and quality specifications.	The retailer must make any claim for damaged <b><u>fresh fruits and vegetables</u></b> grocery products or shortfalls, or any similar claims, within a reasonable time of, and in any event no later than 30 days after, delivery of the groceries to the retailer (or the retailer's nominee).
<p>Clause 22: No duress about supplying to competitors</p>	Support	HortNZ supports this clause but wonders how this will be enforced in practice. Duress about supplying to competitors typically occurs through non-traceable communication, like phone calls or blacklisting.	Retain as drafted.
<p>Clause 27: Price increases</p> <p>(1) (d) the supplier has not informed the retailer of the same price increase...</p>	Oppose	It should be clear that fresh produce is not included in clause 27 (1). Produce prices are variable due to many factors outside of suppliers' (growers') control, including weather events and pests and diseases.	This clause applies if... (1) (d) <b><u>the price increase is not in respect of fresh fruits and vegetables</u></b> <b><u>and</u></b> the supplier has not informed the retailer of the same price increase in respect of the product within the last 6 months.

## Horticulture Supply Chain

The horticulture supply chain and flows of produce are described below. These processes have a bearing on the relationship between the grower and the ultimate consumer and the risks of losses along the supply chain.

The horticulture supply chain has multiple steps, from farm gate, to processing to transport, to storage and distribution, to retail before reaching the consumer. Different growers sell their product at different stages along this supply chain.



## Flows of Fresh Produce in NZ

The graph illustrates the flows of produce. The Code of Conduct is focused on the retailer, but there is a significant flow of produce from growers via the wholesale market. There are also direct relations between growers and small retailers and food service markets.

