

# SUBMISSION ON

# New Zealand Grocery Code of Conduct

10 August 2022

**To:** MBIE

**Name of Submitter:** Horticulture New Zealand

**Supported by:** Tomatoes NZ, NZ Asparagus Council,  
Vegetables NZ, Strawberry Growers NZ, Citrus NZ,  
NZ Passionfruit Growers Association, Summerfruit  
NZ, NZ Kiwiberry Growers Inc, Persimmon Industry  
Council, NZ Feijoa Growers Association, New  
Zealand Boysenberry Council

## Contact for Service:

Privacy of natural persons

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## Our submission

Horticulture New Zealand (HortNZ) thanks MBIE for the opportunity to submit on the NZ Grocery 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 Aotearoa 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 our countries 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

HortNZ is concerned about the negotiating power imbalance between the major grocery retailers and their suppliers.<sup>1</sup> We agree that this imbalance impacts on suppliers' ability and incentives to invest and innovate, including developing new offerings of healthy food (fruit, vegetables and berries) for consumers. In turn, it impacts the conditions of entry and expansion into the retailer grocery market and ultimately the grocery offering to consumers.

HortNZ supports the mandatory grocery code of conduct to govern relationships between the major grocery retailers and their suppliers.

There are many issues that impact on the costs of growing fruit and vegetables for domestic supply in Aotearoa New Zealand that are not influenced by the relationship growers have with the supermarkets, for example the cost and complexity of regulation and the ability of consumers to afford to meet their nutritional needs.

The resilient supply of a variety of fresh fruit and vegetables is essential to health of New Zealanders. Growers being able to receive a fair price for their produce is key to the resilience of food system. We see the code of conduct being a key driver to fairer and more transparent negotiations in future.

## Key points

- The proposed code of conduct is a step in the right direction, but it will not resolve all the issues related to the power imbalance associated with the sale of fruit and vegetables.
- Good faith has not served growers well in the past, and the code needs to be specific, provide greater transparency and a dispute resolution mechanism.
- The code will need simple and s
- Growers receiving a fair price will not necessarily lower the price for consumers but will provide long-term benefits for consumers by improving the resilience of New Zealand food system
- The Code should capture all retailers including smaller companies, food subscription services and online retailers that may not have shop floor
- Wholesalers are the first point of sale for many growers and the Code should capture wholesalers too
- Supply agreements are needed for all commercial actions of supply to retail and wholesale organisations. These agreements need to form a basis for all discussion - particularly if there are issues that need to be covered that are outside of the Code or need specific agreement.

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<sup>1</sup> Commission's Final Report, para 8.50-8.56.



# Submission

## 1. Key issues for Horticulture

This section outlines key concerns for the horticulture sector and the matters that inform the responses HortNZ has made to the questions raised in the consultation paper. The questions raised in the consultation paper are addressed in section 2.

### 1.1. Unsustainable returns for vegetable growers

Growers are facing increasing pressure to grow fruit and vegetables and enable them to make a profit. Compliance, inflation and a non-competitive marketplace, are all having an effect on grower returns, and creating financial hardship across the sector. Not all the issues facing growers will be influenced by the Code of Conduct, but the Code of Conduct will be an important element in helping growers negotiate a fairer and more sustainable price for their products – especially for those growers of fruit, vegetables and berries that are primarily focused on supplying the domestic market.

The vegetable product groups have recently completed a grower survey that has indicated the following issues<sup>2</sup>:

- Vegetable growers are price takers. Over 95% of fresh vegetables are consumed domestically, supplying a duopoly retail channel fixated on historical price metrics
- There is significant impending regulatory burden from Freshwater farm plans, HWEN, Fair Pay agreements, Minimum wage increases. Regulatory pressure drives costs up which are not recovered by growers
- Low returns encourage growers to plough in their crops rather than sell them at a loss. This has an environmental and economic deficit effect as well as a lost opportunity to enable kiwis to access healthy food for both mental and physical wellbeing.
- Selling produce at cost or below cost stifles investment and growth in the vegetable industry.
- Growers support transparent wholesale and retail supply chains – from farm gate to retail shelf.
- Freight is a not competitive model, unless growers run their own trucks
- Growers need flexibility to use crate and freight providers of their choice – not the retailers.
- Growers are facing an acute labour shortage. Many vegetable growers do not have export returns / nor retained. Reliance on immigration labour is not sustainable for vegetable growing
- Over a decade long period of retail price stagnation on vegetables
- Historically growers have had a varied experience with relying on good faith in negotiation – often growers have been left to assume more risk than is fair and the quality of the sale has had a lot to do with the individual buyer for the retailer or wholesaler rather than the fairness of the transaction. In the past, there has

<sup>2</sup> James Morrison, July 2022. Vegetable Policy Strategy Insights

been a tendency for retailers and wholesalers to work to verbal agreements rather than signed contracts.

One of the benefits of the Code will be a greater understanding for consumers of the costs of the fruit and vegetables they are purchasing: transparency of the costs of the production, wholesale pricing linked to volumes and / or the margins charged by the supply chain participants. We believe greater transparency on the supply chain and pricing of produce at each stage throughout the chain will increase public scrutiny and an understanding of the financial aspects of producing the product they are buying; we believe will be a real and enduring force for competitive pricing.

## **1.2. Fresh Supply of fruit and vegetables**

The perishable nature of fresh produce means it should be specifically addressed in the Code.<sup>3</sup> Fresh produce suppliers may need greater flexibility to account for the seasonal nature of produce and the timeframes it takes to grow fresh produce. The requirements should include the designated retailer's expectations for fresh produce quality and processes for accepting (or rejecting) produce and protections to prevent last-minute renegotiation on terms that could expose growers to additional risks or costs.

Vegetable growers generally operate under a model of being price-takers. Vegetable growers often do not have agreement or confirmation of price of their produce prior to vegetables being sent to market. How growers sell produce varies, with some growers selling direct to retailers and others choosing to aggregate or sell their produce via wholesale markets.

Currently, many growers produce is sold 'on the floor' - meaning a price is set by the market on the day. Similar to an auction system, this reduces ability to ensure cost of production is covered at point of sale. Growers have been very clear that the prices they receive for their produce have not changed in 15 years, while costs of production have sharply increased. It is important to demonstrate the vulnerabilities of the grower in the supply chain and the vast difference between the first point of sale of produce and the consumer price.

Growers need the ability to set a minimum price for their produce, have open and transparent discussion and information about market pricing and the impacts of selling produce below minimum cost price.

Growers do not have access to real time information on prices of produce and cannot share information between each other as this is considered anti-competitive<sup>4</sup>; the information imbalance creates a lack of transparency for growers and suppliers of fresh produce. One opportunity that can be explored as part of the development of the Code of Conduct, is enabling growers to more easily information share to ensure fairer negotiations and ability for growers to set minimum prices for cost of production recovery

## **1.3. Fresh supply of fruit and vegetables and food security for New Zealand**

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<sup>3</sup> Australia also has a Horticulture Code of Conduct, which regulates conduct in transactions between growers and wholesale 'traders', agents, or merchants.

<sup>4</sup> Commerce Act 1986

Over 80% of vegetables grown in New Zealand are for domestic consumption. Deloitte's report on the 'Pukekohe Hub'<sup>5</sup> described three distribution channels: retail, foodservice and exports. In this area, the most heavily used channel was retail which distributes 83% of produce. The other two channels – food services and export – distribute 7 and 10%, respectively.<sup>6</sup> Similarly, KPMG's 2017 report on New Zealand's domestic vegetable production demonstrated that for the ten key vegetables that are staples of New Zealand diets, the vast majority are consumed or processed in New Zealand.<sup>7</sup>

For most vegetable crops, the domestic market is the primary market, but many growers produce export crops within their rotations for practical (soil health) and economic reasons. For example, onions which are predominately grown for export are grown with other vegetables crops in rotation. Onions are grown in rotation with non-allium crops to promote soil health and provide a break in crops to ensure pests and diseases are managed more effectively (than if crops are non-rotated). Export income provides greater economic resilience for those growers producing vegetables for the domestic consumption.

New Zealand also has an important role in exporting fresh vegetables to the Pacific Islands. For example, in 2016, 76% of total exported potatoes went to Fiji, and 87% of exported Kumara, 82% of exported cauliflower, and 75% of exported cabbage went to the Pacific Islands. NZ has an important role in the food security of our Pacific neighbours.<sup>8</sup>

New Zealand and our Pacific Island neighbours are too remote to import many fresh vegetables from elsewhere in the world. Most vegetables that New Zealand imports have been processed. In 2019, the most imported vegetables were preserved tomatoes and frozen potatoes.<sup>9</sup>

Many fruit crops are grown mainly for domestic supply. For example, nectarines, peaches and plums, oranges, mandarins, feijoas, tamarillos, and strawberries<sup>10</sup>.

Otago University has recently modelled the potential health impacts of increased vegetable prices. This study found that using the health costs of an increase in vegetable prices of 43 - 58 percent,<sup>11</sup> would be a loss of 58,300 - 72,800 Quality Adjusted Life Years and health costs of \$490 - \$610 million across the population.<sup>12</sup>

The recent high court decision relating to the Specified Vegetable Growing Area Policy in the NPS-FM 2020 notes "Continuity of supply in fresh vegetables is important for

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<sup>5</sup> The growing area that straddles the Auckland and Waikato boundaries and is a key producer of vegetables in New Zealand.

<sup>6</sup> Deloitte "New Zealand's Food Story: The Pukekohe Hub" Prepared for Horticulture New Zealand (August 2018)

<sup>7</sup> KPMG, 2017 New Zealand's domestic vegetable production: the growing story.

<sup>8</sup> [https://wits.worldbank.org/CountryProfile/en/Country/WSM/Year/2019/TradeFlow/Import/Partner/all/Product/16-24\\_FoodProd](https://wits.worldbank.org/CountryProfile/en/Country/WSM/Year/2019/TradeFlow/Import/Partner/all/Product/16-24_FoodProd)

<sup>9</sup> FreshFacts 2020

<sup>10</sup> FreshFacts 2020

<sup>11</sup> <https://www2.deloitte.com/nz/en/pages/primary/articles/pukekohe-hub.html>

<sup>12</sup> [/www.hortnz.co.nz/assets/Environment/Reports-research/The-health-and-health-system-cost-impacts-of-increasing-vegetables-prices-over-time.pdf](https://www.hortnz.co.nz/assets/Environment/Reports-research/The-health-and-health-system-cost-impacts-of-increasing-vegetables-prices-over-time.pdf)



national food security and human health".<sup>13</sup> also signifies the importance of having thriving horticultural businesses.

## 2. HortNZ Responses to Consultation Paper Questions

The following section addresses questions raised on in the consultation paper. Horticulture NZ has answered with a pan-sector lens covering the concerns raised by our wide range of growers.

**Q. 1** Do you have any comments in relation to **Chapter 2**, in particular any comments on:  
- the objectives (section 2.2)?  
evaluation criteria for the Code (section 2.3)?

HortNZ agrees with the objectives to improve the dealings between the major grocery retailers and suppliers and competition in the market for the acquisition of groceries done by addressing issues caused by the imbalance of negotiating power between the major grocery retailers and their suppliers.

We believe the definition of retailer needs to broaden so it can include food subscription services. This is because food subscription services are increasing in market share and fulfilling the role traditionally held by a retailer.

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.

We see the criteria used to evaluate the options (Effective, Efficient, Durable) as necessary metrics. While the weighting (equal) may create some bias, it is considered that this will balance out with better terms of trade.

The Code may enable growers to innovate and invest and reduce the likelihood of suppliers being forced to exist, but only if growers are able to obtain prices that sufficiently cover their increasing input costs. Therefore, it may not follow that a code of conduct will result in lower prices for consumers for all goods. Particularly where the prices offered do not provide sustainable returns to growers. However, we consider that there is a long-term benefit to consumers in having a resilient supply of fresh fruit and vegetables, and this supply is dependent on growers receiving fair margins to enable them to continue to invest in their businesses, including their people, innovate and maintain confidence for the future.

It is necessary for the adjudicator to have oversight of the process in all aspects of the supply chain to ensure there is fairness and equity from farm to consumer.

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<sup>13</sup> MUAŪPOKO TRIBAL AUTHORITY INC v MINISTER FOR ENVIRONMENT [2022] NZHC 883 [29 April 2022]

In relation to **section 3.3**, which of the three **Designation Options** do you think is best, and why?

We prefer **Option B**.

We note that option A has a \$500m turnover threshold in a **single year** where retailers **may** designate, and option B is a \$750m turnover across **two financial years** and a retailer **must** designate.

Our preference would be for a lower threshold and with the designation requirements of option B as these provide the most clarity and expectation about retailer's requirements and designation under the code. While option B has an overall lower threshold, this is measures over two financial years and we believe having a single financial year measure is clearer and less open to manipulation.

We are concerned that having physical size and turnover limits will mean small owner operators (either small by size or turnover) will fall outside of the code, all retailers – stores, owner operator and food subscription services, should be held to account and included in the code.

Our preference is a low threshold, where the regulator must designate and the inclusion of non-traditional retailers such as food subscription services.

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In relation to section 3.4, which of the three Options do you think is best, and why?

Our preference is for the threshold to be as per designation **Option A**.

Obligations on the Code of Conduct need to rest with both Head Office and stores for the equity to prevail within the code. Many retail operations work under a franchise model, which do have conditions of trade, but at the same time there are several stores large enough to facilitate direct purchasing independently of head office. This is especially true, and more common with fresh produce that is perishable and has a short shelf life – i.e. the vast majority of fruit and vegetables available to consumers in NZ.

Direct relationships with local producers offer a point of difference with large retail entities. It is important that there are no gaps in the Code of Conduct between head office and franchisees. It needs to be clear that all aspects of the retailer's business – head office through to store level are included and subject to the Code. Retailers can then set clear expectations on how the Code is met within their organisational structures between head office and stores.

Specifically mentioning the in-store buying operations as being a part of what a retailer head office is held accountable for, will assist head offices to educate teams and stores to meet code of conduct obligations.

We do not consider floor area to be a good measure, we note that many food subscription services will have a nil floor area but have a considerable turnover. We believe the code should apply to wholesalers and include food subscription services as retailers.

4 Do you have any comments on the preliminary assessment of the options against the criteria in **Chapter 3**?

We agree with **Option B**.

We agree on a low threshold for designation and the discretion and investigation outlined in option B improves effectiveness and the ability to capture retailers appropriately.

HortNZ primary concern is the effectiveness of the Code. The Code is important for ensuring the resilience of our food system and supporting the health of New Zealanders. We consider the weighting of criteria should be towards the most effective approach.

A low threshold for retailers to be designated to the code appears to be straightforward and easily administered and would capture most of the retail sector ensuring consistency. It is then important to make requirements and obligations of the code clear across the retail sector – head office to store level. Stating that retailers must designate ensures clarity and clear expectations from the Code for retailers and growers.

We believe the whole supply chain from farm gate through to retail shelf needs to be captured by the code. This includes reviewing what a modern retailer is defined as. We believe this should include food subscription services which in practice, are retailers without physical stores.

5 In relation to **4.2 purpose of the Code**, which of the three options do you agree with, and why?

We support **Option 3 -Alternative Code**.

Option 3 alternative code offers the best outcomes for the grower/supplier and retailer relationship. We believe improved supply chain relationships and balance will create better outcomes for consumers and growers. It is important the whole supply chain is covered by any Code developed as many growers have indirect relationships with retailers – a large volume of produce sales between growers and retailers are facilitated by wholesalers and marketers.

We consider that elements of tikanga Māori could be incorporated in “good faith” and in “dispute resolution”.

We believe that economic development for all growers, including Māori owned horticultural businesses, will be enabled by the code. We believe that an improvement in relationships and transparent information will help growers to meet the costs of production and create a healthier business environment. We support greater transparency with supply agreements and more flexibility for growers. It is important that sustainable margins for growers are addressed through the Code as we believe this is in the long-term interests of NZ consumers and growers, not only for the people of Aotearoa – but also our Pacific neighbours.

We believe a disputes resolution mechanism is an important aspect of the Code and must be developed. The dispute resolution will need to be clear and concise with clear

definitions. HortNZ is happy to assist MBIE to draft such a document (as we understand this is a particular weakness of overseas code of conducts).

- 6 Do you see any risks if the purpose of the Code was to:
- address any impacts of the major grocery retailers' trading relationship with the supplier on other grocery retailers, or
  - support any wholesale supply arrangements?
- If yes, please explain the risks.

We see there are risks if the code is limited to grocery retailers and supplies relationships. We prefer that the Code should also apply to wholesale supply arrangements as a lot of produce is sold to retailers through wholesale markets.

Growers have been clear that there are significant issues at the first point of sale of their produce. A citrus grower has shared that in 2019 they received \$0.5163 per kg for their produce at first point of sale, and in 2022 this decreased to \$0.3465 per kg.<sup>14</sup> Costs of production have dramatically increased in the last three years, however the price the grower has received has decreased.

The price the grower has received for their produce at the first point of sale has also contrasted with the increased price the consumer has paid at the retail end over the same period. This speaks to the need to consider the whole supply chain and its contribution to the retail price. Growers have little scale and ability to ensure a fair price that covers their costs of production, with enough margin to ensure businesses are viable are received for their produce

This demonstrates the vulnerabilities growers have at the start of the supply-chain in a price-taker model. It is important to note that growers can sell direct to retail chains or via wholesale markets. While the method of sale may differ, growers have been clear the issues are the same – the price they receive at first point of sale is not enough to cover costs of production and support a healthy business. It is important the Code considers the whole supply chain if it is to provide protection for growers, and not be limited to the grower and retailer supply relationship. The code needs to consider the sale of produce to retailers via wholesale markets.

There is a need to ensure the code does not inhibit growers' abilities to operate in a free-market environment. For example, a grower should be able to freely pursue a contract with an alternative supplier if that contract is more advantageous to the grower without prejudice. This will help create a competitive environment for growers to work in.

- 7 In relation to 4.3 overarching obligations, which of the three options do you agree with, and why?

We support **Option 3**.

Option 3 provides the greatest protection to suppliers. We agree with the use of the good faith in processes but note that growers have provided feedback that good-faith has not served them well in the past. We also consider that the concept of fairness in

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<sup>14</sup> based on invoices received from grower.

outcomes is relevant, and therefore we support the use of the concept of fair dealing for those elements described in option 3.

We do not think that option 3 will create a risk of an overly large distributional shift from retailers to suppliers, and we consider the most effective option in supporting the long-term interests of consumers which are dependent on a resilient and sustainable supply of fresh fruit and vegetables.

8 Do you have any views on how to incorporate tikanga Māori or Te Ao Māori in the Code?

We consider that tikanga Māori should be incorporated within the concepts of good faith and dispute resolution, to ensure these concepts that are drawn from international experience and law are also fit for purpose for Aotearoa New Zealand.

9 How can the Code best incorporate economic development objectives, including those of Māori?

We don't think economic development objectives should be included within the code, but rather, will be enabled by an effective Code.

The purpose of the code is to create a fair, transparent environment for the sale of products from suppliers and growers to retailers. The Code will contribute to a healthier economic environment for business to operate.

10 Do you have any comments on the preliminary assessment of the options against the criteria in **Chapter 4**?

HortNZ primary concern is the effectiveness of the code. The Code is important for ensuring the resilience of our food system and supporting the health of New Zealanders. We consider the weighting of criteria should be towards the most effective approach

11 In relation to **5.2 Requirements for supply agreements to be written and contain minimum content**, which of the options do you agree with, and why?  
Is there any content that you think should be required in grocery supply agreements but is not mentioned?

We support **Option 2** (prescriptive code) & **Option 3** (alternative code).

We believe the expectations are clear and require the minimum necessary content to be in every supply agreement, which we support.

We note the concern around the potential for these to be less durable but consider that new or variations to agreements should be able to be agreed to reasonably simply. Noting we support **agreed** variations.

11 In relation to **5.2 Requirements for supply agreements to be written and contain minimum content**, which of the options do you agree with, and why?  
Is there any content that you think should be required in grocery supply agreements but is not mentioned?

We support **Option 2** (Prescriptive Code) & **Option 3** (Alternative Code)

Unilateral variations can undermine the grower/supplier retailer relationship. Variations need to be considered in the context of each supply agreement and there must be reasonable notice given for any variation.

Retrospective variations need to be prohibited, especially in instances where they require payment from a grower.

13 Do you have any comments on the preliminary assessment of the options against the criteria in **Chapter 5**?

We prefer **Option 2**.

Our primary concern is to protect growers from unexpected or unreasonable unilateral variations that may impose costs or risks.

14 In relation to **6.2 Changes in supply chain processes**, which option do you think is best, and why?  
Are suppliers being pressured to use a retailer's own logistics services and if so, what is the impact?

We support **Option 3**.

Growers need to retain flexibility in the logistics and should not be pressured into using the retailer's preferred supplier. Growers feedback has been clear that there are ongoing issues with retailers requiring growers to use specific transport services and crate companies. In many cases retailers have even specified crate sizes to be used which has resulted in inefficiencies and increased freight, transport and crate costs as well as supply issues.

15 In relation to **6.3 fresh produce standards and quality specifications**, do you think the Code should include specific provisions about fresh produce and if yes, please explain what you think it should include?

**Yes.** We believe the Code should include specific provisions about fresh produce.

We support **Option 2**.

Option 2 outlines a clearer process for the supply of fresh produce.

We represent growers of fruit, vegetables and berries produce. There are risks and uncertainties associated with the production and supply of food related to certainty and transparency around the terms of supply, including the designated retailer's expectations for fresh produce quality and processes for accepting (or rejecting) produce. Consumers also play a part in setting expectations and quality standards retailers require. Growers may be vulnerable to last-minute renegotiation on terms that could expose them to additional risks or costs, however we believe there is a good understanding around seasonal pressures and the impact this has on supply of fresh produce. There is a need to have specific provisions on timeframes for rejection of produce and flexibility to allow for the need for supply

Fresh produce needs to be fully recognised as a perishable good. It is critical that any variation to any agreement is well communicated, within ample time to remove mitigating costs in effect to that change. Quality standards are well understood by produce growers and agreements do have time limits for rejection products. Fresh produce requires cool chain to be in effect whether it is accepted or rejected.

We consider that quality is well understood in the retail and wholesale market for fresh produce. We would like to consider a more prescriptive practice to be followed so that any new entrant to retail or wholesale is fully cognoscente of the roles and obligations of the code of conduct.

We consider the timeframes within Option 2 are generous, however, there is a need to consider the highly perishable nature of fresh produce and short timeframes growers work under. We agree with the NZFGC that a timeframe of 6-8 hours from receipt of product is reasonable and realistic given fresh produce is checked on delivery by the receiver.

We believe Option 2 provides more transparency for suppliers and sets clear expectations out for all parties.

16	In relation to <b>6.4 Obligations in relation to ranging, shelf allocation, and delisting</b> , which option do you think is best, and why?
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We prefer **Option 3**.

It provides the most transparency to suppliers. We believe that a fair review of products conducted by a retailer would highlight which products could be considered for delisting and a fair process followed from that point. Any delisting of products needs to be part of a range review process and not a pre-determined outcome before a process has been conducted. Suppliers must be given fair notice of delisting

17	In relation to <b>6.5 Other obligations</b> , which option do you think is best, and why? Please comment on the range of different areas - confidential information, intellectual property, business disruption, freedom of association, whistleblower protections, pressure to opt out of wholesale supply arrangements, exclusive supply clauses and 'most favoured nation' price clauses.
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We prefer **Option 3**.

We support protections for intellectual property, including taonga. We support prohibitions on threats and hindering lawful associations and conduct that discourages suppliers from opting out of wholesale access regime. We support confidentiality and the right for growers to safely conduct business within a healthy business environment. We support fair open and transparent supply agreements that enable better outcomes for growers and ultimately consumers.

We support the right of whistle blowers to raise concerns and believe this is enabled through the Protected Disclosures Act (2000 or 2022). We would seek to have anti-retaliation measures in place. Growers have spoken about being 'blacklisted' for speaking out in the past or requesting reviews of how produce reaches the consumer



from the farmgate. There needs to be protections in place so growers to raise concerns confidentially and anonymously, but recognising New Zealand is a small place so active monitoring of how growers are treated, especially in instances of complaint.

We believe Country of Origin Labelling (CoOL) is mandatory and supports consumers to make educated choices about the fresh produce they purchase. CoOL should be incorporated into the code.

18 Do you have any other comments about issues relating to product supply and placement?

We believe that product supply and placement can be negotiated in the supply agreement and cost attributed to the appropriate party at this time. Special consideration needs to be given to the seasonal and vulnerable nature of the supply of fresh produce, this includes prohibition of penalties for short or non-supply.

19 Do you have any comments on the preliminary assessment of the options against the criteria in **Chapter 6**?

We believe transparency and fairness are needed to enable better outcomes for growers. We believe that costs can be met more equitably where retailers and if appropriate in some cases, growers, wholesalers, and marketers can share burden of cost. We do not believe costs of compliance should be passed on exclusively to growers. Some process costs, such as range reviews, should be the sole responsibility of the retailer as part of their usual business activity.

20 In relation to **7.2 Payment terms and set-offs**, which option do you think is best, and why?

We prefer **Option 3**.

Suppliers are too often required to wait for payment and set off's can be unjustified or unclear. Any payment needs to conform to the terms and conditions of the supply agreement, including within the minimum payment timeframe set in the agreement. Setoffs should be prohibited, including in situations where if a grower owes money to a retailer or creditor, payment should not be by way of set off.

While option 3 may have a higher administrative cost related to agreeing the meaning of prompt payment means and agree set offs, however these agreements will lead to fairer and more certain outcomes for suppliers and therefore will be with the upfront investment of time.

21 In relation to **7.3 Responses to price increases**, which option do you think is best, and why?

We prefer **Option 2**.



Growers are faced with escalating costs of production they cannot control, furthermore events outside of growers control (such as weather events) can have an immediate impact on supply and the need to increase price to reflect the shortage of supply. Growers must have the opportunity to negotiate price increases in good faith. Option 2 provides more certainty for suppliers.

Price increases are needed from time to time. Price increases can be part of an annual review of a supply agreement or handled independently, after appropriate written notification. Consideration needs to be given to the seasonal nature of the growing and supply of fresh produce. We agree the process highlighted in the Australian Code is appropriate, and that a 30-day notice period is reasonable in some circumstances, however given the volatile nature of growing produce, believe retailers need to be more responsive to issues that affect the supply of fresh produce and request a 7 day notice period be more appropriate for fresh produce.

We agree that cost increases are also experienced by the grower and would like mechanisms to ensure growers are able to recoup production costs and set minimum sale prices in the market that are adhered to.

22 In relation to **7.4 Payments for shrinkage and wastage**, which option do you think is best, and why?

We prefer **Option 3**.

Option 3 provides the additional protection with the sunset clause to prevent retailers requesting payments for wastage that has occurred many months earlier. We also agree that payments for wastage should only occur when it is established the wastage has occurred before the retailer has taken possession of the product and that payments for wastage need to be tightly governed to specific circumstances, and be reasonable and proportionate, including a sunset clause.

Payment requests for wastage should occur no more than 7 days after produce has been received. There needs to be a balance between stores responsibly ordering and genuine wastage that has occurred before they have taken possession of produce ordered.

We agree payments for shrinkage should be prohibited, we believe that is an internal issue for a retailer to manage and not the responsibility of the supplier.

23 In relation to **7.5 Payments for retailer's business activities, product placement, and as a condition of being a supplier**, which option do you think is best, and why?

We prefer **Option 3**.

It is unreasonable for retailers to take payments for actions that cannot be specified. Marketing costs and positioning costs need to be prohibited unless stipulated in the supply agreement and are reasonable given the circumstance.

Likewise, growers need flexibility to use the best service available across the board. For example, crates are an ongoing issue – cost, availability, and supply. Currently, growers are forced into using a crate hire company specified by the retailer. In some cases, the crate company is linked, owned or involved with the retailer. The requirement to use specific crate companies can result in shortages and result in food waste and costs to growers.

Furthermore, retailers specify the size crate they will accept which can increase the number of crates, pallets and transport movements resulting in much higher costs to the grower to get the produce to the retailer.

Freight is another area where growers are often required to use a retailer’s own company or preferred supplier, when growers need to be able to have choice and flexibility to use the best provider, they can find to transport their produce for a fair price.

24 In relation to **7.6 Payments for promotions and promotional buying**, which option do you think is best, and why?  
What are your views on promotional buying and investment buying?

We agree **Option 3**.

Option 3 affords the best outcomes for efficiency and transparency. The cost of promotions should not be borne by the supplier and there must be a mechanism to have suppliers reimbursed for produce bought at a promotional or lower price and on sold at a regular (higher) price outside of the promotional period. It is unfortunate that fresh produce is often sold as loss leader by supermarkets – and growers are expected to absorb the cost. The advantage is to the retailer where it gets consumers in the door and purchasing their fresh produce – but also all other grocery items in their store with various profits margins.

Growers have highlighted that there is an issue with products that have longer shelf-life. Retailers over order during a special or promotional pricing period and on-sell stock outside of the promotion at a higher retail price. We are unsure how this can be monitored but need to draw attention to the fact this happens in fresh produce as well.

25 Do you think requests from retailers for payments for data services is an issue and if so, why?

Data services should be optional, and suppliers should be able to understand if the data they are being sold is the same data the retailer is relying on for range reviews.

Payments for data should not be included in supply agreements but can be included as a separate service agreement if the grower wishes.

26 Are there any other instances where requests for payments should be limited? If so, what are the issues and how should they be addressed in a Code?

Growers should not be requested for additional payments from any aspect of the supply chain between farm gate and retail shelf – including wholesalers, marketers and retailers. Consideration needs to be given to the first point of sale and the number of transactions that occur in between the first point of sale and the retail shelf. It is possible that other areas of the supply-chain could meet costs instead of the grower.

As stated in 23, the concern for growers is the amount of specification from retailers and wholesalers about what third-party suppliers and packaging for transport of goods impacts on the cost of production. This is not a cost that is recovered from the retailer or wholesaler, it is an additional cost the grower must pay out of the income received from the first point of sale. Often – as is the case with freight and crates, the retailer has an interest directly, or indirectly with the third-party company being specified.

27 Do you have any comments on the preliminary assessment of the options against the criteria in **Chapter 7**?

We support the **Alternative Code** option as the most appropriate option.

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

We are not aware of consumer complaints being an issue between suppliers and retailers, however we recognise the power imbalance in the market may mean that suppliers / growers have little position to push back on payment requests from retailers.

We note in feedback from growers that there have been instances of being ‘blacklisted’ when speaking out about issues with retailers and this contributes to a culture of non-complaint.

We note in some supply agreements there may be a cost allocation guide set out, particularly in instances of recall. These need to be considered in context of development of the Code and cost of complaints.

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

We agree that there are barriers to suppliers escalating a dispute through retailers, most certainly in terms of financial barriers, and concern that escalating a complaint will result in relationship damage.

We agree that a disputes resolution process under the Code will only be for suppliers/growers and retailers.

We agree that a 'light touch eligibility assessment' would offer the most appropriate way to determine if the dispute resolution process is best addressed under the code, or if it more appropriately should be referred to another process.

We agree that an independent dispute resolution process needs to be culturally responsive and accessible for all suppliers and retailers, including Māori businesses.

We agree any dispute resolution process should be accessible and should not financially penalise or cost the supplier for initiating the dispute to be referred to a resolution process.

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

We support **Option C**.

Option C provides the best dispute resolution process for NZ growers and suppliers and note confidentiality and in some cases, anonymity of the supplier must be upheld to ensure there is not ongoing relationship issues with retailers.

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

The Code of Conduct needs to have an aspect of accountability including penalties, clearly outlined and capture the whole supply chain from grower through to retailer. Focusing only on grower and retailer relationship does not capture the whole supply-chain or protect growers.

Wholesale and marketing companies need to be included in any Code as a facilitator of wholesale fruit and vegetable transactions between growers and retailers. Especially given the overwhelming feedback from growers about pricing issues which occur during the initial sale of produce from the grower.

We note that the first point of sale for most produce sold is through a wholesale/marketing company and then onto a retailer or distributor, this can include a non-traditional retailer such as a food subscription service. Fair prices and transparency of the system needs to include all aspects of the supply-chain from farm gate through to retail shelf.

32 Do you have any views on the Australian and UK approaches to monitoring, compliance obligations, and enforcement, and which might be most effective for New Zealand?

The Australian approach is more closely aligned to what a Code would want to achieve in NZ. We note that the Australian approach has incorporated aspects of the UK Code and then 'localised it' for their needs. We agree that we can learn from the examples of both UK and Australia, but ensure any Code developed for NZ is fit for purpose and incorporates unique aspects of our market.

We would like to see differentiation of perishable goods such as produce in the code to ensure the code is reactive to the seasonal and perishable nature of produce and recognises the unique pressures growers have in the market.

We would like to see greater transparency in real-time pricing information for growers recognising the volatile nature of the fresh produce market and that this pricing information imbalance prevents growers from identifying where the best markets are for their produce. Subsequently, this imbalance means wholesalers and retailers can exploit this information deficit to their advantage and the grower's disadvantage.

We believe the Code needs to be prescriptive and clear on expectations otherwise there is risk that the code will be unclear and difficult to adhere to.

We agree the Code is needed to ensure fair conduct through the whole sector, from grower, through to wholesale/marketer and retailer. We believe this starts with a clearly defined Code that clearly outlines expectations and requirements from all parties in the supply chain (grower, wholesale/marketers, and retailers).

We would also like to see more prescriptive and clear legislative guidelines for enforcement functions of the Code. There may be a need to clearly defined consequences, fines and penalties for breaches of the Code. We believe these can be mediated and assigned through an independent disputes resolution body and are needed to ensure compliance.

We believe there is a need to clearly define minimum requirements for products and allow room for growers and suppliers to become competitive by exceeding these requirements at times and allow for flexibility with seasonal demands.

Horticulture NZ welcomes the opportunity to work with government drafting a Code.

33

Do you have any comments on the potential compliance costs (for suppliers and designated retailers) from the proposed content of the Code of Conduct?

We believe that growers currently assume far more cost than is fair and would like to see this remedied through the Code. Growers need to have the ability to fairly set minimum prices which can only be done if they have access to market sales information. Without this, compliance costs will further erode growers' ability to operate profitable businesses and will undermine the supply of fresh and healthy fruit, vegetables and berries to our team of 5 million as well as erode the ability to invest in export ventures to ensure stability in our small and medium growers business to expand to large enterprises.

34

Do you have any views on how the Code should be implemented?

We agree with a staged approach to implementation - this could be staged with some provisions coming into effect immediately and others after a period, with elements that require no modification to contracts coming in within 30 days and contractual matters being implemented within 12 months.