SUBMISSION ON

Grocery Industry Dispute Resolution Scheme

2 February 2024

To: New Zealand Dispute Resolution Centre
Name of Submitter: Horticulture New Zealand
Supported by: Persimmon Industry Council, Pukekohe Vegetable Growers Association, Summerfruit NZ, Vegetables NZ Inc.

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Horticulture™ New Zealand
Ahumāra Kai Aotearoa

OVERVIEW

Submission structure

1. **Part 1:** HortNZ's Role
2. **Part 2:** Submission
   Direct responses to the consultation questions

Our submission

Horticulture New Zealand (HortNZ) thanks the New Zealand Dispute Resolution Centre (NZDRC) for the opportunity to submit on the Grocery Industry Dispute Resolution Scheme and welcomes any opportunity to continue to work with NZDRC and to discuss our submission.

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

PART 1

HortNZ's Role

Background to HortNZ

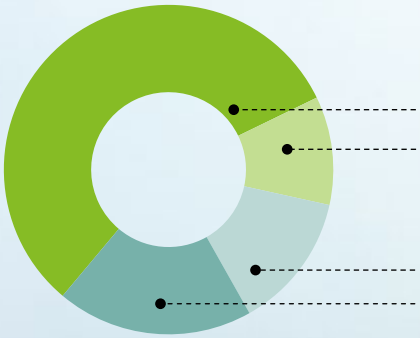
HortNZ represents the interests of approximately 4,200 commercial fruit and vegetable growers in New Zealand who grow around 100 different fruit, and vegetables. The horticultural sector provides over 40,000 jobs.

There are 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.



Export

Fruit $3.94bn

Vegetables $0.74bn

Domestic

Fruit $0.93bn

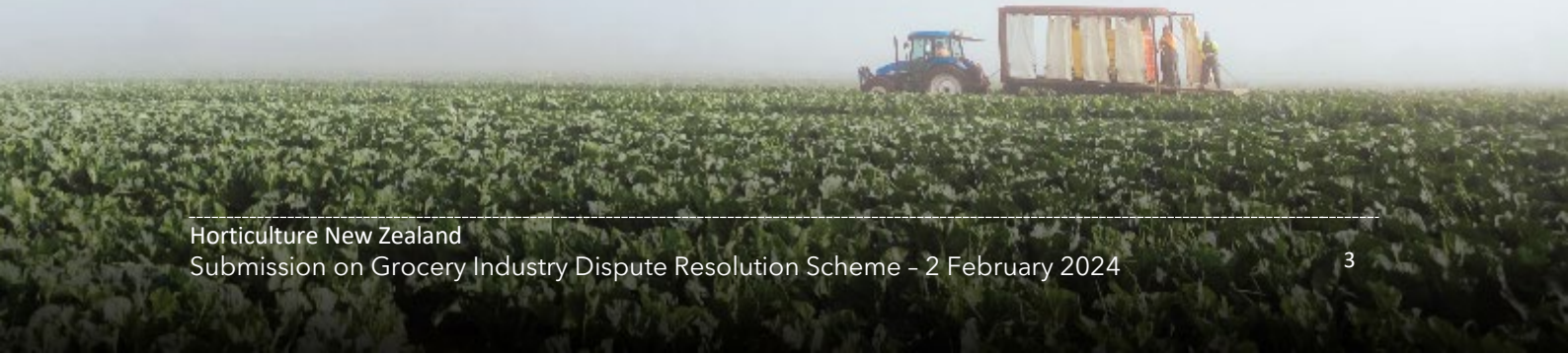
Vegetables $1.34bn

Industry value $6.94bn

Total exports $4.67bn

Total domestic $2.27bn

Source: Stats NZ and MPI



PART 2

Submission

Discussion Questions

General High-level issues

Q 1.	Do the Rules adequately provide a Scheme for Wholesale Customers and Suppliers that is user-focused, accessible, independent, fair, accountable, efficient, and effective?

Yes. The Government Centre for Dispute Resolution (GCDR) best practice principles provide a strong foundation to deliver a trustworthy system that works well for all participants.

Overall, the system needs to serve as a strong enough deterrent to the supermarkets that it will disincentivise anti-competitive behaviour, and suppliers will not have to take the retailers through dispute resolution in the first place. The financial penalties and binding nature of adjudication decisions through the scheme provide these disincentives for bad behaviour.

Suppliers would have to be in serious financial distress to consider using dispute resolution given the potential long-term damage to business relationships and reputation. This means that interventions and investigations into unfair trade practices from the Commerce Commission and connected parties need to be proactive, beginning before businesses reach a breaking point. More emphasis should be placed by enforcers and policymakers on early identification of anti-competitive practices.

There should also be lower-stakes venues for suppliers to report issues that do not reach the level of seriousness that would compel them to use the Scheme. The Commerce Commission Grocery Team's new anonymous reporting tool is a step in the right direction.

The Scheme itself could be more accessible to suppliers, most of whom do not have a legal background or dedicated legal team. Graphics are one way to communicate the process to a general audience. A flowchart showing different action paths could make the rules easier to understand. A table contrasting the differences between the mediation and adjudication options would also be helpful. These materials should be made available throughout explanatory documents of the Rules and in documentation provided to parties during dispute resolution.

Mediation

Q 2.	Are the rules relevant to Mediation clear and practical?

Yes, HortNZ agrees that the rules for Mediation are clear and practical.

Q 3.	Is the role of a Mediator clear?
Yes. HortNZ supports the need for a Mediator to be an independent neutral expert, rather than an advisor. HortNZ also supports that the Mediator has the flexibility to conduct the Mediation as suits the situation on a case-by-case basis, so long as there are clear timeframes for the process to resolve built into the Scheme.	

Q 4.	Is confidentiality adequately protected by the Rules?
Yes. Confidentiality is of utmost importance to mitigate reputational risk and protect commercially sensitive information. Care must be given that suppliers are protected and that communications about disputes are not subject to Official Information Act requests.	

Q 5.	Do you have any comments to make on Rules 12.1 to 12.5? Please use precise Rule references in any comments made.
12.1, 12.2 and 12.3 are strongly supported. The need for 12.4 (c) is understandable, but the threshold for sharing any confidential information should be high. The parties whom the information is shared with also need to be held to strict confidentiality rules. In addition, suppliers need to be included in the discussion about the need for sharing the information, not just notified. There should be a pathway for them to block the sharing of confidential information related to the dispute process if sharing that information could hurt the supplier's business. It is important that no loopholes are left where another retailer could be informed that a supplier participated in this process, as that would harm business relationships external to the dispute in question. It is unclear what constitutes a "reasonable time" in 12.5. Either a strict number of days should be provided, or a Party should notify other Parties of the intent to disclose as soon as practicable.	

Adjudication

Q 6.	Are the rules relevant to adjudication clear and practical?
Yes, HortNZ agrees that the rules for Adjudication are clear and practical. Confidentiality, in particular, is strongly supported to protect the parties and their future business proceedings.	

Q 7.	Is the role of an Adjudicator clear?
Yes. The Adjudicator's role as suitable, impartial and independent is supported. It should be clear that they are an independent neutral expert, rather than an advisor, with language similar to that for a Mediator.	

Q 8.	The process set out in the Scheme has been proven to be efficient in time and cost. Does the practice of "no oral hearing" raise any concerns for you?
An oral hearing should be an option, but not a requirement of adjudication. The adjudication process does not currently include a "right to be heard" through an oral hearing, which is one of the principles of natural justice required under the accompanying legislation. While hearings can impose additional costs, they also provide an opportunity for suppliers to state their case if they are more comfortable expressing themselves aloud than in written form. Making the hearings an option, not a requirement, will give suppliers the opportunity to forgo that step if they prefer.	

Funding

Q 9.	Is the Scheme sufficiently accessible for Suppliers and Wholesale Customers? Please use precise Rule references in any comments made.
No. The requirement for suppliers to pay for their own cost of participation (11.3, 24.5) will be a deterrent for small suppliers to participate. Retailers should be required to pay for suppliers' cost of participation, including reasonable costs and disbursements, if the Mediator or Adjudication finds that the claim was not frivolous, vexatious or without substantial merit. Clauses 24.6-24.8 are insufficient to make the Scheme financially accessible to suppliers, as there should be recourse for suppliers to recover costs even when actors do not meet the conditions of 24.6-24.8. Growers do not often have dedicated legal teams, while retailers have ample financial resources and lawyers on speed dial. Presumably, suppliers will only bring a complaint through the scheme if they are in a poor financial position due to unfair dealings with the retailer, which means they will not be in a position to pay expensive lawyers. This power imbalance will prevent suppliers from participating in the scheme unless there is another avenue to pay for their representation.	

The fact that funding is paid through a levy on the Regulated Grocery Retailers is supported. Retailers paying for the Mediator or Adjudicator's fee is also supported.

Q 10.	Are there sufficient safeguards to protect the Regulated Grocery Retailers from exposure to the (time and) cost of defending vexatious, frivolous or claims without substantial merit by Suppliers and Wholesale Customers?
Yes. The Scheme clearly lays out exceptions to the costing model in the case of vexatious, frivolous or meritless claims which will be an adequate deterrent.	

Q 11.	Is it fair that Suppliers and Wholesale Customers should be required to meet the costs associated with bringing claims that are vexatious, frivolous and/or without substantial merit?
Yes. It is fair so long as the Mediator or Adjudicator designating claims as such are truly independent and neutral. Their neutrality should be enshrined in the Scheme through clear rules.	

Q 12.	Do you have any comments to make on accessibility or funding?
A pathway should be created to allow multiple small suppliers to make a joint claim, within the boundaries of the Commerce Act 1986, to share upfront expenses for participating in the Scheme. Retailers should then be required to reimburse Claimants for legal expenses should the Mediator or Adjudicator find the claim to have merit.	

Tikanga Māori

Q 13.	Do the rules and matters set out above adequately provide for adoption of Tikanga Māori processes and support services, substantively and procedurally?
The tikanga-based system is appropriate as described.	

Clause 14

Q 14.	What comments do you have on any issues involving clause 14, with particular regard to: Whether how NZDRC intends to promote the Scheme is likely to be effective (clause 14(2)(b)) Whether the Rules provide for a Dispute Resolution Scheme which is consistent with the rules of natural justice (clause 14(2)(e) Whether the rules have as little formality and technicality as needed (clause 14(2)(f))? Please identify the precise clause you are commenting on, eg, "clause 14(2)(b)" and the relevant Rule(s).

Clause 14(2)(b): HortNZ supports the advertisement methods covered by 28.36-28.38. NZDRC meets its obligation to "work with other parties such as the Grocery Commissioner" under clause 14(2)(b) of the Grocery Industry Competition Act via Rule 28.33, but HortNZ and other industry bodies should be included as "interested parties". As such, NZDRC should make efforts to advertise the scheme in news sources read regularly by suppliers and wholesalers, including but not limited to newspapers (print and digital), industry newsletters and magazines like *NZ Grower* and *The Orchardist*. NZDRC should also produce easy-to-understand guidance for potential users of the Scheme that can be distributed by representative bodies and industry groups.

It is also recommended that 28.36 is reworked to say "Regulated Grocery Retailers must take all reasonable steps to promote the Scheme to **all** Suppliers and Wholesale Customers…"

Clause 14(2)(e): The adjudication process does not currently include a "right to be heard" through an oral hearing, which is one of the principles of natural justice. An oral hearing should be an option under the adjudication pathway. In addition, the mediation section should contain the requirement to comply with the principles of natural justice, in alignment with the requirement for adjudicators under 21.7 (b).

Clause 14(2)(f): The rules should be accompanied by flow charts, tables or similar diagrams to illustrate both the mediation and adjudication processes, the roles of all Parties, the costs to all Parties and relevant timeframes, as discussed under Question 1.

Q 15.	Do the Rules adequately cover the requirements of clause 14? Please identify the precise clause you are commenting on, eg, "clause 14(2)(b)" and the relevant Rule(s).

The table below outlines amendments sought by HortNZ to align the Grocery Industry Dispute Resolution Scheme with Schedule 2 of the Grocery Industry Competition Act.

Clause of Schedule 2 of the Act	Rules of Scheme	Amendments sought by HortNZ to scheme
Clause 14(2)(g): the kinds of remedial action that the scheme can impose on a party to resolve the dispute:	17.6 – 17.9 (Substance of Determination for Adjudication)	The Scheme should clearly state the kinds of recourse available to participants, including compensation and changes to supply agreements, for mediation as well as adjudication. The Rules for mediation should provide examples of recourse, not an exhaustive list of remedial actions, to leave some flexibility.
Clause 14(2)(h): the circumstances in which the scheme may make an order (a costs order) requiring a party to pay all or part of another party's expenses in relation to a dispute resolution proceeding:	11.3 Unless the Parties have agreed otherwise…the Parties will meet their own costs… 24.1 …the Parties must pay their own costs and expenses…the Adjudicator can make a different determination on Costs… 24.7-24.8	24.7 and 24.8 provide protections against frivolous claims or bad faith from a Party, but the circumstances outlined for a costs order are too narrow to make the Scheme financially accessible to suppliers. Retailers should be required to pay for suppliers' cost of participation, including reasonable costs and disbursements, if the Mediator or Adjudication finds that the claim was not frivolous, vexatious or without substantial merit.
Clause 14(2)(k): that the matters shared or covered in, or in the course of, dispute resolution proceedings are confidential:	12 Confidentiality (Mediation) 25 Confidentiality (Adjudication)	Discussed under Questions 5 and 34.
Clause 14(2)(l): the amount payable (if any) by either or both parties to a dispute in connection with that particular dispute:	7.10 If a Claim is declined… 11 Costs 17.6 Substance of Determination 24.2 – 24.4 Amount of Adjudicator's Fee	There is scant framework in the rules about how the NZDRC will set the costs, only that they will do so on their website and that Low Value Claims will have a fixed Adjudicator Fee (24.3). More information is required.

Part 1 of the Rules

Q 16.	Do you have any comments to make in relation to Part 1? Please use precise Rule references in any comments made.
HortNZ does not have additional comments to provide on Part 1.	

Part 2 of the Rules

Q 17.	Rule 4.1 requires the Claimant to serve a Notice of Dispute on the relevant Regulated Grocery Retailer to initiate dispute resolution under the Scheme. Does this requirement present any problem(s) for the Claimant?
HortNZ believes that this is an acceptable requirement, as presented under Rules 4.1 and 7.1.	

Q 18.	Do you have any comments to make in relation to Part 2. Please use precise Rule references in any comments made.
HortNZ does not have additional comments to provide on Part 2.	

Part 3 of the Rules: Mediation

Q 19.	Are the provisions for the Mediation process clear and workable?
Yes, HortNZ agrees that the rules for mediation are clear and workable.	

Q 20.	Is the Mediator given adequate powers to manage the process?
Yes, the mediator has adequate powers.	

Q 21.	Should the Mediator be able to terminate the Mediation?
Yes. It is reasonable that the Mediator is able to end the Mediation should a Party no longer be willing to participate or should they consider it impossible to achieve a resolution. It should be clear, however, that a Party can still pursue their Claim through Adjudication if the Mediator ends the Mediation because they failed to facilitate a resolution.	

Q 22.	Is the method of enforcement of a Settlement Agreement adequate (by applying to the District Court for the Agreement to be made into an order)?
Yes. This is a strong mode of enforcement.	

Part 4 of the Rules: Adjudication

Q 23.	Given that under clause 14(2)(i) matters must be resolved within 25 Working Days of being referred to the Scheme, are the timeframes appropriate?
Yes, 25 working days is appropriate.	

Q 24.	Is the enforcement procedure clear and workable?
Yes. It is appropriate that a party may recover the unpaid portion of a debt in court, as well as the reasonable costs and expenses of recovery, including the fees associated with pursuing action in court.	

Q 25.	Is the procedure for appeals clear and workable?
Yes. It is appropriate that appeals can only be made on a question of law.	

Q 26.	Should Determinations be made on the papers, with no oral hearing?
No. This fails to comply with the principles of natural justice, which call for Parties to be heard. An oral hearing should be an option, but not a requirement of adjudication. While hearings can impose additional costs, they also provide an opportunity for suppliers to state their case if they are more comfortable expressing themselves aloud than in written form. Making the hearings an option, not a requirement, will give suppliers the opportunity to forgo that step if they prefer.	

Q 27.	Should an Adjudicator be able to end an Adjudication if the Claimant fails to serve their claim in time?
Yes. It is reasonable to keep the process efficient, so long as the claimant is able to request a reasonable extension from the Adjudicator.	

Q 28.	Should an Adjudicator be able to receive any evidence (on the basis they can determine the relevance, weight and materiality of any evidence provided by the Parties)?
Yes. This approach is supported because supply agreements often include oral contracts, and disputes may arise through daily interactions that are not all captured on paper. A longstanding relationship of unfair trade practices may be relevant to a claim that is narrower in scope and should not be taken out of consideration on a technicality.	

Q 29.	Should an Adjudicator be able to fix an amount of damages if steps ordered to be taken by the Regulated Grocery Retailer are not taken by the Regulated Grocery Retailer under the Determination, by a certain time?
Yes. This holds the Regulated Grocery Retailer accountable to complete those non-monetary steps.	

Q 30.	Should an Adjudicator have the power to award general damages?
Yes. An Adjudicator should be able to award general damages for loss of business reputation, breach of contract, emotional distress or other non-monetary damages inflicted by a retailer on a supplier or wholesale customer (17.9).	

Q 31.	Should an Adjudicator be able to award interest?
Yes. An Adjudicator should be able to award interest should a respondent delay paying necessary damages. Grower-suppliers often operate on tight margins, and loss of income due to a contract dispute may cause serious harm to a horticultural business, especially since these businesses need to plan months in advance to buy seeds a season ahead of when the supply will be needed. Interest will disincentivise late payments.	

Q 32.	Should a Respondent be able to object to the withdrawal of a Claim?
Yes. It is fair that the claimant (supplier or wholesaler) should be able to withdraw if a Determination is no longer necessary, but there should be some leeway to continue with the Determination if the Claim was frivolous, vexatious or not substantiated.	

Q 33.	Is the costs regime clear, fair and workable?
Somewhat. The requirement for suppliers to pay for their own cost of participation (11.3, 24.5) will be a deterrent for small suppliers to participate. Retailers should be required to pay for suppliers' cost of participation, including reasonable costs and disbursements, if the Mediator or Adjudication finds that the claim was not frivolous, vexatious or without substantial merit. See Question 9 for further discussion. There should be recourse for a small business or joint group of small businesses to receive financial assistance to make a Claim, within the bounds of the Commerce Act 1986. Organisations should not have to meet a financial bar to seek justice if they are being financially exploited in an unfair supply relationship.	

Q 34.	Do the Rules adequately protect confidentiality?
The need for 25.4 (c) is understandable, but the threshold for sharing any confidential information should be high. The parties whom the information is shared with also need to be held to strict confidentiality rules. In addition, suppliers need to be included in the discussion about the need for sharing the information, not just notified. There should be a pathway for them to block the sharing of confidential information related to the dispute process if sharing that information could hurt the supplier's business. It is important that no loopholes are left where another retailer could be informed that a supplier participated in this process, as that would harm business relationships external to the dispute in question. It is unclear what constitutes a "reasonable time" in 25.5. Either a strict number of days should be provided, or a Party should notify other Parties of the intent to disclose as soon as practicable.	

Q 35.	Do you have any comments to make about Part 4 of the Rules? Please use precise Rule references in any comments made.

Rules 21.17 and 21.18 discuss appointing experts to assist with Adjudication. Expertise specific to horticulture and trade of fresh fruits and vegetables will be needed for disputes related to fresh produce. The rules should require that when a dispute relates to fresh produce suppliers, industry-specific expertise is brought in if that expertise is not held by the Mediator or Adjudicator.

Part 5 of the Rules

Q 36.	Is the method of funding the Scheme fair ie, that the Scheme is funded by the Regulated Grocery Retailers?
Yes. It is fair that the Scheme is funded via a Levy on Regulated Grocery Retailers. They should be responsible for paying for remedies for their own unfair trade practices.	

Q 37.	Is the apportionment of the Levy fair? Is there another mechanism that would be more equitable as between the Regulated Grocery Retailers?
HortNZ has no specific comments on this question.	

Q 38.	Do you have any comments to make about Part 5 of the Rules? Please use precise Rule references in any comments made.
28.5 The requirements for communications to be in writing is supported. 28.25 and 28.26 are also supported to protect and hold a high standard for participants in the scheme. 28.32 is supported so that independent reviews are regularly undertaken to ensure the Scheme is effective in meeting its objectives.	

Schedule 1 of the Rules

Q 39.	Is the appointment and revocation process sufficiently clear?
Yes, the appointment and revocation process is clear.	

Q 40.	Is the Challenge Notice process sufficiently clear?
Yes, the Challenge Notice process is clear.	

Q 41.	Do you have any comments about Schedule 1? Please refer to relevant clauses when responding.
1.1 (d) is supported, since English is not the first language of some suppliers, and a bilingual Mediator or Adjudicator may be able to lower communication barriers.	

Schedule 2 of the Rules

Q 42.	Is the process for accounting by NZDRC to the Regulated Grocery Retailers for expenditure on items for which provisional amounts are included in the Levy sufficiently clear?
HortNZ has no specific comments on this question.	

Q 43.	Do you have any comments about Schedule 2? Please refer to precise Rules when responding.
HortNZ has no specific comments on this question.	

General Comments

Q 44.	Do you have any other comments on matters not discussed in this consultation paper?
Participation in the Scheme should be made as easy and accessible as possible for suppliers, who will already be taking a huge risk to their business relationships by speaking out about unfair trade practices. In a retail environment lacking competition, a complaint against one Regulated Grocery Retailer is essentially a claim against half the market for participants who only sell domestically. Suppliers will need an understanding of how long the dispute resolution process will take, clear steps explaining what happens in the process and what to expect when it concludes.	

They will only take the risk to participate if they know whether it will be worth it, that it will not take too long, and that the outcome will be enforceable.

Supply agreements themselves contain an embedded power imbalance, even with the protections of the Grocery Supply Code of Conduct. Suppliers may feel pressure to sign an agreement that is not in their best interest to get produce on shelves because there are not enough alternative buyers. Once imbalanced provisions are in the supply agreement, the supplier is no longer protected by the Code and may lose business if they express dissatisfaction.

As such, fairness must extend to negotiation of the supply agreement. Supermarkets are far better resourced and have dedicated teams who handle supply agreements. Growers have fewer resources to vet the legal implications of their supply agreement before signing.

HortNZ also seeks protections for whistle blowers who inform the Commerce Commission, NZDRC or other parties enforcing the Grocery Industry Competition Act of unfair trade practices. Without adequate protection, people will not feel comfortable reporting anticompetitive behaviour.