

SUBMISSION ON

Review of the Grocery Code

16 September 2024

To: Commerce Commission

Name of Submitter: Horticulture New Zealand

Supported by: New Zealand Apples and Pears Inc.,
Persimmon Industry Council, Pukekohe Vegetable Growers
Association, Vegetables New Zealand, Inc.

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OVERVIEW

Submission structure

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Our submission

Horticulture New Zealand (HortNZ) thanks The Commerce Commission for the opportunity to submit on the Review of the Grocery Code and welcomes any opportunity to continue to work with the Commerce Commission and to discuss our submission.

HortNZ could not gain an advantage in trade competition through this submission.

HortNZ wishes to be heard in support of our submission and would be prepared to consider presenting our submission in a joint case with others making a similar submission at any hearing.

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

HortNZ's Role

Background to HortNZ

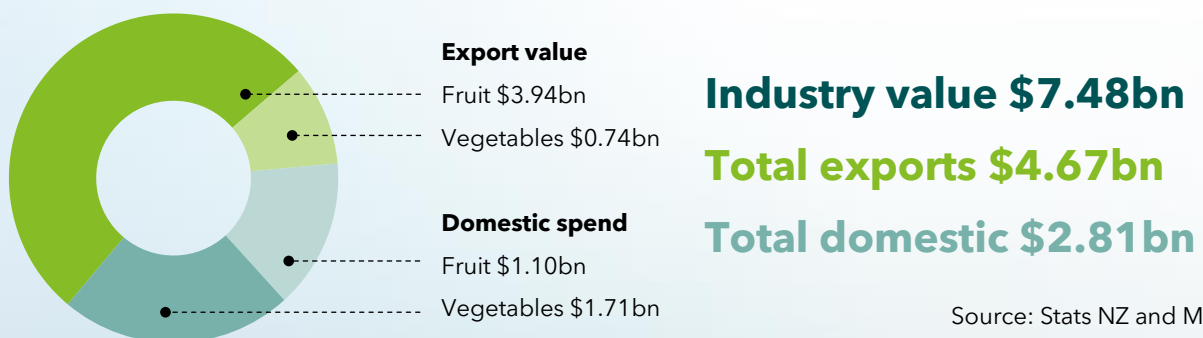
HortNZ represents the interests of approximately 4,200 commercial fruit and vegetable growers in New Zealand who grow around 100 different fruits and vegetables. The horticultural sector provides over 40,000 jobs.

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.



Executive Summary

HortNZ supports the Review of the Grocery Supply Code. A well-designed, implemented and enforced Code will improve fair practices in fresh produce retail. Growers are mindful there is a balance between creating a fair-trading environment and over-regulation.

Recognising the Whole Fresh Produce Supply Chain

The Code only covers a small portion of fresh produce transactions. The first point of sale is the stage of the supply chain which has the greatest impact on growers. This is more often through another channel such as an aggregate wholesale market, not directly with a supermarket retailer.

The Code would be greatly improved by widening it to cover transactions with wholesale markets, as is the case in the Australian Food and Grocery Code of Conduct¹ and Horticulture Code of Conduct².

HortNZ supports the recently announced Wholesale Supply Inquiry. We seek that the Terms of Reference of the Inquiry are extended to **investigate the relationship between suppliers and wholesalers**, whose transactions are subject to the same power dynamics and frustrations as those between direct suppliers and the regulated retailers.

The Terms of Reference should **include "specialty wholesalers", especially those which trade specifically in fresh produce**, not just those set up by the regulated grocery retailers.

Crates

There are issues with supermarket and wholesale markets requiring growers to use specified support service companies, such as crate suppliers. Retailers have contracts with growers which require the use of specific crate companies, which, paired with crate shortages, have created supply chain disruptions. **Crates need to be considered** along with other services such as transport and incorporated into the Code.

Supplier Loyalty Programmes

One unintended consequence of the Code has been an approach where some stores reportedly require 80% of purchases on each fresh produce line to be through a single grower. While the intention may be to focus on supporting a supplier relationship, this is a barrier to smaller and medium size growers competing and securing supply contracts. This could also cause a shift towards purchases through aggregated wholesale markets who are not covered by the Code.

¹ [Rights and responsibilities under the food and grocery code | ACCC](#)

² [Horticulture Code of Conduct | ACCC](#)

Price Transparency and Reporting Margins

HortNZ supports the Commerce Commission's intent to introduce a Disclosure Standard, which will require reporting on margins from the regulated retailers.³ There is a need to increase transparency on pricing. Retrospective reporting on fresh produce prices will reveal supermarket markups and whether the retailers are passing the price benefits good seasonal supply to consumers.

We seek that this is **extended to reporting on margins from wholesale purchases** as well, so there can be transparency to consumers about the level of markups and what is influencing the retail price.

Retroactive Extension of Specials

Growers have raised an issue that occurs at the conclusion of promotional periods, when the price of the product on special should return to a pre-promotion level. In some instances, a retailer has informed the grower that the ordinary purchase price has now dropped and will remain at the lower promotional price.

Due to the perishable and seasonal nature of horticultural products, retailers may take advantage of price fluctuations to lock in lower prices for longer periods through use of specials. Many growers rely on the early season price to help cover the cost of growing a crop. Growers are also generally price takers, so they are not in the position to set a price outside of what the market dictates.

High Quality Information for the Commerce Commission

The Commission should establish a **supplier reference group** to discuss concerns and issues outside of the formal consultation process and with a greater layer of anonymity, similar to an existing group in Australia.

The Commission should also work with industry groups to raise the profile of their anonymous reporting tool, which is a valuable initiative, emphasising that no concern is too small to report.

³ [Annual-Grocery-Report-Executive-Summary.pdf \(comcom.govt.nz\)](#) (p. 3)

Submission

1. HortNZ's Previous Involvement

HortNZ previously submitted on the Grocery Code of Conduct in August 2022 and July 2023, the Grocery Industry Competition Bill in December 2022, and the Grocery Industry Dispute Resolution Scheme in February 2024.

HortNZ organised a webinar for growers in February 2024, where Commerce Commission officials explained the Grocery Code of Conduct and key information about supply agreements and dispute resolution.

Throughout past consultation processes, HortNZ advocated for recognition of the complexity of the horticulture supply chain. We raised that the Grocery Supply Code, as written, does not capture all of the potential unfair practices that take place at first point of sale transactions, which may not be with a regulated grocery retailer.

2. Recognising the Whole Fresh Produce Supply Chain

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 the three regulated grocery 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 North and South Island. While these are the major players, fresh produce is also sold through smaller supermarkets, online grocery sales, green grocers and food subscription services (e.g. My Food Bag, Hello Fresh). Growers are at risk of exploitative supply agreements with any of these modes of sale.

For example, there are known instances when food subscription services have asked growers to grow a product, sometimes a niche crop, at a high volume. Growers then plant that crop a season before the subscription service needs it. Then, when it comes harvest time, the subscription service says that they no longer need the product, order less than they arranged at time of planting or tell the grower that they've sourced it for a slightly lower price from a different business. The original grower then struggles to find a market for the product, especially if it was something specialised that supermarkets do not usually supply.

There have also been instances when a subscription service threatened a grower's entire usual contract for supply if the grower could not supply a niche product at a particular time. Subscription services have been known to "blacklist" through wholesalers, by asking a wholesaler not to source produce from a particular grower due to past conflicts.

Growers are particularly vulnerable because they grow fresh produce which must be sold within limited timeframes due to its perishable nature. Because growers have to decide what to supply over a season in advance, certainty is needed that a retailer or wholesaler will buy what they produce. Given this vulnerability, a Horticulture Code of Conduct would be justified to govern wholesalers' and food subscription services' behaviour, as is in place in Australia.⁴

2.1. Australia's Horticulture Code

The Australian Horticulture Code of Conduct is a mandatory industry code which manages trade between growers and intermediaries who market or on-sell produce.⁵ The Code requires growers and traders to engage in good faith using horticulture produce agreements. This type of Code would remedy the concerns HortNZ has raised in this and previous submissions about managing unfair practices at growers' first point of sale.

Outcome sought:

- We seek an expansion of the Grocery Supply Code or introduction of a new Horticultural Code to **cover all growers' first point of sale** to the domestic market.

2.2. Wholesale Supply Inquiry

HortNZ supports the Wholesale Supply Inquiry announced by the Commerce Commission on 4 September. The Terms of Reference of this Inquiry focus on the new wholesale supply regime set up under the Grocery Industry Competition Act 2023 which obligates regulated grocery retailers to provide wholesale supply to other retailers.⁶

We support that the Terms of Reference include investigating the dynamics between suppliers and non-regulated grocery retailers. HortNZ continues to seek that these relationships are covered by the Grocery Supply Code.

Outcomes sought:

- We seek that the Terms of Reference of this Inquiry or a new one extend to **investigate the relationship between suppliers and wholesalers**, whose transactions are subject to the same power dynamics and frustrations as those between direct suppliers and the regulated retailers.
- The Terms of Reference should **include "specialty wholesalers"**⁷, **especially those which trade specifically in fresh produce**, not just those set up by the regulated grocery retailers.

This is of particular importance because the Commerce Commission's *First Annual Grocery Report* indicates that only one of the regulated grocery retailers' wholesale regimes offers fresh produce, that being Foodstuffs South Island.⁸

⁴ [Horticulture Code of Conduct | ACCC](#)

⁵ [Horticulture Code of Conduct | ACCC](#)

⁶ https://comcom.govt.nz/_data/assets/pdf_file/0021/362307/Terms-of-Reference-Wholesale-Supply-Inquiry.pdf

⁷ Also referred to as aggregate wholesale markets

⁸ [Annual-Grocery-Report-2024.pdf \(comcom.govt.nz\)](#) (p. 100)

3. Crates

Growers face a number of issues related to the supply and availability of crates. Growers are required to use specified crate suppliers, as part of their agreements with supermarket retailers, to package produce, whether it first goes to wholesale markets or the retailers themselves.

Over the past few years, the crate supply companies have had a shortage of crates available. This has been exacerbated by grocery retailers requiring a reduction in the number of units or 'counts' per crate. This increases freight movements and the number of crates required to transport the same amount of produce. Growers have been unable to explore other crate suppliers, as contracts with wholesalers and supermarket retailers specify which crate company must be used. In addition, this can mean growers are having to hold multiple accounts with various crate companies to meet requirements of the supermarket and wholesaler. This creates a large administrative burden.

The Pukekohe Vegetable Growers Association conducted a survey of their grower members to understand the level of supply and shortages of crates during the peak summer period of December 2023 and January 2024. In some cases, growers reported they had received 0% of their crate orders and few received 100%. Most growers reported receiving only 40-80% of the crates that they ordered.⁹ This issue does not contribute to a trading environment in which businesses compete effectively (in the case of the crate suppliers) or participate confidently (in the case of growers who rely on crates).

4. Reporting on Margins

Growers have raised concerns that the lower costs of in-season produce are not being passed on to consumers. This previous growing season had ideal growing conditions, no significant weather events and good quality and supply of fresh produce to wholesale markets and supermarket retailers. Growers noted, however, that the low prices they received when selling their produce were not reflected in the consumer price advertised in stores.

Growers are receiving pricing similar to what was seen in pre-COVID years, yet consumers are still paying post-COVID premium prices. Growers are keenly aware that many factors contribute to the cost of production of a marketable yield. Many circumstances which fall outside of a grower's control can impact supply, including weather events like the Auckland Anniversary floods and Cyclone Gabrielle. This causes supply shortages that influence price fluctuations faced by consumers. Growers face rising input and production costs due to the current economic climate. When supply and quality are plentiful and prices to growers are low, however, growers do expect to see the consumer benefitting with lower prices as well.

Grower returns should reflect the rising cost of inputs, but they are sometimes paid below the cost of production. Higher returns for producers also allow them to reinvest in their businesses, creating financial room for innovation, environmental sustainability improvements and growth. This, in turn, leads to better products and diversity of available supply for consumers.

⁹ PVGA Crate survey feedback - from Simon Wilcox, chair of PVGA

If growers are being paid too little and consumers charged too much, the issue is with the supermarkets' margins and the fresh produce supply chain. The Commerce Commission's *Annual Grocery Report* found that supermarket margins have grown 0.4% for fresh produce between 2019-2023.¹⁰ While this is a smaller margin increase than found for other product categories, the statistic does not capture that these margins were high to begin with. Growers have on occasion observed over 200-400% markups between what they are paid for their produce and what it is sold for in the supermarket, with 100% markups considered standard.

Suppliers also have to pay rebates and distribution fees which undermines the economic viability of producing fresh crops and contributes to supermarket retailers' increased margins. It is worth noting that while a growers' input prices fluctuate, so does the value of their product. Supermarkets have full control over maintaining their margins.

If growers are not paid an economic return or the prices of vegetables rise higher than consumers are willing to pay, growers will stop supplying particular lines and the diversity of produce choice will be at risk. This has negative implications for the nutrition and public health outcomes of New Zealanders. If growing for the domestic market becomes too uneconomic, smaller growers will go out of business, leading to consolidation and decreased resilience in fresh produce supply for New Zealanders.

HortNZ supports the Commerce Commission's intent to introduce a Disclosure Standards, which will require reporting on margins from the regulated retailers.¹¹

Outcome sought:

- We seek that the Disclosure Standard is **extended to reporting on margins from wholesale purchases** as well, so there can be transparency to consumers about the level of markups and what is influencing the retail price.

This is precedented in Australia, where the Government is conducting an inquiry into "the pricing practices of the supermarkets and the relationship between wholesale, including farmgate, and retail prices".¹²

5. Retroactive Extension of Specials

From time to time, a retailer will approach a grower to run a promotion, where a product is purchased for a lower price and retailed to a customer on special, usually for one to two weeks.

Growers have raised an issue that occurs at the conclusion of promotional periods, when the price of the product on special should return to a pre-promotion level. In some instances, a retailer has informed the grower that the ordinary purchase price has now dropped and will remain at the lower promotional price.

Due to the perishable and seasonal nature of horticultural products, retailers may take advantage of price fluctuations to lock in lower prices for longer periods through use of

¹⁰ [Commerce Commission - Annual Grocery Report \(comcom.govt.nz\)](https://www.comcom.govt.nz/annual-grocery-report)

¹¹ [Annual-Grocery-Report-Executive-Summary.pdf \(comcom.govt.nz\)](https://www.comcom.govt.nz/annual-grocery-report-executive-summary) (p. 3)

¹² [Supermarkets inquiry 2024-25 | ACCC](https://www.accc.gov.au/inquiries/2024-25)

specials. However, growers rely on the early season prices to make a return, ensure they are able to meet the costs of growing and have a healthy business.

This has the greatest impact when the special occurs just before the product is at the height of its season (in higher supply). If these specials occur in those shoulder periods or early season, it can have an impact on the economic viability of a crop.

6. Supplier Loyalty Schemes

Growers have raised an issue with an approach to the Code which has seen establishment of a "grower loyalty" programme, requiring stores to receive 80% of supply for each line from one supplier.

This is problematic for growers who don't grow at the scale to supply 80% of a line or for those who didn't have the preferential relationships. This also speaks to supermarket retailers having a lack of understanding about the scale and nature of growing businesses, the functions of smaller growers who specialise in the off-season, such as covered cropping operations, and the risk to growers if produce is only purchased through aggregated wholesale markets, who fall outside of the Code.

7. Review of the Code

HortNZ supports the position outlined in the review document that exceptions to supply agreements should be subject to a reasonable test that considers the benefits, costs and risks to the supplier and supermarket in agreeing to the exception. HortNZ supports written justification for the exceptions in a grocery supply agreement.

Discussion Questions

Q. 1. Do you consider the Code is currently effective in supporting the objectives set out in paragraph 21?

DISAGREE

HortNZ is concerned that the Code does not cover the first point of sale transactions of growers produce. Objective 21.6 speaks to the Code contributing to a trading environment where businesses compete effectively. There is still an information and power imbalance for fair pricing. Growers cannot discuss pricing with one another due to the Commerce Act. Due to the seasonal nature of fresh produce pricing and the vulnerability of growers being price takers, clear and transparent reporting on prices grocery retailers have paid for produce is needed. This would improve understanding of the markup applied and ensure growers are receiving fair prices to cover their costs of growing.

HortNZ believes the Code should be widened to cover all first point of sale transactions. A small number of transactions are between a grower and supermarket retailer. More often, the produce supply chain includes sale through a variety of channels not covered by the Code. The same dynamic exists between wholesale markets and growers; until

wholesalers are included within the Code, growers are still subject to the same issues that drove the development of the Code in the first place.

Q. 2 Following on from question 1, are there certain objectives that you wish to comment on?

21.2 HortNZ believes other conditions that limit a supplier's ability to explore more competitive options for getting produce to market need to be discouraged. The most relevant example of this is the requirement to transport produce in specified crates from specified companies. To encourage better service and competition among support service companies, such as crate companies, growers need to be able to explore more options, especially if crate companies are not able to meet volumes required by growers.

21.6 HortNZ believes there is still a power imbalance in the fresh produce supply category. This can be remedied by retrospective publication or reporting of prices of fresh produce to increase transparency to suppliers and consumers of pricing of fresh produce. This is raised earlier in the document.

21.7 HortNZ believes widening of the Code to encompass wholesale transactions will increase businesses and consumers ability to participate confidently in the trading environment. Further to this we believe reporting on pricing will also aid transparency and understanding of the costs involved at the retail end of the supply chain.

21.8 HortNZ believes greater understanding is needed about the fresh produce sector and the scale and nature of fresh produce businesses. Growers are generally family businesses of different sizes and scales. Growers also choose to operate businesses covering different crops, seasonality and opportunities within these areas. While potentially well intended, HortNZ is concerned about the requirement for some stores to purchase 80% of supply lines from a single grower or source. Growers can be unfairly impacted if they cannot supply 80% due to factors outside of their control; also, smaller and medium size growers will be unable to meet this requirement. This will result in less growing businesses able to meet requirements of a supermarket retailer implementing this approach and less diversity in the market.

Q. 3. Are there any issues with the content of the Code that may be impacting the Code's effectiveness in supporting the Codes objectives in paragraph 21?

The Code does not cover all fresh produce transactions, and HortNZ advocates for a widening of the code to apply to wholesalers as well. Alternatively, a Horticultural Code of Conduct could be established like the one in Australia.

Q. 4. Are there any opportunities for improving the content of the Code to support the objectives in paragraph 21?

Consideration needs to be given to capturing conduct of wholesalers within, or in addition to the Code. Growers' main interaction with the market is at the first point of sale, which is often through a wholesale market. The same dynamic exists between growers and aggregate wholesale markets as with supermarket retailers.

Retrospective reporting on pricing needs to be considered to improve transparency and understanding of seasonal price variations – especially in dynamic products such as fresh produce. This increases and encourages honesty in the system and fair prices to both suppliers and consumers.

Q. 5. Are there any issues with the way the Code is being operated or implemented that may be impacting its effectiveness in supporting the objectives in paragraph 21?

Growers are waiting to see the Code tested before getting confidence that it will work in the way it is intended. Historically, growers have been negatively impacted by behaviours such as ‘blacklisting’ and are understandably cautious about being early testers of the Code. This has been well covered in previous submissions and raised with the Commerce Commission through discussions.

Q. 6. Are there any opportunities for improving the operation or implementation of the Code to support the objectives in paragraph 21?

HortNZ would welcome the following to improve implementation of the Code:

- Widen the Code to cover wholesalers or implement a Horticultural Code of Conduct to cover these transactions.
- Require reporting on purchase prices of produce and retail prices.
- Enable more choice in support services such as crate providers by capturing these services within the Code as other services such as transport are already captured.

Q. 7. Do you have any suggestions about steps to include within the review process to support input into the review?

The Commission should establish a supplier reference group made up of a variety of suppliers from different products to discuss concerns and issues. This would provide an opportunity for concerns and issues to be raised outside of formal consultations and provide growers another layer of anonymity when raising concerns. A similar structure exists in Australia, and this can be used to build perspective on themes or issues in a different forum. This can also increase awareness of range of issues with compliance with the Code. HortNZ would welcome the opportunity to participate in recruiting suppliers.

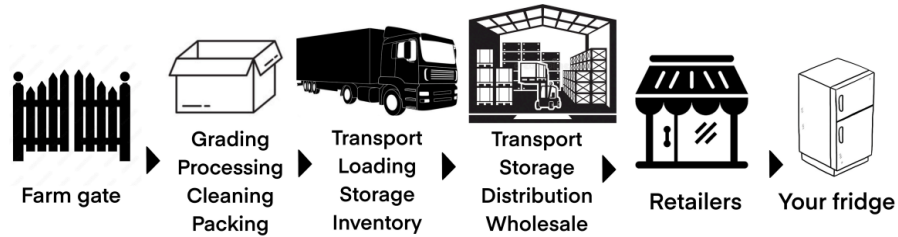
Q. 8. Do you have any other comments you would like us to consider when planning this review process?

HortNZ is mindful there is a balance between creating a fair-trading environment and over regulation. We are seeking the above to help improve the transparency and fairness in the trading environment.

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 fresh produce wholesale market. There are also direct relations between growers and small retailers and food service markets.

