



NEW ZEALAND
DISPUTE RESOLUTION
CENTRE

Te Pokapū Whakatau Tāutohe o Aotearoa

CONSULTATION PAPER

GROCERY INDUSTRY DISPUTE RESOLUTION SCHEME RULES

2023 Draft





NEW ZEALAND DISPUTE RESOLUTION CENTRE
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How to have your say

Submissions process

The New Zealand Dispute Resolution Centre (**NZDRC**) seeks written submissions on the issues raised in this document by **2.00 pm on Friday, 26 January 2024**.

Your submission may respond to any or all of these issues. Where possible, please include evidence to support your views. For example, references to independent research, facts and figures, or relevant examples.

Please use the submission template provided at: <https://nzdrc.co.nz/grocery-dispute-resolution-consultation/>

Please include your name and contact details (and if applicable) the name of your organisation in your submission.

You can make your submission by:

- sending your submission as a Microsoft Word document to:

info@nzdrc.co.nz

- mailing your submission to:

New Zealand Dispute Resolution Centre

PO Box 33297

Takapuna 0740

Please direct any questions that you have in relation to the submissions process to:

info@nzdrc.co.nz

The consultation paper is comprehensive due to the diverse range of potential submitters. It is emphasised that any submitter may elect to respond to all or any of the questions recorded in this consultation paper and duplicated in the submission form.

Use of information

The information provided in submissions will be used to inform NZDRC's Rule development process and will inform advice to the Minister of Commerce and Consumer Affairs on the detail of the new Rules for the Grocery Dispute Resolution Scheme for the purpose of seeking approval of the Rules. We may contact submitters directly if we require clarification of any matters in submissions.

Important notice

The opinions contained in this document are those of the New Zealand Dispute Resolution Centre (**NZDRC**) and do not reflect official Government policy. Readers are advised to seek specific legal advice from a qualified professional person before undertaking any action in reliance on the contents of this publication. The contents of this consultation paper must not be construed as legal advice. NZDRC does not accept any responsibility or liability whatsoever whether in contract, tort, equity, or otherwise for any action taken as a result of reading, or reliance placed on NZDRC because of having read any part, or all, of the information in this consultation paper, or for any error, inadequacy, deficiency, flaw in or omission from the consultation paper.





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List of Acronyms and Terms

Act	The Grocery Industry Competition Act 2023
Approved Scheme	Has the meaning set out in clause 3 of Schedule 2 of the Act
Commission	The New Zealand Commerce Commission
Dispute Resolution Scheme (Scheme)	Means the approved Scheme under clause 3 of Schedule 2 of the Act
Eligible dispute	Means the type of dispute set out at section 154(1) of the Act being a class of dispute between a Supplier or Wholesale Customer and a Regulated Grocery Retailer that may be referred to the Dispute Resolution Scheme. Disputes eligible for referral to the Scheme include those with a claimed amount not exceeding \$5 million or where no amount is claimed arising from Grocery Supply Code requirements or wholesale supply of groceries requirements under Part 3 of the Act or falling within a class of eligible disputes prescribed by Regulations made under section 154 of the Act. Only Suppliers or Wholesale Customers (not Regulated Grocery Retailers) can refer Disputes to the Scheme. The Governor-General may, by Order in Council made on the recommendation of the Minister, make regulations prescribing further eligible classes of disputes that may be referred to the Scheme.
GCDR	Government Centre for Dispute Resolution
Grocery Supply Code	Grocery Supply Code of Conduct
MBIE	Ministry of Business, Innovation and Employment
NZDRRC	New Zealand Dispute Resolution Centre Te Pokapū Whakatau Tautohe o Aotearoa
Provider	In relation to a Scheme, means the person responsible for the Scheme under clause 2 of Schedule 2 of the Act
Regulated Grocery Retailer	Regulated Grocery Retailer means: (a) a Regulated Grocery Retailer within the meaning of Part 2 (Grocery supply code) of the Act; and





-
- (b) a Regulated Grocery Retailer within the meaning of Part 3 (Wholesale supply of groceries) of the Act; and
 - (c) a person that is no longer a Regulated Grocery Retailer under (a) or (b) but who was a Regulated Grocery Retailer at the time of the conduct giving rise to the Dispute; and includes a Related Person.

Related Person

Related Person/Party means a person that is any of the following in relation to a Regulated Grocery Retailer (person A):

- (a) a person that is an interconnected body corporate of A; or
- (b) a person that is a successor to A; or
- (c) a person that is a franchisee of A; or
- (d) a person that is a transacting shareholder of A; or
- (e) an associated person as that term is defined in section 5(1) of the Act; or
- (f) a person over whose business the Regulated Grocery Retailer has material influence.

Rules

The 2023 Grocery Industry Dispute Resolution Scheme Rules prepared by NZDRC

Supplier

Supplier means:

- (a) any person that has taken, or is actively taking, steps towards entering into a supply agreement to supply groceries; and
- (b) a person that is no longer a Supplier, but was at the time of the conduct giving rise to the Dispute, provided that not more than three months have expired after the later of:
 - (i) the date on which the Supplier last provided supply to the Regulated Grocery Retailer under the supply agreement; or
 - (ii) the date on which the Regulated Grocery Retailer confirmed in writing to the Supplier that the supply agreement was ending (a **former supplier**).

Wholesale Customer

Wholesale Customer means:

- (a) any person that receives the wholesale supply, or wants to obtain the wholesale supply, of groceries from a Regulated





Grocery Retailer for the purpose of supplying groceries, directly or indirectly, at retail to consumers; and

- (b) a person that is no longer a Wholesale Customer, but was at the time of the conduct giving rise to the Dispute, provided that not more than three months have expired after:
 - (i) the date on which the Wholesale Customer last received supply from the Regulated Grocery Retailer under the wholesale agreement; or
 - (ii) the date on which the Regulated Grocery Retailer confirmed in writing to the Wholesale Customer that the wholesale agreement was ending (a **former Wholesale Customer**).
-





CONSULTATION PAPER DISPUTE RESOLUTION SCHEME RULES

PART 1: BACKGROUND AND CONTEXT

1 THE MARKET STUDY INTO THE RETAIL GROCERY SECTOR IN NEW ZEALAND AND PROGRESSION TO DATE

1. On 8 March 2022, the Commerce Commission (**Commission**) published its final report on the market study into the retail grocery sector in New Zealand. It found that competition in the retail grocery sector was not working well for consumers and recommended changes to increase competition and help improve the price, quality and range of groceries and services available to New Zealanders.
2. The Grocery Industry Competition Act 2023 (**Act**) came into force on 10 July 2023, giving the Commission new powers to monitor and regulate the grocery sector.
3. The Grocery Supply Code 2023 (**Grocery Supply Code**) came into force on 28 September 2023 pursuant to the Grocery Industry Competition (Grocery Supply Code) Amendment Regulations 2023.
4. In the Commission's final report, the Commission recommended that a dispute resolution mechanism should be provided which is independent, affordable, timely, confidential, and informed by specialist expertise. This has been provided for in the Act. In order for the Act to function as intended, Subpart 5 of Part 4 of the Act combined with Schedule 2 of the Act established a framework for a Dispute Resolution Scheme to deal with disputes between Regulated Grocery Retailers¹ and their Suppliers or Wholesale Customers.
5. The dispute resolution process is to settle any issues that may arise regarding conduct regulated by the Grocery Supply Code and any issues that may arise regarding conduct in relation to the wholesale supply of groceries regulated under Part 3 of the Act.
6. On 10 July 2023, the Ministry of Business, Innovation and Employment (**MBIE**) released a Request for Applications for the Provision of an external Dispute Resolution Scheme for the grocery industry. The deadline for receiving applications was by 2.00 pm Friday, 18 August 2023.
7. On 11 October 2023, the (then) Minister of Commerce and Consumer Affairs decided to approve the Dispute Resolution Scheme of the New Zealand Dispute Resolution Centre | Te Pokapū Whakatau Tautohe o Aotearoa (**NZDRC**) which NZDRC had submitted in accordance with clause 4 of Schedule 2 of the Act. NZDRC will be the Provider of the Scheme in terms of clause 2 of Schedule 2 of the Act. The 2023 draft Grocery Industry Dispute Resolution Scheme Rules (**Rules**) have been prepared by NZDRC.
8. In particular, but without limitation to compliance with the balance of the Act, the Rules must comply with clause 14 of Schedule 2 of the Act. The Rules accordingly do so and

Currently, Foodstuffs North Island Limited, Foodstuffs South Island Limited, and Woolworths New Zealand Limited and any of their Related Parties.





consultation on this issue is specifically sought (see Part 4 and Appendix 1 of this consultation paper).

9. NZDRC now seeks feedback on the Rules to fulfil the consultation requirement that the persons, or representatives of the persons, that the Minister considers will be substantially affected by the Scheme have been consulted before the Scheme Rules are approved and issued (see clauses 5(b) and 6(2)(b) of Schedule 2 of the Act). NZDRC may consult on the Scheme Rules after its approval as the scheme provider under clause 9 of Schedule 2 of the Act.
10. After the consultation period ends on **Friday, 26 January 2024**, the submissions will be analysed and the Rules may be amended. NZDRC will ultimately seek the Minister of Commerce and Consumer Affairs' approval of the Rules in terms of clause 4(1) of Schedule 2 of the Act.
11. The Scheme will be operational (i.e., able to deal with disputes) once the Rules are approved.

PART 2: THE CONTENTS OF THE CONSULTATION PAPER AND TIMING OF CONSULTATION

2 WHAT IS IN THIS CONSULTATION PAPER

12. This consultation paper should be read alongside the draft rules of the Scheme, which are located on www.nzdrc.co.nz. We are seeking feedback on key matters such as funding, as well as the draft content of the rules.

3 THE STRUCTURE OF THE CONSULTATION PAPER

13. The content of this consultation paper is as follows:
 - (a) general, high-level issues;
 - (b) clause 14 of Schedule 2 of the Act; and
 - (c) the content of the Rules.

4 THE TIMING OF CONSULTATION

14. Consultation is open from **1 December 2023** until **2.00 pm on Friday, 26 January 2024**. We welcome any submissions, comments, or questions that you may have on any issue raised in this consultation paper. Submissions may respond to any or all of these issues. Following analysis of the submissions, the Rules may be revised based on the feedback we receive.





PART 3: GENERAL HIGH-LEVEL ISSUES

5 OVERVIEW

15. This section of the consultation paper deals with matters which straddle the draft Rules on a high-level basis and which give insight into the focus of the drafting of the Rules.
16. The Rules are designed to assist in meeting the purpose of the Act, which is to *promote competition and efficiency in the grocery industry for the long-term benefit of consumers in New Zealand*.
17. The purpose of the Scheme pursuant to Schedule 2 of the Act is to ensure that:
 - (a) Suppliers and Wholesale Customers that are party to an eligible Dispute with a Regulated Grocery Retailer have access to the Scheme to resolve their Dispute; and
 - (b) the Scheme is user focused, accessible, independent, fair, accountable, efficient, and effective.

6 DISPUTE RESOLUTION BEST PRACTICE PRINCIPLES

18. NZDRC is committed to achieving best practice in providing dispute resolution services and meeting the purpose of the Dispute Resolution Scheme stated in clause 1 of Schedule 2 of the Act.
19. The Government Centre for Dispute Resolution (**GCDR**) has published a best practice dispute resolution framework.²
20. The GCDR best practice dispute resolution principles are the first element of the framework. They are high-level statements of best practice that can be applied to inform the design, delivery and review of dispute resolution schemes to inform practice when providing dispute resolution services. The best practice principles are defined as follows:

1. User focused and accessible

Users of dispute resolution services are at the centre of all aspects of the dispute resolution system. Dispute resolution is easy for potential users to find, enter and use regardless of their capabilities and resources.

2. Independent and fair

Disputes are managed and resolved in accordance with applicable law and natural justice. All dispute resolution functions are, and are seen to be, carried out in an objective and unbiased way.

² <https://www.mbie.govt.nz/cross-government-functions/government-centre-for-dispute-resolution/dispute-resolution-tools-and-resources/aotearoa-best-practice-dispute-resolution-framework/>





3. Efficient

Dispute resolution provides value for money through appropriate, proportionate and timely responses to issues. It evolves and improves over time and makes good use of information to identify systemic issues.

4. Effective

Dispute resolution delivers sustainable results and meets intended objectives. It fulfils its role in the wider government system by helping minimise conflict and supporting a more productive and harmonious New Zealand.

5. Accountable

There is public confidence in dispute resolution. Those involved in its design and delivery are held to account for the quality of their performance. Regular monitoring and assessment and public reporting encourages ongoing improvement and better outcomes across the system.

21. NZDRC's proposed Rules comply with the GCDR best practice principles in all respects. They also meet the nine best practice dispute resolution aspirational standards (the second element of the GCDR framework). The standards identify core aspects of best practice that are both meaningful and measurable and that can be applied across the Dispute Resolution Scheme for assessing best practice and the maturity of the Scheme.

7 THE PURPOSE OF THE RULES

22. The purpose of the Rules is to ensure that:
- (a) Suppliers and Wholesale Customers that are party to an eligible Dispute with a Regulated Grocery Retailer have access to the Scheme to resolve their Dispute; and
 - (b) the Scheme is user-focused, accessible, independent, fair, accountable, efficient, and effective.
23. Only a Supplier or Wholesale Customer may initiate a dispute resolution process under the Rules. A Regulated Grocery Retailer may not be a Claimant under the Scheme.³
24. The approved Scheme will not cater to consumers.

Consultation Questions

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?
------	--

³ Section 153 of the Act.





8 DISPUTE RESOLUTION METHODS

25. Under Rule 4.1 the Claimant must elect to refer a Dispute to either Mediation or Adjudication under the Scheme at the time the Notice of Dispute is served on the Respondent.

Mediation

26. Mediation is a consensual, confidential, and informal negotiation process in which parties to a dispute use the services of a skilled and independent Mediator to assist them to define the issues in dispute, develop and explore settlement options, assess the implications of settlement options, and negotiate a mutually acceptable settlement of that dispute which meets their interests and needs.
27. The primary objectives of Mediation are to facilitate communication, foster understanding, enable and assist the parties to negotiate and resolve the dispute promptly, cost effectively, and confidentially rather than have a decision imposed upon them by an Adjudicator.
28. Mediation enables the parties to negotiate flexible and creative solutions which need not conform to strict legal rights or general community standards.
29. Mediation has a timetable, structure and dynamics that simple negotiation lacks. It allows expectations to be checked and managed and intransigence to be overcome. The opportunity to discuss issues in an informal, private and confidential setting with the assistance of a Mediator helps improve communications, break down barriers and preserve or re-build relationships and reputations.
30. The Mediator will not decide the dispute for the parties. The Mediator is not an advisor or advocate for anyone involved in the dispute. They must remain impartial and neutral, and while they may have candid discussions with the parties, they will not give advice or make any decisions for the parties.
31. A Mediator is described in section 163(b) of the Act as *mediator or other person assisting the parties to reach a settlement agreement, under the dispute resolution scheme*.
32. See commentary to Part 3 of the Rules at subpart 19 of the consultation paper (below).

Confidentiality In Mediation

33. Rules 12.1 to 12.5 deal with confidentiality in terms of Mediation and Rules 25.1 to 25.10 in terms of Adjudication.
34. In the Rules, **Confidential Information**⁴ means all non-public materials and information that relates to the Mediation (or Adjudication, as the case may be) and includes:
- (a) all statements, admissions or other information, documents, or evidence provided to the Mediator by a Party;
 - (b) any notes made by the Mediator;

⁴ Rule 12.3 and Rule 25.3.





- (c) any matters disclosed orally in the Mediation;
 - (d) any documents used or generated by a Party, Representative or advisor for the purposes of the Mediation; and
 - (e) any documents given to or generated by NZDRC for the purpose of the Mediation.
35. The Rules set out a Permitted disclosure regime which is set out in Rules 12.4, 12.5 and 25.4 to 25.6 and discussed further at 82 and 85(cc) (below).

Consultation Questions

Q 2.	Are the rules relevant to Mediation clear and practical?
Q 3.	Is the role of a Mediator clear?
Q 4.	Is confidentiality adequately protected by the Rules?
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.

Adjudication

36. Adjudication is a process of resolving disputes by a neutral third-party person through a formal, structured decision-making process. The process is designed to fairly and impartially resolve disputes by applying relevant statutory provisions and legal principles to the preferred evidence.
37. It involves a neutral third-party Adjudicator receiving, examining and reviewing the written submissions and evidence provided by the Parties and making a final and binding decision (a **Determination**) of the matters in dispute.
38. The purpose of Adjudication is to:
- (a) resolve a dispute in a manner that is fair, prompt, cost effective, and proportionate to the amount in dispute and the complexity of the issues involved; and
 - (b) provide a Determination within 25 Working Days of the Claimant (a Supplier or Wholesale Customer) serving the Notice of Dispute on the Respondent (a Regulated Grocery Retailer) that is binding on the Parties (unless and until the Dispute is finally determined by arbitration, legal proceedings in a court or tribunal, or subsequent agreement between the Parties).
39. The Parties must not disrupt or delay the Adjudication or interfere with the purpose of Adjudication.
40. The Parties must comply without delay with the Rules and any Determination of the Adjudicator.
41. The Adjudicator, NZDRC, the Parties, and their Representatives must act in the spirit of the Rules and make every effort to ensure that a Determination made under the Rules is enforceable.





42. Adjudication is more formal than Mediation but less formal than court proceedings and it is not mandatory for parties to be legally represented,⁵ although it is likely to assist.
43. Under the terms of the Scheme, no *other decision maker* than an Adjudicator is provided for in subpart 5 of Part 4 of the Act or Schedule 2 of the Act.
44. See the commentary to Part 4 of the Rules at subpart 20 of the consultation paper (below).

No Hearing

45. The standard practice for any adjudication will be for the Adjudicator to make the Determination *on the papers* only.
46. Rule 16.4 and Rule 16.21 provide for this and are discussed at subpart 20 of the consultation paper (below).

Consultation Questions

Q 6.	Are the rules relevant to adjudication clear and practical?
Q 7.	Is the role of an Adjudicator clear?
Q 8.	The process set out in the Scheme has been proven to be efficient in time and cost. ⁶ Does the practice of “no oral hearing” raise any concerns for you?

9 ACCESSIBILITY OF THE SCHEME

47. Previously it was suggested there were barriers to Suppliers raising a dispute; for example, concern about their relationship with the Regulated Grocery Retailer or the financial costs (and time) of any action.
48. In the UK and Australia for example, the designated Regulated Grocery Retailers fund the Schemes and meet the costs of dispute resolution in relation to their Grocery Codes of Conduct unless there are good reasons not to.
49. In order for dispute resolution to be effective, there needs to be some ability to award costs to incentivise early resolution and, in circumstances where, if the costs are being met by the Regulated Grocery Retailers, there is otherwise no mechanism to mitigate the risk of misuse/abuse of the Scheme and prevent vexatious, frivolous and meritorious claims being brought by Suppliers and Wholesale Customers.
50. The Rules support Regulated Grocery Retailers having good internal processes to resolve issues by requiring them to develop, operate and publicise effective complaints processes modelled on the principles of fairness, accessibility, responsiveness, and efficiency. The complaints processes should be client focussed, visible and accessible to enable quick

⁵ Rule 19.1 to 19.3.

⁶ The process is similar to the statutory adjudication process under the Construction Contracts Act 2002 with improvements that have been learned from delivering that procedure albeit with a shorter timeframe for making a Determination under the Act.





resolution, promote good decision making, and foster good relations with Suppliers and Wholesale Customers.⁷

51. The Rules require Regulated Grocery Retailers to take all reasonable steps to promote the Scheme to Suppliers and Wholesale Customers. Regulated Grocery Retailers must advise a Supplier or Wholesale Customer about access to the Scheme and the process for doing that as soon as a complaint concerning the subject matter of an eligible Dispute is received.⁸
52. The Rules relating to costs of the dispute resolution proceeding are set out at Rules 11.1 to 11.3 and 24.1 to 24.15. They are respectively dealt with in more detail at subparts 19 and 20 of the consultation paper (below).
53. The Rules relating to funding the Scheme are set out at Rules 28.39 to 28.53 and Schedule 2 of the Rules. They are dealt with in more detail at subparts 10 and 23 below.

10 FUNDING

54. To ensure the Scheme is accessible to all persons entitled to use the Scheme, every Regulated Grocery Retailer must pay NZDRC a Levy to fund the Scheme.⁹
55. The Levy will be split evenly between the Regulated Grocery Retailers, but NZDRC may make a different apportionment if expenses are incurred disproportionately in dealing with matters relating to different Regulated Grocery Retailers.

Consultation Questions

Q 9.	Is the Scheme sufficiently accessible for Suppliers and Wholesale Customers? Please use precise Rule references in any comments made.
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?
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?
Q 12.	Do you have any comments to make on accessibility or funding?

11 TIKANGA MĀORI

56. The Rules provide for Tikanga-based dispute resolution at Rules 4.2 to 4.4.

⁷ Rule 28.35.

⁸ Rule 28.36.

⁹ The New Zealand Food & Grocery Council supports the costs being borne by the Regulated Grocery Retailers unless the Supplier's or Wholesale Customer's claim is vexatious or wholly without merit in which case the costs should be determined by the decision-maker (submission on Grocery Code of Conduct: Consultation Paper dated 10 August 2022 at [179]).





57. NZDRC has a longstanding partnership with Tūhono¹⁰ to provide a wrap-around Tikanga-based Māori cultural support framework for those parties who wish to adopt it. This looks different in different cases. We are guided by Tūhono and those requesting support to ensure we deliver services that resonate with them and make them feel comfortable engaging in the process.
58. The framework we use symbolises us working together in collaboration with our stakeholders to establish unique pathways for guiding and supporting parties to dispute resolution services as we journey together using Māori beliefs, principles, values, and practices that derive from traditional knowledge (mātauranga Māori) for improved outcomes for parties.
59. Tūhono has confirmed its commitment to working with us to deliver tikanga-based dispute resolution services for the Grocery Industry Dispute Resolution Scheme.¹¹
60. We are committed to meeting the needs of Māori and upholding the mana of Te Tiriti o Waitangi | the Treaty of Waitangi by recognising, actively promoting, and giving effect to the principles of the Treaty within our policies, procedures, and recruitment processes.
61. By operating in the spirit of Te Tiriti | the Treaty and acting in good faith, our intention is to foster mutual regard and understanding as we work alongside Māori, thereby ensuring Māori have opportunities to participate fully in all levels and aspects of our organisation and the services that we provide.

Consultation questions

Q 13.	Do the rules and matters set out above adequately provide for adoption of Tikanga Māori processes and support services, substantively and procedurally?
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PART 4: SCHEDULE 2, CLAUSE 14 REQUIREMENTS

12 OVERVIEW

62. The Rules must provide for, or set out the matters which are contained in, clause 14 of Schedule 2 of the Act.
63. Items required at clauses 14(3) to 14(5) are set out in Rules 28.54 to 28.55. Notably, the Rules of the Scheme include or provide for matters of process or procedure that are consistent with the purpose set out in clause 1 of Schedule 2:
 - (a) **User-focused:** the timing begins from when the Claimant serves a Notice of Dispute. It is expeditious and cost effective. Frivolous or vexatious complaints can be dealt with through the Adjudicator's powers to award costs.¹²

¹⁰ See: www.Tuhono.net

¹¹ We note that cultural competency more generally is an important part of our organisation. We also have a longstanding relationship with Hivā, who collaborate with us to provide our clients with services embedded in Pacifica values and ideologies. (See: www.Hiva.co.nz)

¹² Rules 24.6 to 24.8





- (b) **Accessible:** the process is transparent and begins with the completion of a form which can be accessed off the www.nzdrc.co.nz website. Representatives are not essential but are very useful. NZDRC's website will be comprehensive and detailed in responding to frequently asked questions and NZDRC's case managers are available by telephone on freephone 0508DISPUTE to assist Parties and their advisors with any questions or concerns about the Scheme's processes and procedures.
- (c) **Independent:** the selection and revocation process outlined at Rule 21 and Schedule 1 ensures impartial Adjudicators or Mediators are selected. The NZDRC has a track record of operating independent dispute resolution systems and will do so here.
- (d) **Fair:** Mediation is fair, prompt, responsive, and flexible. Natural justice is the touchstone of Adjudication.¹³ Tikanga-based dispute resolution is also available for those Parties who wish to adopt it.¹⁴ Access to the courts is reserved on narrow grounds, for appeals¹⁵ and preliminary points of law.¹⁶ Adjudicators may appoint experts¹⁷ or undertake inspections of property.
- (e) **Accountable:** Schedule 1 provides for the Challenge Notice process. The permitted disclosure process also ensures confidentiality.
- (f) **Efficient:** the expeditious timing set out at subparts 19 and 20 (below) will see the 25 Working day goal reached in by far the majority of cases, with the power to extend used as a last resort to ensure procedural fairness (where additional time is reasonably required by the Parties) and additional time is reasonable required to determine complex and high value claims.
- (g) **Effective:** the timing and procedural flexibility of Mediation will ensure a Settlement Agreement has the best chance of emerging. Likewise for the Adjudication, where Adjudicators are motivated to provide a Determination which is robust and in keeping with the applicable statutory and legal principles.¹⁸

13 SUMMARY – SUBPART 5 OF PART 4 OF THE ACT (IN COMPLIANCE WITH CLAUSE 14(2)(a) OF SCHEDULE 2 OF THE ACT)

- 64. The Rules are designed to deliver a dispute resolution scheme which is independent, affordable, timely, confidential, and informed by specialist expertise.
- 65. Clause 14(2)(a) requires a *summary of matters set out in subpart 5*.
- 66. First, the sections in subpart 5 of Part 4 of the Act are broadly outlined¹⁹ in the Foreword to the Rules to provide background. Second, the relevant Rules which cover matters in

¹³ Rules 8.1, 8.2, 21.5 and 21.7(b).

¹⁴ Rules 4.2 to 4.5.

¹⁵ Rules 14.2 to 14.3 and 18.9 to 18.11.

¹⁶ Rule 6.1.

¹⁷ Rules 21.13 to 21.18.

¹⁸ Rule 17.2(a).

¹⁹ NZDRC takes no responsibility for the summary of the sections and directs readers to resort to the written terms of the Act for full and accurate recording of the sections.





subpart 5 are provided in the footnotes to the below sections, and third, see Appendix 1 to this consultation paper for relevant cross-references. Notably:

- (a) Section 151²⁰ deals with an overview of subpart 5:
 - i. who must comply with the Scheme (every Regulated Grocery Retailer);
 - ii. what a Dispute Resolution Scheme is; and
 - iii. when a dispute might be referred to the Scheme.
- (b) Section 152²¹ deals with the interpretation of terms within subpart 5.
- (c) Section 153²² deals with when a Supplier or Wholesale Customer may refer certain disputes to the Dispute Resolution Scheme:
 - i. disputes with a claimed amount not exceeding \$5 million or where no amount is claimed; and
 - ii. the dispute has not been finally resolved by proceedings in any court or tribunal.
- (d) Section 154²³ deals with the power of the Governor-General to create Regulations under the Act to further prescribe classes of eligible Disputes.
- (e) Section 155²⁴ deals with the staying of proceedings unless a court or tribunal orders otherwise:
 - i. a Party may initiate a concurrent proceeding in any court or tribunal;
 - ii. but the concurrent proceeding will be stayed;
 - iii. the staying of proceedings does not apply to proceedings initiated by the Commission; and
 - iv. the Court may act on its own initiative to stay the dispute resolution proceeding.
- (f) Section 156²⁵ states that a *regulated grocery retailer must comply with the rules of the dispute resolution scheme*.
- (g) Section 157²⁶ provides that on *the application of the provider of the dispute resolution scheme, the District Court may make an order requiring a regulated grocery retailer to comply with the rules of the scheme*.
- (h) Section 158²⁷ provides that the decision maker may draw inferences from failure to comply with rules of a Dispute Resolution Scheme.

²⁰ Rules 1.1, 1.2 and 1.5 to 1.6.

²¹ Rule 3.1.

²² Rule 1.2

²³ Rule 1.2(b)(ii) and Rule 28.4

²⁴ Rules 5.1 to 5.4.

²⁵ Rules 1.5 and 1.6.

²⁶ Rule 1.6.

²⁷ Rules 21.8 to 21.11.





- (i) Section 159²⁸ deals with the enforcement of Settlement Agreements which may become orders of the District Court on application.
- (j) Section 160²⁹ states that binding decisions take force as orders of the District Court.
- (k) Section 161³⁰ deals with appeals against binding decisions:
 - i. with the forum dependent on the monetary jurisdiction (District Court or High Court); and
 - ii. only on a question of law.
- (l) Section 162³¹ provides:

A party to dispute resolution proceedings may, with the consent of the adjudicator or other decision maker, or the mediator or other person assisting the parties to reach a settlement agreement, apply to the High Court to determine any question of law arising in the course of the dispute resolution proceedings.
- (m) Section 163³² deals with privileges and immunities and states that counsel, experts and witnesses have the same protections as in proceedings before a court.
- (n) Section 164³³ deals with the power to take “any evidence”.
- (o) Section 165³⁴ states that any *binding decision must be made in accordance with principles of law*.
- (p) Section 166³⁵ provides that parties may not contract out of the Dispute Resolution Scheme unless a provision of an agreement imposes a stricter obligation on a Regulated Grocery Retailer.

14 SUMMARY

- 67. The Rules provide a working Scheme which largely expressly covers the matters raised in subpart 5 of Part 4 of the Act. This is evidenced in the footnotes. Where matters are not covered expressly in the Rules, the Act works with the Rules (and vice versa) to provide an outcome or framework in keeping with the Rules’ status as part of an Approved Scheme.
- 68. The following aspects are covered in subpart 5 of Part 4 of the Act but not in the Rules (save for by implication):
 - (a) The definition in section 152 of:
 - i. *binding decision*;

²⁸ Rules 14.1 to 14.3.

²⁹ Rules 18.4 to 18.8.

³⁰ Rules 18.9 to 18.11.

³¹ Rules 6.1 and 6.2.

³² Rule 28.25.

³³ Rules 17.3 to 17.5.

³⁴ Rule 17.2(a).

³⁵ Rule 1.5.





- ii. *dispute resolution scheme*; and
- iii. *provider*.

(b) The Rules dovetail with the Act in all respects.

- 69. The omission of any matter from the Rules does not detract from the enforceability of the legislative provision of the Act or Regulations nor the enforceability of the Rules.
- 70. The Dispute Resolution Scheme fulfils clause 14 in conjunction with the Act and will operate effectively as a standalone Scheme.

15 CLAUSE 14

- 71. See Appendix 1 (below) for discussion of clauses 14(2)(b) to 14(2)(o) of Schedule 2 of the Act but then respond to the relevant consultation questions (below).

Consultation Questions

Q 14.	<p>What comments do you have on any issues involving clause 14, with particular regard to:</p> <ul style="list-style-type: none">- 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))? <p>Please identify the precise clause you are commenting on, eg, “clause 14(2)(b)” and the relevant Rule(s).</p>
Q 15.	<p>Do the Rules adequately cover the requirements of clause 14?</p> <p>Please identify the precise clause you are commenting on, eg, “clause 14(2)(b)” and the relevant Rule(s).</p>

PART 5: CONTENT OF THE RULES

16 OVERVIEW

- 72. The draft Rules are published on the NZDRC website: <https://nzdrc.co.nz/grocery-dispute-resolution-consultation/>
- 73. The Rules are the subject of clause 4 of Schedule 2 and clause 6(1) approval and the draft Dispute Resolution Scheme is pending clause 6(3) approval, following consultation.
- 74. A summary of the Rules is found at Part 4 (subparts 12 to 14 inclusive) (above) and Appendix 1 (below) pursuant to clause 14(2)(a). The Rules are set out as follows:
 - (a) Part 1 Preliminary provisions (Rules 1–3)
 - (b) Part 2 Dispute resolution processes and relationship with other dispute resolution procedures (Rules 4–7)





- (c) Part 3 Mediation (Rules 8–15)
- (d) Part 4 Adjudication (Rules 16–27)
- (e) Part 5 Miscellaneous Provisions (Rule 28).
- (f) Schedule 1: Appointment, Revocation and Replacement of mediators and Adjudicators
- (g) Schedule 2: Calculation of Levy

17 PART 1: PRELIMINARY PROVISIONS (RULES 1–3)

75. These Rules set out the empowering provisions of the Rules, the purpose of the Rules and the definitions used within the Rules.

Consultation Questions

Q 16.	Do you have any comments to make in relation to Part 1? Please use precise Rule references in any comments made.
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18 PART 2: DISPUTE RESOLUTION PROCESSES AND RELATIONSHIP WITH OTHER DISPUTE RESOLUTION PROCEDURES (RULES 4–7)

76. Rules under Part 2 relate to:
- (a) dispute resolution: Claimant must choose either Mediation or Adjudication, and the Tikanga-based framework (Rule 4);
 - (b) relationship with other proceedings: what to do when arbitration or court proceedings are on foot and whether the Commission has brought them (Rule 5);
 - (c) determination of preliminary point of law by court (Rule 6); and
 - (d) how to start dispute resolution (Rule 7).
77. These requirements are important for establishing the framework and initiating the process for the Dispute Resolution Scheme. In particular we note that:
- (a) The Claimant must elect to refer a Dispute to either Mediation or Adjudication under the Scheme at the time the Notice of Dispute is served on the Respondent.³⁶
 - (b) Tikanga-based dispute resolution is provided for.³⁷
 - (c) A dispute can be subject to Mediation or Adjudication even if other court or tribunal proceedings are afoot.³⁸

³⁶ Rule 4.1.

³⁷ Rules 4.2 to 4.4.

³⁸ Rule 5.1.





- i. While the dispute resolution process under the Rules is underway and any appeal rights continue, the concurrent court or tribunal proceeding will be stayed.³⁹
 - ii. This does not apply to proceedings initiated by the Commission.⁴⁰
- (d) With the consent of all parties (including the Adjudicator or Mediator), or under certain narrow circumstances without said consent, a Party may apply to the High Court to determine a preliminary point of law once the dispute resolution proceeding has begun.⁴¹

Consultation Questions

Q 17.	Rule 4.1 ⁴² 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?
Q 18.	Do you have any comments to make in relation to Part 2. Please use precise Rule references in any comments made.

19 PART 3: MEDIATION (RULES 8–15)

78. The Rules for Mediation under the Scheme are set out at Rules 8 to 15.⁴³
79. The expected timeframes⁴⁴ for Mediation set out in the Rules can be summarised as:

Procedural step	Rule	Timing
Notice of Dispute	7.1, 7.4, 7.5	No fixed time.
Correction of Notice of dispute	7.6	Within 3 Working Days of receiving notice that the information was missing.
Application for Dispute Resolution	7.2, 7.7, 7.8	Within 5 Working Days of the Claimant serving a Notice of Dispute on the Respondent.

³⁹ Rule 5.2.

⁴⁰ Rules 5.3, 5.4.

⁴¹ Rules 6.1 and 6.2.

⁴² And see Rules 7.1 to 7.10.

⁴³ See section 3.9 above.

⁴⁴ See Rule 28.20 for an example of calculating time.





Commencement Date	7.3, 7.9, 7.12, 7.13	Mediator appointed once the Application for Dispute Resolution is received. Once received, NZDRC will use its best endeavours to make an appointment within 3 Working Days (the date NZDRC notifies the Parties that a Mediator has been appointed).
Position statements	8.1, 8.5	Provided by the Parties to the Mediator, NZDRC and every other Party 3 Working Days before the Mediation.
Mediation	8.4	Date fixed within 25 Working Days of service of the Notice of Dispute by the Claimant on the Respondent.
Settlement Agreement	10.1	If the Parties reach agreement on any or all matters in dispute, such agreement must be recorded in a Settlement Agreement signed by the Parties.

80. Other matters to be noted from Part 3 of the Rules include:

- (a) The parties must comply with the Mediator's reasonable requests to attend Mediation and provide information.⁴⁵
- (b) The Mediator cannot be called to give evidence post-Mediation, nor are notes and records available, save for the Settlement Agreement itself.⁴⁶
- (c) A Party may be represented at a Mediation.⁴⁷
- (d) A Settlement Agreement must be in writing and signed by all parties.⁴⁸
- (e) A Mediator is entitled to have their reasonable fee paid for the work done:
 - i. fixed as per the terms and conditions set out on the NZDRC website www.nzdrc.co.nz;⁴⁹ and
 - ii. by the Regulated Grocery Retailer unless otherwise agreed.⁵⁰
- (f) Mediation is confidential.⁵¹

⁴⁵ Rule 8.3.

⁴⁶ Rules 8.10 and 8.11.

⁴⁷ Rule 9.1.

⁴⁸ Rule 10.1.

⁴⁹ Rule 11.2.

⁵⁰ Rule 11.3.

⁵¹ Rules 12.1 and 12.2.





- (g) The permitted disclosure regime is set out to recognise some disclosure is potentially required by legal compulsion or to enforce the Settlement Agreement or Determination.⁵² If it is so required:
 - i. the Party seeking to disclose must notify the other Parties and the Mediator or Adjudicator a reasonable time before they make disclosure.
- (h) The Mediation ends when a Settlement Agreement is signed.⁵³
- (i) The Mediator may also end the Mediation on their own initiative if:⁵⁴
 - i. a Party is no longer willing to participate; or
 - ii. the Mediator is *unable to assist the Parties to achieve resolution of the Dispute*.
- (j) A Settlement Agreement can be enforced by:⁵⁵
 - i. a Party or NZDRC applying to the District Court; and
 - ii. the District Court may alter any terms it considers manifestly unreasonable so as *the modification results in an agreement that could have been entered into under the Scheme*.
- (k) The Mediator, NZDRC and its staff have the widest immunity possible, save the Mediator acting fraudulently.⁵⁶

Consultation Questions

Q 19.	Are the provisions for the Mediation process clear and workable?
Q 20.	Is the Mediator given adequate powers to manage the process? ⁵⁷
Q 21.	Should the Mediator be able to terminate the Mediation? ⁵⁸
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)? ⁵⁹

20 PART 4: ADJUDICATION (RULES 16–27)

81. The Rules for Adjudication⁶⁰ are set out at Rules 16 to 27.

⁵² Rules 12.4 and 12.5.

⁵³ Rule 13.1.

⁵⁴ Rule 13.2.

⁵⁵ Rule 14.

⁵⁶ Rule 15.

⁵⁷ Rules 8.2, 8.6, 8.7 and 8.9.

⁵⁸ Rule 13.2.

⁵⁹ Rules 10.1 and 14.2.

⁶⁰ See section 3.9 above.





82. The expected timeframes for Adjudication as set out in the Rules can be summarised as follows:⁶¹

Procedural step	Rule	Timing
Notice of Dispute	7.1, 7.4, 7.5	No fixed time. ⁶²
Correction of Notice of dispute	7.6	Within 3 Working Days of the Claimant serving a Notice of Dispute on the Respondent.
Application for Dispute Resolution	7.2, 7.7, 7.8	Within 5 Working Days of the Claimant serving a Notice of Dispute on the Respondent.
Commencement Date	7.3, 7.9, 7.12, 7.13	Adjudicator appointed once the Application for Dispute Resolution is received. Once received, NZDRC will use its best endeavours to make an appointment within 3 Working Days (the date NZDRC notifies the Parties that an Adjudicator has been appointed).
Claim	16.1, 16.5	3 Working Days from the Commencement Date.
Response	16.7, 16.8	6 Working Days from the Commencement Date.
Reply	16.12 to 16.14	8 Working Days from the Commencement Date.
Rejoinder	16.15 to 16.17	10 Working Days from the Commencement Date.
Determination	17.21	The Adjudicator must make their Determination within 25 Working Days of service of the Notice of Dispute by the Claimant on the Respondent.
Application for correction	17.24 to 17.26	Within 2 Working Days of the date on which a copy of the Determination is given to the Parties.

⁶¹ The Adjudicator has the power to extend time for any action: clause 14(i)(iii) of Schedule 2 of the Act and Rules 16.19 and 17.25.

⁶² Subject to the provisions of the Limitation Act 2010.





Correction	17.27 to 17.29	Within 3 Working Days of the date on which a copy of the Determination is given to the Parties.
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83. Other relevant matters of note in Part 4 include:

- (a) Each Submission must be in reply to the previous one. No counterclaims by the Respondent Regulated Grocery Retailer are permitted.⁶³
- (b) No hearing will be held, but conferences, visits or inspections are possible.⁶⁴
- (c) *The Claim must include:*⁶⁵
 - i. *the nature and basis of the claim;*
 - ii. *the amount of compensation claimed, or other relief or remedy sought, including any claim for interest;*
 - iii. *copies of any expert reports, witness statements or other documents the Claimant relies on; and*
 - iv. *submissions on the factual and legal issues involved in the claim, and the Claimant's contentions as to those issues.*
- (d) *The Response must include:*⁶⁶
 - i. *what matters in the Claim are accepted or agreed;*
 - ii. *what matters are disputed, with reasons why;*
 - iii. *any defence to the Claim;*
 - iv. *copies of any expert reports, witness statements or other documents the Respondent relies on; and*
 - v. *submissions on the factual and legal issues involved in the Claim and the Response, and the Respondent's contentions as to those issues.*
- (e) The Parties⁶⁷ or the Adjudicator may extend time for service of Submissions.⁶⁸
- (f) Copies of contracts should be provided, but if oral, they should be recorded in a statutory declaration and served.⁶⁹
- (g) A Party must promptly raise any objection they have to (otherwise it is deemed to be waived).⁷⁰

⁶³ Rules 16.3, 16.9 and 16.11.

⁶⁴ Rules 16.4 and 21.12.

⁶⁵ Rule 16.5.

⁶⁶ Rule 16.7.

⁶⁷ Rule 16.18.

⁶⁸ Rules 16.19, 16.20, 17.25 and 21.12(d).

⁶⁹ Rule 16.21.

⁷⁰ Rules 16.27 and 16.28.





- i. a direction, ruling or request of the Adjudicator;
 - ii. any failure by another party or the Adjudicator to comply with the Rules;
 - iii. an irregularity affecting the conduct of the Adjudication;
 - iv. the Adjudicator's jurisdiction; or
 - v. the powers of the Adjudicator.
- (h) An Adjudicator may determine an eligible Dispute, Costs, jurisdiction to hear the matter and *any matters that are necessary to carry out the Adjudicator's role in accordance with these Rules*.⁷¹
- (i) The Adjudicator must have regard to principles of law, among other prescribed matters when making their Determination.⁷²
- (j) Each Party bears the burden of proof for any claim or affirmative defence, and the Adjudicator will determine the materiality and weight to be given to any evidence and can receive any evidence.⁷³
- (k) If an amount of money is claimed by the Claimant, the Adjudicator must determine:⁷⁴
- i. the Respondent's liability to pay that money (if any), including any conditions on that liability;
 - ii. the amount payable (or conditionally payable);
 - iii. the date on which the payment must be made or becomes payable; and
 - iv. the conditions on which it becomes payable.
- (l) If no amount of money is claimed, the Adjudicator must determine the rights and obligations of the parties.⁷⁵
- (m) If the Adjudicator determines that any Respondent must take action other than the payment of money, the Adjudicator must also fix an amount to be paid and the date it must be paid by, if the Respondent fails to take that action.⁷⁶
- (n) An Adjudicator has the power to award damages as compensation for a Supplier or Wholesale Customer.⁷⁷
- (o) The Adjudicator can award interest:⁷⁸
- i. for contractual disputes, at the contractual rate;⁷⁹ or

⁷¹ Rule 17.1.

⁷² Rule 17.2.

⁷³ Rules 17.3 to 17.5.

⁷⁴ Rule 17.6.

⁷⁵ Rule 17.7.

⁷⁶ Rule 17.8.

⁷⁷ Rule 17.9.

⁷⁸ Rule 17.10.

⁷⁹ Rule 17.12.





- ii. for contractual disputes, as determined by the Adjudicator;⁸⁰ or
- iii. for non-contractual disputes, as determined by the Adjudicator.⁸¹
- (p) *The Determination must be in writing and be signed and dated by the Adjudicator.*⁸²
 - i. It must contain the reasons (unless otherwise agreed) which are proportionate to the complexity of the matter.⁸³
 - ii. It must be submitted in draft form to NZDRC for peer review.⁸⁴
- (q) The Adjudicator must make their Determination within 25 Working Days of the Claimant serving the Notice of Dispute on the Respondent or such longer period of time as the Adjudicator determines.⁸⁵
- (r) The Determination is binding unless determined otherwise in a court or by subsequent agreement.⁸⁶
- (s) The Determination:⁸⁷
 - i. has full legal effect even if legal proceedings are initiated;
 - ii. must be complied with before a Party starts legal proceedings;
 - iii. must be treated as a District Court order and enforced accordingly; and
 - iv. is a debt due and owing and may be recovered in a court, with expenses of recovery payable.
- (t) An appeal on a question of law (only) may be brought in the District Court or High Court dependent on the value of claim, and with leave of the first appeal court if a further appeal is sought.⁸⁸
- (u) Representatives may be appointed:⁸⁹
 - i. at will, pre-Adjudication; or
 - ii. with the Adjudicator's prior approval post Adjudication (so as to prevent a conflict of interest or similar impediment arising);
- (v) A Claim can be withdrawn at any time before a Determination is issued:⁹⁰
 - i. The Adjudicator can still rule on Costs:

⁸⁰ Rule 17.13.

⁸¹ Rule 17.14.

⁸² Rule 17.15.

⁸³ Rules 17.17 and 17.18.

⁸⁴ Rule 17.19.

⁸⁵ Rule 17.21.

⁸⁶ Rule 18.1.

⁸⁷ Rules 18.2 to 18.4, 18.6 and 18.7.

⁸⁸ Rules 18.9 to 18.11.

⁸⁹ Rules 19.1 to 19.3.

⁹⁰ Rules 20.1 to 20.10.





1. on the Adjudicator's own initiative or request of a Party within 3 Working Days of the Notice of Withdrawal;⁹¹ and
 2. a Determination on Costs cannot vary an agreement on costs between the Parties entered into after the Adjudication began.⁹²
- ii. A new Claim may be started (unless determined under another dispute resolution process).
 - iii. A unilateral withdrawal may still result in a Determination *if the Adjudicator considers that the Respondent has a legitimate interest in obtaining a Determination* and in response to a Respondent's Notice of Objection.
 - iv. An agreed withdrawal may occur, such as when a settlement has been reached and this may be recorded in the Adjudicator's Determination on request within 3 Working Days of advice of the withdrawal.
- (w) The Adjudicator must be suitable, impartial and independent of the Parties:⁹³
- i. The Adjudicator must give NZDRC the written declaration set out in clause 1.3 of Schedule 1 of the Rules.
 - ii. The Adjudicator has a continuing duty to the Parties and NZDRC to advise of any matter which emerges which *may be likely to give rise to justifiable doubts about their suitability, impartiality or independence in the eyes of any of the Parties*.
 - iii. An appointment can be revoked in accordance with clause 2 of Schedule 1, pursuant to the Challenge Notice procedure:⁹⁴
 1. *A Party may request the replacement of a Mediator or an Adjudicator if the Party becomes aware of information or circumstances that it considers gives rise to justifiable doubts about the Mediator's or Adjudicator's suitability, impartiality or independence.*⁹⁵
 2. The request for revocation must be made within 5 Working days of the Party becoming aware of the information.
 3. The recipient has 3 Working Days (only) to respond.
 4. If every Party agrees or the Mediator or Adjudicator voluntarily withdraws or NZDRC so determines, the appointment will be revoked.⁹⁶
 5. A Challenge Notice does not affect the conduct of the Mediation or Adjudication (unless as prescribed) and is not an implied acceptance of the basis for the challenge.⁹⁷

⁹¹ Rules 24.10 to 24.12.

⁹² Rule 24.13.

⁹³ Rule 21.1 to 21.4 and Schedule 1.

⁹⁴ Or for other prescribed reasons under clause 3 of Schedule 1.

⁹⁵ Clauses 2.1 to 2.3 of Schedule 1.

⁹⁶ Clause 2.4 of Schedule 1.

⁹⁷ Clauses 2.5 and 2.6 of Schedule 1.





- iv. An Adjudicator may conduct the Adjudication in any manner they think fit, having regard to the purposes of the Scheme and natural justice:⁹⁸
 - 1. An Adjudicator has a general power to make any directions, rulings or requests.
 - 2. The Parties must comply.
 - 3. An Adjudicator may draw any reasonable inferences from late supplied information and make a ruling on the information available to them.
 - 4. An Adjudicator has specific powers:⁹⁹
 - a. among other things to arrange visits and inspections in the presence of all Parties and on reasonable notice and with the permission of the owner or occupier;¹⁰⁰ and
 - b. to appoint an expert after consulting the Parties and on terms stated in the Rules.¹⁰¹
- (x) An Adjudicator may determine related Adjudications together if the Parties agree in writing.¹⁰²
- (y) *The Adjudicator is not liable for anything done or not done in carrying out their role as Adjudicator unless the Adjudicator acts fraudulently.*¹⁰³
- (z) There are two types of costs:

Adjudicator's fee	Parties' own costs
The Regulated Grocery Retailer pays the Adjudicator's fee. However, the Adjudicator may make a different Determination in some circumstances. ¹⁰⁴	Parties pay their own costs and expenses. However, the Adjudicator may make a different Determination in some circumstances. ¹⁰⁵
The Adjudicator's Fee includes an amount payable for the time the Adjudicator is engaged in their role, as well as any disbursements. ¹⁰⁶	

⁹⁸ Rules 21.5 to 21.18.

⁹⁹ Rule 21.12.

¹⁰⁰ Rules 21.13 to 21.16.

¹⁰¹ Rules 21.17 and 21.18.

¹⁰² Rule 22.1.

¹⁰³ Rules 23.1 and 27.

¹⁰⁴ Rules 24.6, 24.7 and 24.8.

¹⁰⁵ Rules 24.1 and 24.5.

¹⁰⁶ Rule 24.2.





Low value claims will be determined as per the terms and conditions on the NZDRC website: www.nzdrc.co.nz . ¹⁰⁷	
For general claims the Adjudicator's Fee is an amount that is reasonable having regard to the work done and costs, expenses or fees incurred by the Adjudicator. ¹⁰⁸ But the Adjudicator's Fee is capped as per the terms and conditions on the NZDRC website: www.nzdrc.co.nz .	

- i. If an Adjudicator is replaced part way through, NZDRC will determine the Adjudicator's fee which is appropriate to be paid to each Adjudicator.¹⁰⁹
- (aa) The Adjudication must be conducted in private.¹¹⁰
- (bb) All parties must keep Confidential Information confidential.¹¹¹
- (cc) Confidential Information can be disclosed to the extent necessary on closely prescribed circumstances:¹¹²
 - i. the Party seeking to disclose must notify the other Parties and the Mediator or Adjudicator a reasonable time before they make disclosure; and
 - ii. if an intended disclosure arises during an Adjudication, the Adjudicator will promptly determine the matter and no disclosure can occur until the determination occurs.
- (dd) The Adjudicator may deal with a breach of confidentiality in the way they see fit.¹¹³
- (ee) The Adjudicator or NZDRC may issue binding directions in relation to information security or data protection.¹¹⁴
- (ff) The Adjudicator and NZDRC are given the widest immunity the law will allow:¹¹⁵
 - i. This covers NZDRC's employees (including the Registrar).¹¹⁶
 - ii. This does not cover acting fraudulently.¹¹⁷

¹⁰⁷ Rule 24.3.

¹⁰⁸ Rule 24.4.

¹⁰⁹ Rule 24.9.

¹¹⁰ Rule 25.1.

¹¹¹ Rules 25.2 and 25.3.

¹¹² Rules 25.4 to 25.8.

¹¹³ Rule 25.10.

¹¹⁴ Rule 26.1.

¹¹⁵ Rule 27.1.

¹¹⁶ Rule 27.1.

¹¹⁷ Rule 27.2.





- iii. The Parties jointly and severally indemnify the Adjudicator and NZDRC if a claim is brought.¹¹⁸
- iv. Written or oral words of the Adjudicator or NZDRC cannot found an action in defamation.¹¹⁹
- v. After the Adjudication has ended the Adjudicator and NZDRC have:¹²⁰
 1. no obligation to comment; and
 2. cannot give evidence in legal proceedings arising in relation to the Adjudication.

Consultation Questions

Q 23.	Given that under clause 14(2)(i) matters must be resolved within 25 Working Days of being referred to the Scheme, ¹²¹ are the timeframes appropriate?
Q 24.	Is the enforcement procedure clear and workable?
Q 25.	Is the procedure for appeals clear and workable?
Q 26.	Should Determinations be made on the papers, with no oral hearing? ¹²²
Q 27.	Should an Adjudicator be able to end an Adjudication if the Claimant fails to serve their claim in time? ¹²³
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)? ¹²⁴
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? ¹²⁵
Q 30.	Should an Adjudicator have the power to award general damages?
Q 31.	Should an Adjudicator be able to award interest?
Q 32.	Should a Respondent be able to object to the withdrawal of a Claim?
Q 33.	Is the costs regime clear, fair and workable?
Q 34.	Do the Rules adequately protect confidentiality?
Q 35.	Do you have any comments to make about Part 4 of the Rules? Please use precise Rule references in any comments made.

¹¹⁸ Rule 27.3.

¹¹⁹ Rule 27.4.

¹²⁰ Rule 27.5.

¹²¹ Or any further time that the adjudicator or other decision maker (if any), or the provider, allows.

¹²² Rule 16.22.

¹²³ Rule 16.24.

¹²⁴ Rule 17.4, 17.5.

¹²⁵ Rule 17.8.





21 PART 5: MISCELLANEOUS PROVISIONS (RULE 28)

84. Rule 28 deals with general provisions including:
- (a) Application of these Rules
 - (b) Communications and notices
 - (c) Time and language of Mediation and Adjudication
 - (d) Working days
 - (e) Calculation of time
 - (f) No storage of documents
 - (g) Authority of NZDRC
 - (h) General privileges and immunities
 - (i) Professional standards and complaints
 - (j) Reporting
 - (k) Promotion of Scheme
 - (l) Funding of the Scheme
 - (m) General matters.
85. Part 5 of the Rules is important for administrative purposes and matters such as the method of communication, calculation of when things need to be done by, promoting the Scheme, who pays for the Scheme, sundry matters, and lastly addressing the balance of requirements under clauses 14(3) and 14(4) of Schedule 2 of the Act.
86. Matters of note in this Part include:
- (a) these Rules may be amended with the approval of the Minister;¹²⁶
 - (b) The Registrar may issue practice notes;¹²⁷
 - (c) Regulations may be made prescribing further eligible disputes.¹²⁸
 - (d) Communications must be written and preferably by email:¹²⁹
 - i. copied to the Adjudicator, Registrar and Parties;¹³⁰
 - ii. may be served by other means (such as personally or registered post);¹³¹

¹²⁶ Rule 28.1

¹²⁷ Rule 28.3

¹²⁸ Rule 28.4

¹²⁹ Rules 28.5, 28.8 to 28.13

¹³⁰ Rule 28.7.

¹³¹ Rules 28.14, 28.15.





- iii. in English unless otherwise determined by the Mediator or Adjudicator;¹³² and
 - iv. on a defined Working Day,¹³³ pursuant to a prescribed method of calculating time.¹³⁴
- (e) All decisions of NZDRC under the Rules are administrative in nature and:¹³⁵
- i. are final and binding;
 - ii. not subject to appeal to NZDRC; and
 - iii. not to be subject to any other body (unless NZDRC acts fraudulently).
- (f) Every witness, counsel or expert has the same privileges and immunities as if in proceedings before a court.¹³⁶
- (g) All Mediators and Adjudicators must:¹³⁷
- i. be current members of a relevant professional body; and
 - ii. comply with continuing professional development requirements and their code of ethics.
- (h) Any complaint about the operation of the Scheme:¹³⁸
- i. must be made on the form provided on the NZDRC website: www.nzdrc.co.nz/complaints;
 - ii. must be dealt with pursuant to the NZDRC Complaints Policy (also on the NZDRC website: www.nzdrc.co.nz/complaints); and
 - iii. may not be used to challenge a Mediation outcome or Determination.
- (i) NZDRC must:
- i. supply an Annual Report to the Minister within three months of the end of the financial year;¹³⁹ and
 - ii. *The Minister must ensure that an independent review of the Scheme is undertaken at least once every three years after the date of the Scheme's approval.*¹⁴⁰

87. NZDRC must promote the Scheme:¹⁴¹

¹³² Rules 28.16 and 21.12.

¹³³ Rules 28.17, 28.18.

¹³⁴ Rules 28.19 to 28.21.

¹³⁵ Rules 28.23 and 28.24.

¹³⁶ Rule 28.25.

¹³⁷ Rule 28.26.

¹³⁸ Rules 28.27 and 28.28.

¹³⁹ Rules 28.29 to 28.31.

¹⁴⁰ Rule 28.32.

¹⁴¹ Rules 28.33 to 28.38.





- (a) working with the Commission, the Grocery Commissioner and other interested parties; and
 - (b) ensure the Scheme is accessible to all persons entitled to use the Scheme.
88. Every Regulated Grocery Retailer must pay NZDRC a Levy annually in advance to fund the Scheme.¹⁴² The Levy:
- (a) will be set by NZDRC;¹⁴³ and
 - (b) will be split evenly between the Regulated Grocery Retailers, but NZDRC may make a different apportionment if expenses are incurred disproportionately in dealing with matters relating to different Regulated Grocery Retailers;¹⁴⁴
89. NZDRC may refund or roll over any surplus funding into the next financial year.¹⁴⁵
90. NZDRC must inform each Regulated Grocery Retailer of their share of the Levy to be paid at least 5 Working Days before payment is due.¹⁴⁶
91. NZDRC may charge interest on late payments.¹⁴⁷
92. NZDRC may recover any unpaid Levy or interest in any court of competent jurisdiction as a debt due.¹⁴⁸
93. The Rules of an Approved Scheme must be treated as containing any provision that is implied into those Rules by the Regulations (if any).¹⁴⁹
94. A Rule of an Approved Scheme has no effect to the extent that it is inconsistent with any provision implied into the rules by the Regulations (if any).¹⁵⁰

Consultation Questions

Q 36.	Is the method of funding the Scheme fair ie, that the Scheme is funded by the Regulated Grocery Retailers?
Q 37.	Is the apportionment of the Levy fair? Is there another mechanism that would be more equitable as between the Regulated Grocery Retailers?
Q 38.	Do you have any comments to make about Part 5 of the Rules? Please use precise Rule references in any comments made.

¹⁴² Rules 28.39 and 28.50.

¹⁴³ Rule 28.42.

¹⁴⁴ Rules 28.43 and 24.44.

¹⁴⁵ Rules 28.47 and 28.48.

¹⁴⁶ Rule 28.45.

¹⁴⁷ Rule 28.51.

¹⁴⁸ Rule 28.53.

¹⁴⁹ Rule 28.54.

¹⁵⁰ Rule 28.55.





22 SCHEDULE 1: APPOINTMENT, REVOCATION AND REPLACEMENT OF MEDIATORS AND ADJUDICATORS

95. Schedule 1 of the Rules deals with Appointment, Revocation and Replacement of Mediators and Adjudicators:
- (a) selection and Appointment Criteria;
 - (b) revocation of Appointment Following Challenge Notice;
 - (c) revocation of Appointment for Other Reasons; and
 - (d) appointment of a Replacement Mediator or Adjudicator.
96. The appointment of a Mediator or an Adjudicator takes into consideration certain prescribed matters.¹⁵¹
97. *Any person requested to act as a Mediator or an Adjudicator must provide NZDRC with a written declaration:*¹⁵²
- (a) *confirming that, to the best of their knowledge, they are ready, willing and able to provide sufficient time, diligence and effort to ensure the conduct of the Mediation or Adjudication in a timely manner and in accordance with these Rules;*
 - (b) *advising whether, to the best of their knowledge, there are any circumstances (past or present) that are likely to give rise to justifiable doubts as to their impartiality or independence in the eyes of any of the Parties; and*
 - (c) *undertaking to comply with the continuing duty to disclose any circumstances arising which may be likely to give rise to justifiable doubts about their suitability, impartiality or independence in the eyes of any of the Parties (see Rule 21.3).*
98. The Challenge Notice process has been dealt with at 85(w) and 97(b) (above).¹⁵³
99. NZDRC can revoke a Mediator's or an Adjudicator's appointment for other prescribed reasons after consulting the Mediator or Adjudicator and the Parties.¹⁵⁴
100. NZDRC will use best endeavours to appoint a replacement Mediator or Adjudicator within 3 Working Days of revocation.¹⁵⁵

Consultation Questions

Q 39.	Is the appointment and revocation process sufficiently clear?
Q 40.	Is the Challenge Notice process sufficiently clear? ¹⁵⁶
Q 41.	Do you have any comments about Schedule 1? Please refer to relevant clauses when responding.

¹⁵¹ Clauses 1.1 and 1.2 of Schedule 1.

¹⁵² Clause 1.3 of Schedule 1.

¹⁵³ Rule 21.4 and clause 2 of Schedule 1.

¹⁵⁴ Clause 3 of Schedule 1.

¹⁵⁵ Clause 4 of Schedule 1.

¹⁵⁶ Rule 21.4 and clause 2 of Schedule 1.





23 SCHEDULE 2: CALCULATION OF LEVY

101. Schedule 2 of the Rules deals with the process for fixing the Levy to be paid by the Regulated Grocery Retailers to fund the Scheme and the mechanism for NZDRC to account to the Regulated Grocery Retailers for expenditure in relation to stakeholder liaison, marketing, litigation (where NZDRC is empowered to initiate legal proceedings in the exercise of its powers under the Act) and the cost of providing Mediation and Adjudication services under the Scheme.

Consultation Questions

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?
Q 43.	Do you have any comments about Schedule 2? Please refer to precise Rules when responding.

PART 6: CONCLUSION

24 GENERAL COMMENTS

102. We would like to hear any general comments you may have that may not be related to any specific aspect of the Rules.

Consultation Questions

Q 44.	Do you have any other comments on matters not discussed in this consultation paper? Please refer to precise Rules or clauses when responding.
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Appendix 1

Schedule 2 of the Act	Rules	Comments
Clause 14(2)(b)	28.33 to 28.38	How the provider will promote knowledge about, and accessibility to, the Scheme (which must include requirements for the provider to work with other parties such as the Grocery Commissioner to do so).
Clause 14(2)(c)	7.1 to 7.10	How disputes may be referred for resolution by the Scheme.
Clause 14(2)(d)	4.1 to 4.4	See also detailed process provisions at rr 8.1 to 15.5 (Mediation) and rr 16.1 to 28.3 (Adjudication).
Clause 14(2)(e)	8.2, 21.5 and 21.7(b)	See also Schedule 1 of the Rules – Appointment, Revocation and Replacement of Mediators and Adjudicators.
Clause 14(2)(f)		<p>The dispute resolution processes (Mediation and Adjudication) are both relatively informal: Mediation is an informal process by its nature (managed negotiation with a structure and timetable that simple negotiation lacks) and Adjudication (the determinative option) is confined to four simple steps over a period of 10 Working Days (unless the Parties agree otherwise, or the Adjudicator considers that additional time is reasonably required, or the Adjudicator requires further information). The Determination is made on the documents avoiding the formality and cost of an oral hearing.</p> <p>However, and most importantly, 30 plus years' experience has taught us that the procedural rules that underpin any alternative dispute resolution scheme need to be comprehensive and detailed in order for the process to be clear, consistent and certain to enable procedural informality and avoid the costs and delays associated with arguments over (legally) technical and jurisdictional compliance issues.</p>
Clause 14(2)(g)	16.9	No counterclaim.
	17.1	Confirms the jurisdiction conferred on the Adjudicator.





Schedule 2 of the Act	Rules	Comments
	17.6 to 17.9 17.10 to 17.14	Confirms the kinds of remedies that an Adjudicator can order under the Rules. Confirms that interest is available as a remedy whether as contractual interest or interest as common law damages
Clause 14(2)(h)	24.1 to 24.6 11.1 to 11.3	These Rules set out how costs in Adjudication can be dealt with under the Rules (Party and Party costs and the costs and expenses of the Adjudicator). While a Mediator cannot make an 'order' as to costs, these Rules set out how costs in Mediation can be dealt with under the Rules.
Clause 14(2)(i)	8.4 17.21, 17.21(a) and 17.21(b)	Mediation must take place within 25 Working Days of service of the Notice of Dispute by the Claimant on the Respondent. Adjudicator must make their Determination within 25 Working Days of service of the Notice of Dispute by the Claimant on the Respondent but may extend the time in certain circumstances.
Clause 14(2)(j)	21.6 21.8 21.12(a), (b), (g), and (i) 21.18(b) 8.3	This is a general power to make directions, ruling and requests. Parties must comply with any direction, ruling or request of the Adjudicator. Specific powers to request information, documents, translation of a document, to do something reasonably required to enable the complete and effective conduct of the Adjudication. Parties must give an Adjudicator appointed expert any relevant information etc. This Rule provides that Parties to Mediation must also comply with a reasonable request made by a Mediator to provide information.
Clause 14(2)(k)	12.1 to 12.5 25.1 to 25.10	These Rules expressly deal with confidentiality in Mediation and permitted disclosures and the process for that. These Rules expressly deal with confidentiality in Adjudication and permitted disclosures and the process for that. Rule 25.10 deals with any breach during the Adjudication and provides remedies that may be ordered by the Adjudicator.





Schedule 2 of the Act	Rules	Comments
	26.1	This Rule deals with information security and data protection.
Clause 14(2)(l)	14.1 to 14.3	These Rules deal with enforcement of a Settlement Agreement. Rule 14.2 provides that a Party or NZDRC (as it is empowered to do under s 159(3) of the Act) may apply to the District Court for an enforcement order. Rule 14.3 provides that a Party may apply to the District Court to vary the terms of a Settlement Agreement where those terms are manifestly unreasonable.
	11.1 to 11.3	These Rules deal with the amount payable by the Parties in relation to the costs of Mediation and how those amounts will be met by the Parties – The Mediation Fee will be met by the Respondent (Regulated Grocery Retailer) and the Parties must meet their own costs and expenses in the absence of any agreement otherwise.
	18.1 to 18.8	These Rules deal with enforcement of Adjudicators' Determinations. A Determination is binding on the Parties unless and until the Dispute is finally determined by proceedings in a court, or subsequent agreement of the Parties.
	24.1 to 24.15	These Rules deal with the amount payable by the Parties in relation to Adjudication costs (Party v Party costs and the Adjudication Fee) and the basis on which a costs Determination can be made (including on withdrawal of a claim).
Clause 14(2)(m)	28.32	This Rule provides that the Minister must ensure that an independent review of the Scheme is undertaken at least once every three years after the date of the Scheme's approval.
Clause 14(2)(n)	28.26 to 28.28	These Rules deal with professional standards for Mediators and Adjudicators (membership of relevant professional bodies with membership rules and codes of ethics), and complaints.
Clause 14(2)(o)	28.4	See also Rule 1.2(b)(iii) which defines an eligible Dispute as one that falls within a class of eligible Disputes prescribed by regulations made under s 154 of the Act

