



Review of Anti-Competitive Land Agreements

DISCUSSION DOCUMENT



MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

Te Kāwanatanga o Aotearoa
New Zealand Government



**MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT**
HĪKINA WHAKATUTUKI

Ministry of Business, Innovation and Employment (MBIE) Hīkina Whakatutuki – Lifting to make successful

MBIE develops and delivers policy, services, advice and regulation to support economic growth and the prosperity and wellbeing of New Zealanders.

MORE INFORMATION

Information, examples and answers to your questions about the topics covered here can be found on our website: www.mbie.govt.nz.

DISCLAIMER

This document is a guide only. It should not be used as a substitute for legislation or legal advice. The Ministry of Business, Innovation and Employment is not responsible for the results of any actions taken on the basis of information in this document, or for any errors or omissions.

Online ISBN: 978-1-99-106992-4

July 2023

©Crown Copyright

The material contained in this report is subject to Crown copyright protection unless otherwise indicated. The Crown copyright protected material may be reproduced free of charge in any format or media without requiring specific permission. This is subject to the material being reproduced accurately and not being used in a derogatory manner or in a misleading context. Where the material is being published or issued to others, the source and copyright status should be acknowledged. The permission to reproduce Crown copyright protected material does not extend to any material in this report that is identified as being the copyright of a third party. Authorisation to reproduce such material should be obtained from the copyright holders.

How to have your say

Submissions process

The Ministry of Business, Innovation and Employment (MBIE) seeks written submissions on this discussion paper.

Your submission may respond to any or all of the elements of this discussion paper. Where possible, please include evidence to support your views, for example, references to independent research, facts and figures, or relevant examples.

Please include your contact details in the cover letter or e-mail accompanying your submission.

You can make your submission through the following methods:

- Filling out the submission template available and sending your submission to the email or mailing details below
- By sending your submission as a Microsoft Word document to competition.policy@mbie.govt.nz.
- By mailing your submission to:

Competition Policy
Building, Resources and Markets
Ministry of Business, Innovation & Employment
PO Box 1473
Wellington 6140
New Zealand

Please direct any questions that you have in relation to the submissions process to competition.policy@mbie.govt.nz.

Use and release of information

The information provided in submissions will be used by MBIE to inform MBIE's policy development process and will inform advice to Ministers on the economy-wide review of anti-competitive land agreements. As part of policy development, MBIE may work with other agencies. We may share our analysis of the information we receive, but before doing so we will remove submitter names and contact details as well as any information you indicate to be confidential. We may use the personal information provided to contact you directly if we require clarification of any matters in submissions or to consult with you.

MBIE intends to upload PDF copies of submissions received to MBIE's website at www.mbie.govt.nz as well as an analysis of submissions. MBIE will consider you to have consented to uploading by making a submission unless you clearly specify otherwise in your submission.

If your submission contains any information that is confidential or you otherwise wish us not to publish, please:

- indicate that you do not wish us to publish your submission on the front of the submission, or
- clearly mark any confidential information that you do not wish us to publish within the text and provide a separate version excluding the relevant information for publication on our website.

Submissions remain subject to third party requests under the Official Information Act 1982. If you do not want part, or all, of your submission released to a third party under the Official Information Act 1982 then please set out clearly in a cover letter or e-mail accompanying your submission, your objection to the release of any information in the submission and, in particular, which parts you consider should be withheld, together with the reasons for withholding the information. MBIE will take such objections into account and will consult with submitters when responding to requests under the Official Information Act 1982. Please note that any decisions MBIE makes to withhold your information can be reviewed by an Ombudsman who is able to recommend release of that information.

The Privacy Act 2020 establishes certain principles with respect to the collection, use and disclosure of information about individuals by various agencies, including MBIE. Your personal information will be held and stored by MBIE in accordance with the Privacy Act 2020. If any of the information you provide forms a public record it will be retained in accordance with the Public Records Act 2005. Any personal information you supply to MBIE in the course of making a submission will only be used for the purpose of assisting in the development of policy advice in relation to this review and also if we need to contact you in relation to your submission. Please clearly indicate in the cover letter or e-mail accompanying your submission if you do not wish your name, or any other personal information, to be included in any summary of submissions that MBIE may publish.

This information will be held by MBIE. You have a right to ask for a copy of any personal information we hold about you as a result of submissions, and to ask for it to be corrected if you think it is wrong. If you'd like to ask for a copy of your information, or to have it corrected, please contact us at competition.policy@mbie.govt.nz.

Contents

How to have your say	1
Contents	3
Ministerial Foreword	4
Executive Summary	5
Introduction to this document	8
Covenants and other land agreements may limit competition	11
Chapter One: What is competition and how can land agreements lessen this?	11
Businesses use land agreements for a multitude of reasons – many unrelated to competition	18
Chapter Two: What purposes do land agreements serve and are there alternatives?	18
Land use and development is governed by a system of laws and rules	22
Chapter Three: How are land agreements made, and what rules are there around competition?	22
There are rules specific to competition in New Zealand	26
Chapter Four: How well is the current system working?	28
We are seeking views on how well existing tools work to protect competition	28
Chapter Five: Are there changes we can make to improve the current system?	33
We are looking into options to better protect competition	33
Summary of questions in this document	47

Ministerial Foreword

Price, place and product are three foundation stones of a competitive market. Restrictive land agreements seek to remove one of those foundation stones. One way in which to limit competition is to exclude other similar business from competing in the same place – people will only travel so far for a cheaper product, whether that is fuel to fill up the tank, a trolley load of groceries, or just a coffee.

Evidence so far suggests that big businesses have been locking out new market challengers by excluding them from using key locations. Examples might include petrol stations selling a site with a limitation (covenant) for any subsequent owner that it can't be used as a petrol station. Another kind of limitation is a term in a lease (such as in a shopping mall) that says that no competing butchers, fruit and veg, or grocery stores are allowed.

Some restrictions on land use are fair. Examples include those used to protect neighbours from inappropriate activities, or to protect important natural or heritage aspects of the land.

However, it seems hard to justify a restriction on land use where its main objective is to stop other businesses competing. The effect of those restrictions is to give a stronger market position to incumbents – and in some cases, it might amount to an effective monopoly. The long-term effect of such arrangements might be not only to drive up prices, but also to limit innovation, variety and geographical availability of goods and services. That makes everyone worse off in the end.

We have already taken steps to make it illegal for supermarkets to create such restrictive land agreements (or to rely on ones which are already in place), but we want to know how widespread this issue is to determine what further steps to take.

We also want to understand when such agreements are justifiable and what, if any, limitations should be placed on such agreements – to make sure that any steps we take will be targeted and proportionate.

So, if you have experience with land agreements which have restricted business activities, we want to hear from you – so that we can make New Zealand a better place to do business and provide a more competitive environment for all New Zealanders.



Hon Dr Duncan Webb
Minister of Commerce and Consumer Affairs

Executive Summary

The Commerce Commission has recommended an economy-wide review into the use of land agreements to assess whether a wider, multi-sector solution is needed to address their impacts on competition. To initiate this review, this document seeks information to help determine whether there is a problem, define the nature and scale of this, and inform future actions.

COMPETITION IS IMPORTANT TO BUILDING A PRODUCTIVE ECONOMY, AND IN DELIVERING GOOD OUTCOMES FOR CONSUMERS IN THE LONG-TERM

Competition between businesses is a key driver of the price, quality, range of goods and services offered to New Zealanders. We want to be sure that consumers are not being charged more than they should be, and competition between businesses is an important way of disciplining prices, as well as improving quality, ranges, and services.

A competitive market requires there to be space for new entrants and expansion by existing players. If there are costs or an impediment that an entrant faces in a market that an incumbent (existing business) does not face, we call these factors ‘barriers to entry’. In three of its market studies, the Commission identified that the use of land agreements may be a barrier to entry.

Land agreements is a term we are using to mean any legal agreements (including covenants and restrictive leases) that a party can enter to either, restrict the way land can be used, or require it to be used in a certain way. We are interested in private land agreements, meaning, those made by individuals, businesses, or non-government organisations.

We are now gathering information to help us understand whether, and how, land agreements are being used across the economy to create barriers to entry.

WE WANT TO HEAR FROM YOU

Part of our review will involve considering whether we need to make changes. However, before we decide on this, we want to understand whether the use of land agreements is impeding competition. We are looking across the whole economy, both retail and non-retail, and rural and urban businesses. This document is divided into three sections and, depending on who you are, different parts of this document are likely to be of more interest to you:

- **Chapter One: Describes how land agreements can be used to lessen competition**
 - We want to hear from businesses and individuals that have been adversely impacted by land agreements. This could be by limiting the options available for sites, making it difficult to attract or retain customers, or imposing higher costs.
- **Chapter Two: Asks how land agreements can be used to promote positive outcomes**
 - We want to hear from businesses that benefit from land agreements, to understand what purposes these serve and whether there are practical alternatives to achieve this.

- **Chapters Three, Four and Five: Discusses how well the current rules protect competition and proposes options to improve this**
 - We want to hear views on the options we propose for change.

There are questions throughout the document that we have designed to prompt your responses, but all questions are optional, and you can choose to respond to whichever you think are most relevant to you.

CHAPTER ONE: WE WANT TO UNDERSTAND WHETHER, AND HOW, OTHER LAND AGREEMENTS MAY LIMIT COMPETITION

We are interested in whether, and how, land agreements can be used to create barriers to entry or otherwise reduce competition. This could be by preventing land from being used to operate a certain type of business or limiting the freedom of landowners to choose what, or how, they buy or sell, or who they do business with. Such land agreements have the potential to:

- prevent a new business (or existing business wishing to expand) accessing a suitable site
- restrict the ability of a competing business to attract customers; or
- reduce the choices available to customers.

Where this happens, consumers will have fewer options to choose from and existing businesses who hold these restrictions can take advantage of market power by raising prices and lowering quality. We would like to hear from businesses that have experienced obstacles in entering and/or expanding in a market because of a land agreement, or that have been impacted in other ways, and how this impacted the choices you have made.

We will use this information to understand whether there is a problem with the use of land agreements, and whether there are some situations where they are most likely to have negative effects. This will inform whether we need to make changes, and how they should be targeted.

CHAPTER TWO: WE WANT TO UNDERSTAND WHAT REASONS THERE ARE FOR PUTTING LAND AGREEMENTS IN PLACE

Many businesses use land agreements for a multitude of reasons, many unrelated to competition. For example, it is often difficult to understand what the original reason for using a covenant was – particularly when they have been in place many years and land has been sold numerous times.

Although we have concerns about the potential for land agreements to limit competition, we also appreciate that they can create incentives for development and investment and allow businesses to use land in the way they consider more efficient.

You may operate or own a business(s) that benefit from land agreements. We would like to hear from you to understand the purposes they serve. We are also interested in whether this can be achieved by another way, with less impact on competition.

An accurate understanding of the benefits of land agreements for businesses and the wider economy will allow us to balance this against any potential harm. We will use this when analysing the scale of the issue, as well as in evaluating potential interventions later.

CHAPTERS THREE, FOUR AND FIVE: WE SEEK YOUR VIEWS ON POTENTIAL OPTIONS FOR CHANGES

Sections 27 and 28 of the Commerce Act 1986 (the Commerce Act) prohibit covenants, contracts and agreements that have the purpose, effect, or likely effect of substantially lessening competition in a market. Despite this, three of the Commission's market studies have identified that land agreements that could restrict the availability of land to competitors are being used. This indicates that these laws could be working better, but it is unclear why the existing provisions are not providing sufficient deterrence.

This paper sets out:

- options designed to prevent and detect new land agreements that may harm competition; and
- options to help us identify and remedy existing land agreements.

Whether to progress any option, and which one may be most appropriate, depends on the strength of evidence that there is a problem to be addressed and the nature of the problem identified.

Finally, we ask for information on whether the current rules in section 30 of the Commerce Act are at risk of over-capturing covenants, and, if so, whether an exemption should be considered, to relevant provisions for agreements or covenants with certain purposes.

Introduction to this document

We have seen that land agreements have been used in ways that have the potential to lessen competition in the retail fuel, groceries, and residential building supplies sectors. We are now trying to understand whether similar issues exist elsewhere in the economy, and, if so, the materiality and breadth of any impacts. To do this, we are seeking your views.

PURPOSE OF THIS DOCUMENT

We want to understand whether, or to what extent, land agreements (such as covenants) could affect competition.

The Commerce Commission is an independent Crown entity and New Zealand's primary competition, fair trading, consumer credit, and economic regulatory agency. One of its roles (among other things) is to carry out market studies¹ - gather information on a market and identify whether there are features preventing it from working well. In all three of its market studies since 2018, the Commission has raised concerns about the adverse effect that land covenants can have on competition amongst businesses.

As part of the Government's response to the Commerce Commission's study into residential building supplies², MBIE is undertaking a review of land agreements, such as covenants, and how they affect competition across the economy.

The Commerce Act 1986 (Commerce Act) prohibits covenants, contracts and agreements that have the purpose, effect, or likely effect of substantially lessening competition in a market. Despite this, through successive market studies, the Commerce Commission has identified covenants that are used to restrict the availability of land to competitors. It identified such covenants as a potential barrier to entry or expansion in the retail fuel industry, grocery retail industry and most recently in markets for residential building supplies.

The more examples of covenants and other contracts and agreements we are able to consider, the more reliably we will be able to determine what measures will be effective in promoting competition,

¹ A market study (also called 'competition studies') is an in-depth and independent study into the factors affecting competition for particular goods or services, to find out how well competition is working and whether it could be improved. Part 3A of the Commerce Act sets out when the Commission may carry out a market study and the process it must follow:

<https://www.legislation.govt.nz/act/public/1986/0005/latest/LMS114481.html>

² Residential building supplies market study - Final report – Commerce Commission – 6 December 2022:

https://comcom.govt.nz/_data/assets/pdf_file/0014/300704/Residential-Building-Supplies-Market-Study-Final-report-6-December-2022.pdf

and deterring anti-competitive behaviour, without unduly interfering with beneficial purposes served by these agreements in different markets.

PROCESS

We are seeking feedback on the problem and possible options simultaneously.

We are using this paper to seek views on the problem and possible options at the same time. This is slightly unusual, as normally we would consult on whether there is an issue first, then develop options and test these separately. We are following a different process as the findings from the Commerce Commission's studies indicates that the use of certain land agreements could impact competition, and we want to build on this.

We consider that the market study reports have provided enough information for us to develop high-level options (set out in Chapter Five), but we need more information on the nature of the problem (described in Chapter Four) to refine these further.

We will analyse submissions on this consultation and use these to determine whether there is an issue, and, if so, what possible solutions would be most appropriate. The information provided in submissions will be used to inform advice to Ministers as to whether change is necessary. If we proceed with options for change, we intend to carry out further targeted engagement on workability after consultation closes.

SCOPE

This review focusses on how private land agreements can impact competition between businesses (both retail and non-retail).

It does not include:

- **Planning regulation** - We note the findings in the Commerce Commission's market studies that planning law can have a significant impact on competition. However, reform of the Resource Management Act 1991 (RMA), and therefore planning laws, is being progressed through a separate review process, and two Bills are already under consideration (the Spatial Planning Bill and Natural and Built Environment Bill). Therefore, any comment around the effect of planning regulations on competition should be submitted through those channels. When we refer to 'planning laws' in this document, we mean all local government planning tools of regional, district and unitary authorities under the current RMA.
- **Māori interests in land** – In many cases there will be covenants on land to protect Māori interests and taonga. Care needs to be taken to ensure that the ability to use covenants or other agreements for this purpose is not curtailed. For the purposes of the discussion document, land agreements relating to Māori land will be out of scope, as will land agreements designed to protect Māori interests or taonga. Māori landholders are welcome to submit on any of the issues discussed in this document.

- **Specific cases for enforcement** - While we are asking for examples of land agreements which may impact competition, we are looking for patterns and trends, rather than recommending actions in relation to specific incidents. The Commerce Commission is responsible for compliance with, and enforcement of, the Commerce Act. The Commission's decision to take enforcement action under the Commerce Act is made on a case-by-case basis with reference to its Enforcement Response Guidelines.³

If you have any questions about the scope and issues raised, we encourage you to get in touch with us at: competition.policy@mbie.govt.nz

³ Commerce Commission "Enforcement Response Guidelines" (October 2013), available at: [Enforcement-Response-Guidelines-October-2013.pdf \(comcom.govt.nz\)](https://www.comcom.govt.nz/enforcement-response-guidelines-october-2013.pdf)

Covenants and other land agreements may limit competition

Competition exists when businesses compete with one another to provide goods and services for consumers. Common ways to compete are by offering lower prices, or better quality products, both of which are good for consumers⁴. In certain circumstances, land agreements can be used in a way that makes it harder for new business to enter a market, or for an existing business to expand. Where this happens, consumers will have fewer options to choose from and existing businesses who hold these restrictions can take advantage of market power by raising prices (or keeping prices high) and/ or lowering quality.

HAVING MULTIPLE BUSINESSES IN A MARKET ENCOURAGES BUSINESSES TO COMPETE WITH EACH OTHER TO OFFER GOOD PRICES AND PRODUCTS

When customers can choose between different providers, they benefit, and so does the economy as a whole. Their ability to choose forces firms to compete with one another, and the simplest way for a company to compete for customers is to offer a better price than its competitor. Businesses may also be encouraged improve the quality of goods and services they sell or offer a greater range.

Where it is difficult for new businesses to enter a market, or for existing businesses to expand, a market may be concentrated (dominated by a few businesses). If this happens and competition is reduced, one business may be able to maintain or increase its market share, and there is less incentive for that business to offer lower prices.

There are various factors that can prevent or impede newcomers into a market, and so limit competition. If these factors are a cost or an impediment that an entrant faces in a market that an incumbent (existing business) does not face, we call these factors 'barriers to entry'. A high entry barrier is likely to benefit the incumbent and reduce competition, whereas if entry barriers are low, we would expect to see new players increase supply and push prices down.



⁴ To read more about why competition is important for consumers, see this site developed by the European Union: https://competition-policy.ec.europa.eu/consumers/why-competition-policy-important-consumers_en

RESTRICTIONS ON LAND, SUCH AS COVENANTS, CAN REDUCE COMPETITION AND EXACERBATE BARRIERS TO ENTRY

We are interested in how land agreements can create barriers to entry or otherwise reduce competition. We use ‘land agreements’ as a general term to mean any legal agreements that a party (individual, business or organisation) can enter into, to either restrict the way land can be used, by whom, or require it to be used in a certain way.



Land covenants are one type of what we are referring to as land agreements. A covenant is ‘a promise’, and there are two types of covenants relevant to our work:

- **Restrictive land covenants** - a promise not to do something on the land being used or developed. Restrictive covenants usually happen when somebody selling land wishes to restrict what the buyer can do with it. However, sometimes the vendor will agree to restrict their own use of the land they are keeping.
- **Positive land covenants** - a promise to do something in relation to the land.

A land covenant can be made between the owners (or occupiers) of two or more land parcels. A land covenant can also be given ‘in gross’. A covenant in gross benefits a specific person or legal entity, rather than being attached to benefited land.

These types of land agreements can be used across the whole economy, and we want to hear from a range of businesses, both retail and non-retail (for example, manufacturing or processing), and urban and rural communities.

LAND AGREEMENTS CAN RESTRICT ACCESS TO SUITABLE SITES FOR NEW AND EXPANDING BUSINESSES

In each of its market studies, the Commission identified access to suitable sites as one of the potential barriers to entry and expansion of businesses⁵ ⁶. Finding a good site is important to a business – they need a property with suitable characteristics at as low a cost as possible. Not every site will suit every business, but there are features that will mean certain locations and sites are appealing to similar businesses: this could be high foot traffic, good accessibility, parking space, or proximity to complimentary services.



⁵ Market study into the retail grocery sector - Final report - 8 March 2022:

https://comcom.govt.nz/_data/assets/pdf_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf

⁶ Market study into the retail fuel sector - Final report – 5 December 2019:

https://comcom.govt.nz/_data/assets/pdf_file/0028/193915/Retail-fuel-market-study-Final-report-5-December-2019.PDF

For example, sites suitable for building supplies merchants may differ from those suitable for other retailers: street location and foot traffic may not be paramount considerations for a building supplies merchant who focuses on trade customers and/ or operates on a delivery-based model, and the land needs to be in a suitable location for customer traffic and/ or to facilitate delivery of materials to building sites. Service stations on the other hand would be likely to select sites based on high traffic volumes and accessibility.



If one business takes action to prevent existing or potential competitors establishing themselves on sites that have desirable characteristics, entry to a market is made more difficult.

The Commission identified land agreements that could have this effect in the retail fuel, groceries and residential building supplies sector. These included:

- Covenants on land which contained clauses or terms which prevent or restrict the site from being used for operating a similar business.
- Leases with landlords containing exclusivity clauses or terms which prevent or restrict the operation of businesses selling competing products or services nearby (we call these 'exclusive leases').

In the markets the Commission investigated, land agreements which appeared to be used in ways that restrict access to sites were found across the country. In the grocery sector, the Commission identified over 100 exclusivity covenants in leases and more than 90 restrictive covenants, and it saw around 60 store covenants and around 80 exclusive leases benefitting major building supply merchants.

THESE TYPES OF LAND AGREEMENTS CAN CREATE A DETERRENT EFFECT

We consider that their presence alone would likely dissuade a party from buying or leasing a site. For example, if someone who is looking to develop a retail store sees (for example, on the Record of Title) that their preferred site is subject to a land agreement that prevents their desired use of the site, they might decide early in the process not to pursue that site as an option.

The existence of the land agreement could be enough to divert the potential competitor to a different location (either another site nearby, which may be less desirable than the original, or even moving even further away and into a different geographic market area). This could impact competition and may mean that there are situations where older land agreements continue to have an anti-competitive effect by deterring new development. This deterrent effect can be occurring without the landowner or benefitting party even being aware.

Location matters...

For consumers – travel is costly, so consumers tend to favour businesses near their work or home.

For businesses – finding a site with the right characteristics is important, and, for many businesses, their strongest rivals are those geographically closest.

A land agreement might not have a significant impact if there are many equally attractive locations for businesses. For example, there may be many locations appropriate for a coffee shop, so a land agreement on a high street property may be unlikely to have an effect on competitors, as they could find other suitable properties.

In contrast, supermarkets tend to be built on large footprint sites in urban or peri-urban areas, so there are a limited number of sites that are viable for supermarket development. This means that anything that impacts the availability of these sites is more likely to have an impact on competition than a restriction which prevents an individual high street unit from being used as a particular type of business. This is because there are likely to be fewer alternative sites suitable for a superstore development, and more alternative sites suitable for a high street store.

Questions

1.

Have you ever been deterred or prevented from using a site or property for your business as a result of a land agreement? If so, what did it say and what was the nature of the land agreement?

2.

What features did you require for the site, e.g. access to foot traffic?

3.

What impact did this have on your business, e.g. did you find another suitable site?

4.

Is there a sector you consider is more likely to be impacted by difficulty accessing a suitable site?

What features of the sector makes you think this and how is this problematic?

LAND AGREEMENTS MAY PREVENT COMPETITORS ATTRACTING CUSTOMERS, OR RESTRICT CUSTOMER CHOICE

The Commission also identified a type of land agreement that it called ‘land development covenants’. These were covenants on land zoned for residential buildings, which contained clauses or terms giving a building supplies merchant preferential rights to provide key building supplies for any housing to be constructed on the land (i.e. a promise that the owner or occupier of the land would use one business to source their building supplies, or to give that business the option to provide the first and last quote).

These types of covenants and agreements could make it difficult for other businesses to attract customers. If a customer must give a particular business the opportunity to give them a first and last quote on something, this could have several effects:

- There is less incentive on that business to initially quote a competitive price.
- A customer may only get one quote, meaning they might not get the best price, and other businesses are denied the opportunity to compete.
- A customer may get several quotes, but the business with the option of providing the last quote has the opportunity to offer a better price at the end (as it is provided visibility of quotes provided by other merchants).
- There will be a smaller contestable market, potentially making it less attractive for new businesses.

While the Commission did not identify the use of these covenants to be widespread in the residential building supplies sector, it did note that covenants intended to influence customers’ choice of which merchant (or other retailer) they purchase from are of particular concern.

We consider there is potential for a similar type of agreement to be in place in other sectors – agreements that require all tenants of a particular retail development to use the same company for cleaning services, for example.

LAND AGREEMENTS MAY ALSO PUT OTHER RESTRICTIONS IN PLACE

We do not have evidence of these types of land agreements being used in a way that restricts competition, but we would like to hear from business where their ability to operate and compete effectively has been impacted by:

- reverse sensitivity covenants (sometimes called a no-complaints covenant), which prevent future owner or occupiers objecting to certain activities or effects (often noises or smells).
- obligations in a lease that require one party (either the tenant or landlord) to object to future developments.

Questions	
5.	<p>Has your ability to compete been impacted by the terms of a land agreement which required you not to do something? If so, please describe what the land agreements required, and the impact on your subsequent choices.</p> <p>Your ability to compete could include: starting a new business, expanding an existing business, offering lower prices, creating or supplying new products or services, or supplying a new customer group.</p>
6.	<p>Has your ability to compete been impacted by the terms of a land agreement which required you to do something? If so, please describe the requirement, and the impact on your subsequent choices.</p>
7.	<p>If you have been party to a land agreement, was this in place when you decided to occupy the site or property, or did you agree to it afterwards?</p>
8.	<p>In this document we mostly talk about the impact land agreements have as a result of restricting access to suitable sites.</p> <p>Are there other impacts land agreements can have on competing businesses, for example restricting your choices around goods or services by preventing you using a certain supplier?</p>

THE HARM TO COMPETITION WILL VARY DEPENDING ON THE FACTS OF A SITUATION

Understanding whether, or how, a land agreement harms competition is not always a straightforward assessment. For example, it would depend on:

- **The market for a product or service** – whether there are substitutes for the product or service offered by the business benefitting from the land agreement.
- **The geographic market** - where those substitutes are located (if there are lots of other options for consumers within a similar area, the impact on competition would likely be lessened, even if the substitutes were online – the important thing is that consumers have other options).
- **The market for land** – whether businesses can access alternative sites. It will depend on things like whether a business requires a site with unique or special qualities, or a particular location (for example, next to a transport network).

WE WANT TO UNDERSTAND WHAT MIGHT MAKE LAND AGREEMENTS MORE LIKELY TO HAVE AN ANTI-COMPETITIVE EFFECT

Each business and site are different, and assessments would be carried out on a case-by-case basis. The Commerce Commission published a factsheet on its approach to assessing whether land covenants may be in breach of the Commerce Act. This lists scenarios where a land covenant may be more likely to have a substantial effect on competition. We have expanded on this to develop a list of what we consider to be ‘risk factors’ associated with some types of agreements, and their use in certain sectors. These are grouped these into three categories:

- **Features of the agreement**
 - the land covenant has a broad scope and/ or long duration
 - the effect of the land agreement is to strengthen or reinforce barriers to entry or expansion by competitors
 - the land covenant limits landowners’ freedom to choose what they buy or sell, or who they do business with.
- **Features of a market**
 - existing competition in the market is already limited
 - there are only one or two dominant businesses operating in the sector.
- **Features of the business**
 - the business has specific and unique characteristics for desirable land (as there are likely to be fewer options)
 - the business is primarily focussed on bricks-and-mortar retail or supply.

Questions	
9.	Are there other features that you consider could be a ‘risk factor’, where a land agreement may be more likely to impact competition?

Chapter Two: What purposes do land agreements serve and are there alternatives?

Businesses use land agreements for a multitude of reasons – many unrelated to competition

We want to understand whether there are circumstances where parties may use land agreements for beneficial aims, but where those agreements may have the effect of restricting competition, and whether, and how, we should allow types of agreements to continue.

LAND AGREEMENTS CAN PROVIDE BUSINESSES WITH A DEGREE OF CERTAINTY AND CAN INCENTIVISE INVESTMENT

While we have concerns about the potential for land agreements to limit competition, we also appreciate that they can create incentives for development and investment and allow businesses to use land in ways they consider most appropriate. For example, where land agreements encourage new businesses to enter a market with a complementary product or service to what already exists, it can have benefits to competition and consumers. However, it could be that some land agreements which exist for long durations have potential for the opposite to result.

Land agreements put in place by businesses may have other wider benefits, particularly where they encourage development in sectors that support us as we decarbonise and increase productivity. Separately, land agreements can be put in place to protect features of the natural environment, such as biodiversity and open space, which we do not want this work to impact. This is discussed in more detail in [Chapter 5](#).

WE ARE SEEKING INFORMATION ON THE REASONS LAND AGREEMENTS ARE PUT IN PLACE

It is often difficult to understand what the original rationale for a land agreement was – particularly when they have been in place for many years, and land has since been sold numerous times – so we would like to hear from businesses that benefit from land agreements to understand the purposes they serve. We are interested in the differences between land agreements which directly impact competitors, for example those put in place with the intention of protecting a business' place in the market, and those which impact competitors as a secondary effect.

Understanding the purposes of land agreements will help us build a picture of their benefits for businesses and the wider economy and allow us to balance this against any potential harm.

We understand that common reasons for using land agreements include:

Recoup an initial investment:

The Commerce Commission’s investigation into the residential building supplies market found the primary purpose reported by businesses for using store covenants was to stop a competitor from establishing itself near a merchant’s planned or existing store, and this was justified by giving businesses confidence that they will make a return on the investment associated with developing a new store.

Protect ongoing operations:

A hypothetical example provided in a submission on the Commerce Amendment Bill in 2021 described a horticultural grower (Grower A) which has spare adjoining land and wishes to sell that land to another horticultural grower (Grower B), but wishes to place a covenant on the land to restrict Grower B from using that land in ways that would be detrimental to Grower A’s use of his/her retained land (for example, restricting activities that would shade the retained land, cause run-off on to the retained land, or even conservation or waterway protection covenants that place limits on the capacity of Grower B’s use of the purchased land).

We also understand that reverse sensitivity covenants (“no complaints”) are used in a range of sectors. For example, they can be used in a primary sector context, where existing operations have the potential to be affected by increasing rural subdivision nearby. In this situation, a covenant could state that the occupier of a new dwelling has no right-of-complaint about certain adverse effects from an existing adjacent activity, for example, a farm or orchard. These types of covenants support continued land use by existing landowners, especially where they cannot materially reduce their noise, dust or odours.

Avoid dispute:

Another example identified by the Commission was a fuel retailer moving to a new site and specifying that the previous site must not be used as a retail fuel site. One rationale retailers provided to the Commission for this type of covenant was that it can prevent potential disputes over who is liable for any subsequent clean-up of site contamination.

Questions	
10.	<p>We have identified three broad rationales for businesses using land agreements: to recoup an initial investment, to protect ongoing operations, or to protect them from future dispute.</p> <p>Do you agree with these categories?</p> <p>Are there any other rationales for using land agreements that we have not covered here?</p>

11.	Are you party to an agreement that benefits your business, either by requiring another party to do something, or by requiring them not to do something? If so, please provide details of the agreement (the type of agreement, the purpose of the agreement and its duration). If you have multiple land agreements, please provide the most recent example
12.	Did the agreement achieve this aim?
13.	Have you ever used a land agreement to protect your place in the market? If so, how?

ARE THERE CIRCUMSTANCES WHERE ALTERNATIVES COULD ACHIEVE THE SAME PURPOSE?

We want to better understand the reasons for land agreements as this will help us discern whether the benefits sought can be achieved by another way, with less impact on competition. We want to know:

- Are there other, less restrictive, means for the business to achieve its aim?
- Are there ways to lessen the impact of the restriction?

For example:

- Where an agreement is used to recoup an initial investment, would a time-limited agreement (for example, five-year duration) be sufficient to protect an initial investment?
- Could resource consent conditions be used to manage negative effects from neighbouring land use?

Returning to the examples above:

Recoup an initial investment: In this case, a long duration covenant seems inconsistent with the justification: a store covenant that endures after a business stops operating on the land or after it has had a reasonable period to recoup its investment seems unnecessary. One alternative would be for the covenant to be limited to a defined period of time. This would be similar to a patent, where a time-defined restriction which is related to the time it would take to recoup the cost would be better than a blanket restriction.

Protect ongoing operations: In this case, an alternative could have been to restrict the adverse effects only (for example, run-off in waterways) and not specify any particular use of the land. This would create incentives on Grower B to manage their effects without necessarily restricting their production of crops. There may also be other levers such as testing, monitoring and land remediation.

Avoid dispute: It may be possible for the landowner to achieve the same objective by having the land independently assessed following remediation and including an indemnity provision in the sale

contract with the purchaser of the land. Doing this would not preclude any future use of that land for a similar use by a competitor.

Questions	
14.	If you benefit from a land agreement, did you consider any alternative options to the land agreement? If so, what were these and why did you choose the land agreement?
15.	Are you aware of any competition impacts from the alternatives we suggest? If so, what are these?

Chapter Three: How are land agreements made, and what rules are there around competition?

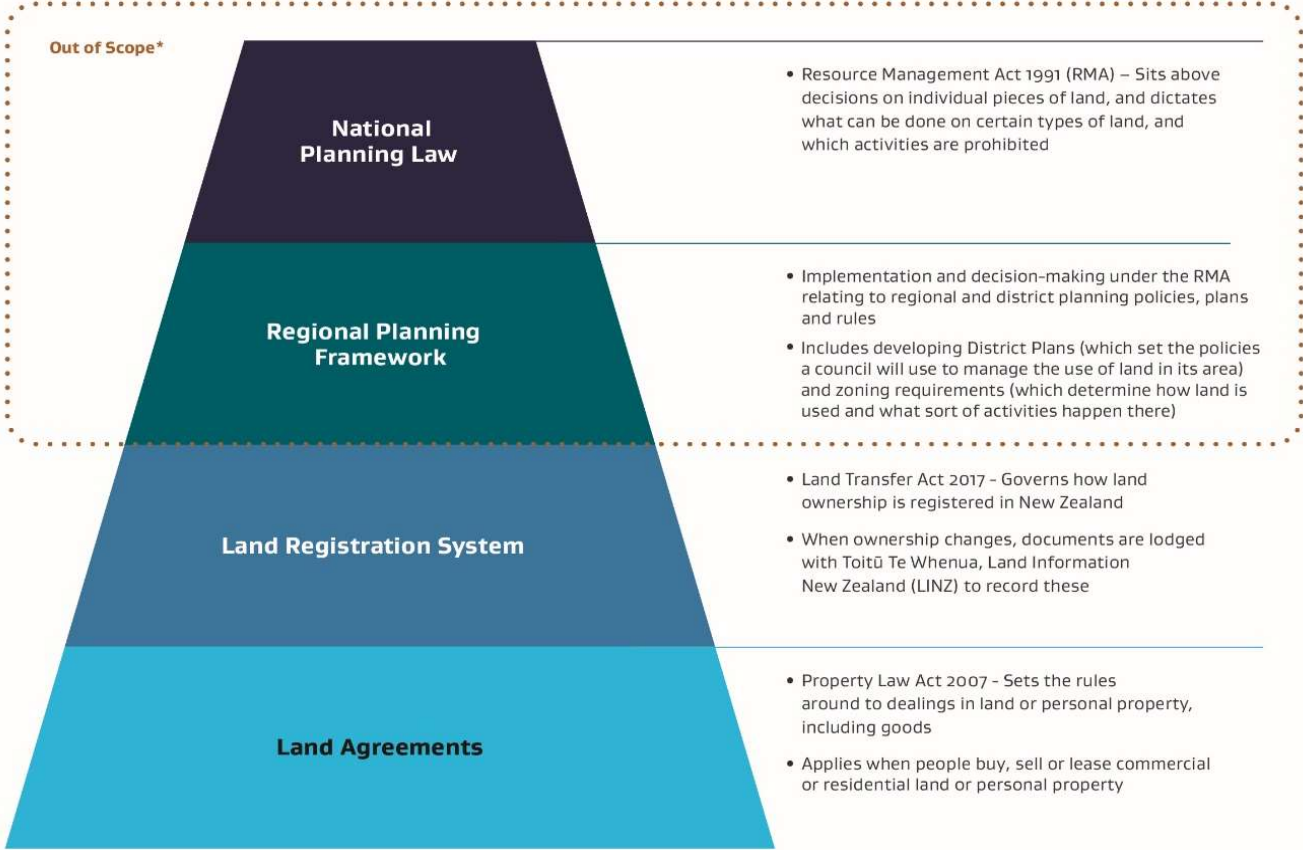
Land use and development is governed by a system of laws and rules

To understand how well our current system protects competition, we need to understand not only the Commerce Act 1986 and its laws specific to competition, but also the wider system of land use and development in New Zealand. This section looks at how land agreements are made and what procedures there are to protect competition.

WHEN SOMEONE DECIDES TO DEVELOP LAND, THEY MUST ENGAGE WITH A SYSTEM OF RULES THAT DEFINE HOW THAT LAND CAN BE USED

Some of these apply at a national level, others are defined by regional and district councils, and some are agreed between individual parties. Figure One below provides an overview of the interplay of the rules governing land development, and the different layers of how land use and development can be mandated or restricted.

Figure One: Rules governing land use and transfer



FOR THE PURPOSES OF THIS WORK, WE ARE INTERESTED IN LAND AGREEMENTS AND THE LAND REGISTRATION SYSTEM

There are three parts of the lifecycle of a land agreement that are relevant to this review:

1. The land agreement is created

The Property Law Act 2007 (Property Law Act) sets the rules around dealings in land or personal property, including goods. It applies when people buy, sell or lease commercial or residential land or personal property (for example, it details the law relating to the cancellation of agreements for sale and purchase).

While it is not a defined term in the Property Law Act, we use the term 'land agreement' in this document to include instruments such as covenants, easements and encumbrances where:

- one party is subject to restrictions or obligations they must comply with and
- another party benefits from the restrictions/obligations and can compel compliance with them.

2. The land agreement is recorded on the Land Titles Register

When a property or section is sold, legal documents are lodged with Toitū Te Whenua Land Information New Zealand (LINZ), to record any changes made to records, such as transfers of ownership, discharges of mortgages and new mortgages.

The 'Land Titles Register'⁷ holds a record of all these changes. The records of title held in the Land Titles Register prove the ownership of land and confirms the site size, and the rights and restrictions that apply to the land. The Registrar-General of Land (RGL, part of LINZ) has specific responsibility for this, including for developing standards, setting an assurance programme and administering claims⁸.

The accuracy of the Land Titles Register is an important part of our legal system: the title of a registered landowner is state guaranteed under the Land Transfer Act 2017 and is supported by a compensation regime under which damages may be paid by the Crown for loss arising from a registration error, guaranteed title search or title fraud.

We consider registration of land agreements is relevant to this review because:

- it provides a publicly searchable record of land agreements, which would otherwise be visible only to the parties involved
- it is the first point at which government has sight of private land agreements and,
- registration can determine whether a land agreement is enforceable against future owners or occupiers of the land. For example, once recorded on the Land Titles Register, a land covenant will 'run with the land', meaning that it will bind any third parties who subsequently acquire (or lease) that land.

3. The land agreement is enforced

There are generally two parties involved in a land agreement: one that must comply with the terms of the agreement, and one that receives the benefit of that compliance. The party subject to restrictions or obligations is required to comply and penalties may be imposed if they fail to do so.

The Property Law Act gives the latter the power to enforce certain types of agreements (i.e. compel the first party to comply), including covenants and easements. Enforcement takes place between parties, and through the court system if there is disagreement.

Registration of a land agreement on the Land Titles Register may not affect whether the agreement is enforceable. For example, if a covenant does not comply with the law, then a party will not be able to compel another to comply, regardless of whether it has been recorded on the Register.

Questions

⁷ Registration and land transfer services are delivered through an electronic workspace known as 'Landonline', but this document refers to the 'Land Titles Register' as a concept.

⁸ Supplementary Information on the responsibilities of LINZ's statutory officers: <https://www.beehive.govt.nz/sites/default/files/2017-12/Land%20Information%20-%20Statutory%20Officers.pdf>

16.

If you are party to a land agreement, did you record this agreement with LINZ?

What type of agreement is it?

A NOTE ON NATIONAL AND REGIONAL PLANNING FRAMEWORKS AND THEIR RELEVANCE TO THIS WORK:

Planning law sits above decisions on individual pieces of land and imposes requirements as to what can and cannot be done on certain types of land. While the national framework sets out the high-level direction, much of the implementation and decision-making relating to land use happens at the regional and district level. For example, territorial authorities (city and district councils, and unitary authorities⁹) create District Plans, and these set the policies a council will use to manage the use of land in its area and minimise any adverse effects – including things like rules on the location and height of buildings. They will also generally set zoning requirements, which determine how land is used and what sort of activities happen there.

Planning law, both national and regional, is not in scope for this document. However, we include it here as it is an important part of understanding the pressures on land and the impact on competition. Planning laws, such as zoning, can mean there is less land available, which then intensifies demand for suitable sites, and amplifies the impact that restrictions placed by individual, such as covenants, can have. Increased pressure on the land that is available for commercial use may also incentivise businesses to acquire this land and/ or to prevent others accessing it.

⁹ Unitary authorities such as Auckland Council or Marlborough District Council, have the functions of both a regional council and a territorial local authority; territorial local authorities are generally city and district councils (refer s5 Local Government Act 2002).

There are rules specific to competition in New Zealand

The Commerce Act 1986 (the Commerce Act) aims to promote competition in markets for the long-term benefit of consumers. It seeks to enable businesses to compete fairly on their merits and for the Commerce Commission, as the regulatory body that administers and enforces the Commerce Act, to take action against anti-competitive conduct. This section describes the parts of the Commerce Act that prohibit agreements that could lessen competition, and what we can do when these are broken.

GENERAL PROHIBITIONS ON AGREEMENTS WHICH LESSEN COMPETITION

Sections 27 and 28 of the Commerce Act prohibit covenants and contracts that harm competition. The main difference is that section 28 is specific to covenants, while section 27 applies to a ‘contract, arrangement or understanding’:

- **section 27** of the Act provides that no person may enter into or give effect to a contract, arrangement or understanding containing a provision that has the purpose, effect, or likely effect of substantially lessening competition in a market and
- **section 28** provides that no person may require, or give, or enforce, a covenant that has the purpose, effect, or likely effect of substantially lessening competition in a market.

These sections have the potential to cover a wider range of agreements, both:

- those with the purpose of substantially lessening competition, which would include an intention or aim to be anti-competitive and
- those with the effect or likely effect of substantially lessening competition, which could include those where the purpose is not to restrict competition, but which apply in such a way that it has an actual or potential restrictive effect, intended or not.

The consequence for contravention of these prohibitions is that the covenant would be unenforceable. Pecuniary penalties and other sanctions, such as damages, may also be imposed by the Court, and, on finding a contravention, the Court may vary the contract or covenant.

Grocery retailers are subject to more specific rules

In 2022, in response to the Commerce Commission’s retail grocery market study, the Commerce Act was amended to prohibit covenants which restrict the availability of suitable sites for grocery

retailers¹⁰. It also made existing covenants unenforceable. To do this, section 28A provides that a covenant, contract, agreement, exclusivity covenant or other provision in a lease that impedes, or is likely to have the effect of impeding, the development or use of land or a site as a grocery retail store (or relevant competitor) will be deemed as having the purpose or effect of substantially reducing competition in the relevant market. By deeming these to reduce competition, it means they now contravene section 27 or 28 of the Commerce Act, without the need to assess their impact on competition.

No covenant can contain a cartel provision

Changes that came into force in April 2023 prohibit covenants that contain a ‘cartel provision’. A cartel provision is one that fixes prices, restricts output, or allocates markets for goods or services that are supplied or acquired by the parties to the covenant in competition with each other. Section 30 of the Commerce Act now makes it clear that covenants or other agreements between competitors which are intended to limit competition are not lawful.

There are some limited exceptions to these provisions, the main one being to allow for collaborative activity that does not have the dominant purpose of lessening competition.

Businesses can apply for authorisation for land agreements

Under the Commerce Act, businesses can apply to the Commission for ‘authorisation’ of an agreement or covenant that might breach the provisions of the Commerce Act which prohibit anti-competitive conduct. Authorisation allows firms to undertake conduct that would otherwise breach the Commerce Act, and the Commission will grant authorisation when it is satisfied that the public benefit of the agreement outweighs the competitive harms¹¹.

New Zealand’s courts have defined a public benefit as: anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress.

Agreements and covenants prohibited under sections 27 and 28 of the Commerce Act are both included in the Commission’s authorisation regime. The Commission can authorise agreements subject to conditions and for a time period it considers appropriate, and it also has the power to vary and revoke authorisations in certain circumstances.

¹⁰Commerce (Grocery Sector Covenants) Amendment Bill,
<https://www.legislation.govt.nz/bill/government/2022/0122/latest/LMS694315.html>

¹¹Updated Authorisation guidelines, Commerce Commission, December 2020:
https://comcom.govt.nz/_data/assets/pdf_file/0012/91011/Authorisation-Guidelines-December-2020.pdf

Chapter Four: How well is the current system working?

We are seeking views on how well existing tools work to protect competition

Although there are already laws which aim to ensure that land agreements do not substantially lessen competition, we have seen through the Commerce Commission's reports that land agreements can risk having anti-competitive effects. This indicates that the laws could be working better, but we do not have a sense of how widespread the issue is, or the why the existing provisions are not providing sufficient deterrence. This section describes some of the challenges to the system working effectively to prevent anti-competitive land agreements.

We consider the challenges within the system fall into three main categories:

- there is minimal audit or control over the content of land agreements when they are created and recorded on the Land Titles Register
- information for monitoring purposes is difficult to obtain
- the Commerce Act provides enforcement powers, but compliance and enforcement are complex and costly.

There is minimal audit or control over the content of land agreements when they are created and recorded on the Land Titles Register



COVENANTS AND OTHER AGREEMENTS ARE PRIVATE CONTRACTS

The creation of land agreements, such as covenants and leases, generally takes place between private parties, and the government does not normally have a role in checking or approving the terms.

There are limited levers with which to ensure the agreements entered into comply with the Commerce Act at the time they are made. We are relying on parties having the relevant knowledge of the

importance of competition and how to comply. Often, a lawyer would be involved in drafting agreements, and may be aware of the relevant provisions in the Commerce Act, but there is no requirement to submit this to government to verify.

Furthermore, businesses and lawyers often use standard templates to create land agreements. These may contain clauses that restrict the uses to which tenants can put the premises, and/ or allow the landlord to withhold consent where the proposed new use is in substantial competition with the business of other occupiers of the same property. The use of templates is not mandatory, but we consider these formats could encourage the drafting of agreements that could have the effect of lessening competition.

Questions	
17.	Were you aware of the prohibitions around anti-competitive covenants and other agreements in the Commerce Act, prior to reading this document? If not, what would have been the best way for this to have been communicated to you?
18.	Have you used a template to create a land agreement? If so, what type of agreement was it? If so, did it contain restrictive clauses, and did you include these in your agreement?

THE LAND REGISTRATION SYSTEM IS NOT DESIGNED TO AUDIT COVENANTS OR OTHER AGREEMENTS

Not all agreements can be recorded in the Land Titles Register, and not all agreements are required to be. However, we believe that the majority of covenants are.

Registration is the first point at which government (through the Registrar-General of Land) becomes involved in a covenant or other land agreement. However, the role of the Registrar-General of Land is to ensure that we have an accurate record of land agreements and has no powers to vet new agreements to ensure they comply with the law, other than ensuring they meet minimum content requirements. This is consistent with covenants or other land agreements (for example, leases) being private contracts, which parties have the freedom to enter into as they so choose. It also has a practical component – there are many laws and regulations applicable to the use and development of land, and to check each of these every time there was an application to make changes would be an undertaking of such a scale that it would be impracticable.

Information for monitoring and detection purposes is difficult to obtain

COVENANTS AND OTHER AGREEMENTS ARE DIFFICULT TO MONITOR FOR COMPLIANCE

The Commerce Commission is responsible for compliance with the Commerce Act, and therefore has a role in detecting land agreements which could lessen competition. However, the Commission is not party to the registration process and would be unlikely to have the capacity to review every new agreement being recorded on the Land Titles Register, even if it was.



The Land Titles Register is accessible online and searches can be carried out to review what affects the land, but only by individual titles. There are search limitations, which require searches to be carried out by title rather than geographically. In order to actively monitor land agreements and whether they contravene the Commerce Act, the Commission would have to research individual land agreements and attempt to map out which land and businesses are affected.

Market studies can help inform compliance work, but for the wider economy, this sort of monitoring is a time-consuming task, and it is difficult to target efforts where they are most needed. Outside of market studies, the Commission largely relies on the public coming forward and informing them of land agreements that may breach the Commerce Act

The Commerce Act provides enforcement powers, but enforcement is complex and costly



COVENANTS ARE DIFFICULT TO REMOVE, EVEN IF A PARTY WISHES TO DO SO VOLUNTARILY

Where businesses become aware that a land agreement they are party to is, or could be, contravening prohibitions in the Commerce Act, they may wish to remove it voluntarily. For example, when the Commerce Commission published its market study report on the grocery sector¹², several major grocery retailers accepted the Commission's concerns about the covenants they had in place and sought to surrender the benefit they enjoy from them

There are two ways to remove covenants:

- A covenant can be removed if all affected landowners (and their mortgagees) agree to remove the covenant.
- A covenant can be removed by application to the High Court on one or more of the grounds outlined in section 317 of the Property Law Act 2007.

¹² Market study into the retail grocery sector - Final report, Commerce Commission, 8 March 2022: https://comcom.govt.nz/_data/assets/pdf_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf

However, there are practical difficulties facing a party wishing to do this. Records of longstanding covenants may not have been kept, and even where known, consent is needed from all (sometimes numerous) parties to the covenant in order to remove it. For example, where the benefitting land has been subdivided and many owners now have the benefit of the covenant and are required to consent to the covenant being removed. Failing agreement between the parties, it is possible to apply to the court to have a covenant changed or removed, but court proceedings can be costly and time-consuming.

Sometimes the party benefitting from a land agreement may issue an undertaking not to enforce it. However, such an undertaking can be reversed over time, and so is likely to provide little assurance to competitors wishing to use the site or operate on multiple sites. Further, unless the undertaking is registered on the title, a prospective purchaser would not know about the undertaking except by making further enquiries.

Under section 28A of the Commerce Act, certain grocery-related covenants are now treated as prohibited and unenforceable. For a transitional period of two years, designated grocery retailers can voluntarily remove or modify covenants they believe would fall within the meaning of section 28A, without needing to secure approval of other parties¹³.

We are interested to hear about your experiences or removing or varying covenants, and what might have made this easier.

Questions	
19.	Have you removed, or attempted to remove, a registered land agreement? If so, what type of agreement was this? Were you successful in doing so?

THE COMMERCE ACT PROVISIONS CAN BE COMPLEX AND COSTLY TO ENFORCE

Sections 27 and 28 of the Commerce Act prohibit a covenant, contract, arrangement or understanding containing a provision that has the purpose, effect, or likely effect of substantially lessening competition in a market.

However, to prove a contravention of existing prohibitions requires complex analysis of the purpose or effect of the covenant or agreement. Determining the actual or likely impact involves assessing the state of competition in the relevant market, the land agreement and how the situation may differ if the land agreement were not in place. It also often involves looking at more than one covenant that

¹³ [Commerce Act 1986 ss 28A, 28B and Land Transfer Act s116.](#)

benefits the same person or associated people¹⁴, as land covenants may, individually, not substantially lessen competition, but multiple land covenants, assessed together, may breach section 28. As discussed above, identifying and gathering information on multiple covenants is not always a simple task. This makes prohibition difficult and expensive to enforce, whether for the Commission or for a competitor seeking to establish stores on multiple sites encumbered by these covenants. We understand that as a result of the time and complexity involved in analysis, it is not feasible for the Commission to carry out enforcement on a large scale.

Due to limitation periods, any enforcement action by the Commission is dependent on how long a land agreement has been in place. The Commission can take action against a party that enters into an agreement that contravenes sections 27 or 28, or that enforces (or attempts to enforce) the terms of that agreement. In either case, the Commission cannot take enforcement action if the event occurred more than 10 years ago.

Many agreements are likely to have been created more than a decade ago, and often the existence of a land agreement alone will deter potential competitors from attempting to secure a site. Therefore, there may be cases where enforcement action by the Commission against a land agreement causing competitive harm is either not an option due to the Commission being time-barred from taking action against the entering into of the agreement, or challenging in the absence of a complaint, due to there being no enforcement (attempted or actual) by the benefitting party. However, there will still be the ability to remove or modify the land agreement, by the consent of the parties or through the courts.

This is not to say that no compliance activity has taken or will take place. Covenants are a focus of the Commerce Commission compliance work in 2023, and as a result of its market studies, the Commission has opened three investigations into historical conduct relating to covenants in the retail grocery sector (each investigation relating to multiple covenants). Independent of the market studies, the Commission is taking enforcement action relating to a restrictive covenant in the building supplies industry¹⁵. The Commission's decision to take enforcement action under the Commerce Act is made on a case-by-case basis with reference to its Enforcement Response Guidelines¹⁶.

¹⁴ This is defined in section 28(7) of the Commerce Act as two people where one person is obliged to comply with the directions, instructions, or wishes of the other person in relation to the covenant or proposed covenant (outside of the rules in the covenant itself), or the persons are interconnected bodies corporate:

<https://www.legislation.govt.nz/act/public/1986/0005/latest/DLM88264.html#DLM88264>

¹⁵ [Commerce Commission - Commission files proceedings in anti-competitive land covenant case \(comcom.govt.nz\)](#)

¹⁶ Commerce Commission "Enforcement Response Guidelines" (October 2013), available at: [Enforcement-Response-Guidelines-October-2013.pdf \(comcom.govt.nz\)](#)

Chapter Five: Are there changes we can make to improve the current system?

We are looking into options to better protect competition

We have developed a range of options that could help us better protect competition. We have divided these options into those designed to prevent and detect new agreements that may harm competition, and those to help us identify and remedy existing agreements. This section describes the options in more detail and seeks your views on the effectiveness and feasibility of each option.

STRUCTURE OF THIS CHAPTER

In this chapter you will find:

- Section 1: An overview of the options we have considered and how these to address the challenges described in the previous chapter.
- Section 2: Options designed to prevent and detect **new land agreements** that may harm competition.
- Section 3: Options to help us identify and remedy **existing land agreements**.
- Section 4: Risks around making changes relating to land agreements.
- Section 5: How we can create flexibility in the rules where needed.

OUR OBJECTIVE IS TO PROTECT AND PROMOTE COMPETITION, WITHOUT UNDULY DISINCENTIVISING THE BENEFICIAL USE OF LAND AGREEMENTS

This objective recognises the benefits that competition can bring and seeks to maximise them by ensuring land agreements do not limit or substantially lessen competition. It also recognises that land agreements can be used for a range of purposes, and we would not want to restrict their use where this is beneficial overall.

THE NEED FOR CHANGE, AND WHAT CHANGE MIGHT LOOK LIKE, DEPENDS ON THE NATURE OF THE PROBLEM

The first, and most important, question this document seeks to answer is whether there is a wider problem with the use of land agreements and their effects on competition, and, if so, what that looks like.

The answer to this will determine whether we consider it is necessary to make changes, and what these look like. Therefore, although this chapter discusses various options, that is not to say that any change has been decided on.

Section 1: Overview of the options





WE ARE SEEKING VIEWS ON THE OPTIONS AT A HIGH-LEVEL, AND MORE WORK WILL BE DONE TO REFINE THESE IF CHANGE IS NEEDED

We are seeking your views on where to focus efforts to improve practices around the use of land agreements.

Broadly, we can look at the regulatory tools in prevention, detection, compliance and enforcement to address any problems identified in the lifecycle of land agreements (from when new agreements are made, to when they are extinguished). Figure Two shows the range of options that could be considered.

We have not attempted to quantify the work involved in making changes and proceeding with any option would be subject to evidence that it would address a problem, and the benefits outweighing the costs. If we did decide to progress any options, further work would be carried out to refine the design.


Figure Two: Overview of the range of options considered in this document

	 Prevention	 Detection	 Compliance	 Enforcement
New Agreements	Increase awareness and understanding of existing rules <hr/> Amend agreement templates <hr/> Introduce checkpoints in the registration process	Introduce requirement to include a description of 'purpose' when land agreements are recorded on the Land Titles Register <hr/> Introduce a requirement for certain types of agreements to be reviewed after a period of time		
Existing Agreements		Introduce requirement for some businesses to disclose information on agreements	Introduce a sunset clause whereby agreements become unenforceable after a certain time <hr/> Make it easier to voluntarily remove a land agreement	Changes to sections 27 and 28 of the Commerce Act

Questions	
20.	<p>Do you consider interventions should target:</p> <ul style="list-style-type: none"> Existing agreements / Future agreements / Both / Neither
21.	<p>Do you consider the focus of interventions should be on (please select all that apply):</p> <ul style="list-style-type: none"> Prevention / Detection / Compliance / Enforcement
22.	<p>Do you consider the options outlined to prevent new anti-competitive agreements would achieve this aim:</p> <ul style="list-style-type: none"> Increase awareness and understanding of existing rules - Yes / No / Somewhat / Don't know Amend agreement templates - Yes / No / Somewhat / Don't know Introduce checkpoints in the registration process - Yes / No / Somewhat / Don't know
23.	<p>Do you consider the options outlined to detect new anti-competitive agreements would achieve this aim:</p> <ul style="list-style-type: none"> Introduce a requirement for new agreements to provide a description of their purpose when they are recorded on the Land Titles Register - Yes / No / Somewhat / Don't know Introduce a requirement for certain types of agreements to be reviewed after a period of time - Yes / No / Somewhat / Don't know
24.	<p>Do you consider the option outlined to detect existing anti-competitive agreements would achieve this aim:</p> <ul style="list-style-type: none"> Introduce a requirement for some businesses to disclose information on agreements - Yes / No / Somewhat / Don't know
25.	<p>Do you consider the options outlined to better enable businesses to voluntarily comply would achieve this aim:</p> <ul style="list-style-type: none"> Introduce a sunset clause whereby agreements become unenforceable after a certain time - Yes / No / Somewhat / Don't know Make it easier to voluntarily remove covenants - Yes / No / Somewhat / Don't know
26.	<p>Do you consider that changing sections 27 and 28 would be more effective at deterring or prohibiting anti-competitive land agreements? Yes / No / Somewhat / Don't know</p>

Section 2: Options to better prevent and detect new anti-competitive covenants and agreements

Preventing new anti-competitive agreements being created or registered could involve increasing awareness of the rules, or greater government oversight of the registration process.

OPTIONS TO <u>PREVENT NEW</u> ANTI-COMEPTIVIE LAND AGREEMENTS 		
Why?	Aim	Discussion
OPTION 1: INCREASE UNDERSTANDING OF EXISTING RULES		
It is possible that businesses are not aware of these rules or do not know how to comply.	<p>Reach a different group of businesses to those engaging with the Commerce Commission.</p> <p>Help empower businesses to ask the right questions of their lawyers when entering an agreement or recording it on the Land Titles Register.</p>	<ul style="list-style-type: none"> • The Commerce Commission has already published guidance on agreements that substantially lessen competition, and examples of where a business may be exempt¹⁷. It also published a Fact Sheet specifically on anti-competitive land covenants¹⁸. • We could look into developing guidance which could be published on the LINZ website. • May be complementary to other options.
OPTION 2: AMEND STANDARD LEASE AGREEMENTS		
Current format of templates could encourage the drafting of agreements that have the effect of substantially lessening competition.	Reduce the unnecessary use of restrictive clauses in lease agreements	<ul style="list-style-type: none"> • May help prevent agreements being made in the first place. • We could identify the most commonly used land agreement templates, and work with the organisations that provide these to amend them or provide guidance on potentially problematic clauses.

¹⁷ Agreements that substantially lessen competition, Commerce Commission, July 2018: https://comcom.govt.nz/_data/assets/pdf_file/0025/90961/Agreements-that-substantially-lesson-competition-Fact-sheet-July-2018.pdf

¹⁸ <https://comcom.govt.nz/business/avoiding-anti-competitive-behaviour/anti-competitive-land-covenants>

OPTION 3: INTRODUCE ADDITIONAL CHECK POINTS IN THE REGISTRATION PROCESS

<p>When LINZ receives an application to record a land agreement on the Land Titles Register, LINZ checks that it contains the required information, but does not accept or reject agreements based on their content.</p>	<p>Help to reduce the number or anti-competitive, or potentially anti-competitive, agreements that are recorded on the Land Titles Register.</p>	<ul style="list-style-type: none"> • Significant resourcing implications involved with changing the registration system. • Considerable change in the role land registration has played to date.
--	--	--

Questions

<p>27.</p>	<p>Do you have any other suggestions for changes we could make to help better prevent anti-competitive land agreements being created and/ or recorded on the Land Titles Register?</p>
-------------------	--

OPTIONS TO *DETECT NEW* ANTI-COMEPTIVIE LAND AGREEMENTS 


Why?	Aim	Discussion
<p>OPTION 4: INTRODUCE A REQUIREMENT FOR NEW AGREEMENTS TO INCLUDE A DESCRIPTION OF THEIR 'PURPOSE'</p>		
<p>Difficulties searching data means detecting land agreements is challenging. It also makes it hard to target monitoring efforts.</p>	<p>Enable the Commerce Commission to flag certain agreements to investigate further.</p>	<ul style="list-style-type: none"> • Limited additional work for parties which apply to record land agreements on the Land Titles register • Further work would be needed to determine whether this requirement would apply to all types of land agreements and all parties, or whether it should be targeted, and, if so, how.
<p>OPTION 5: INTRODUCE A REQUIREMENT FOR BUSINESSES TO REVIEW CERTAIN AGREEMENTS WITH THE COMMERCE COMMISSION AFTER A PERIOD OF TIME</p>		
<p>Many land covenants have long durations, that may run on beyond the time they are</p>	<p>Provide the Commission with better oversight of agreements and allowing changes over time.</p>	<ul style="list-style-type: none"> • Focusses on better dialogue with businesses. • Further work would be needed to determine criteria for which

needed. This can increase the impacts on competition.		businesses would be subject to this requirement, or which types of land agreement, and what the review period should be.
---	--	--

Questions	
28.	<p>If we were to introduce a requirement for certain agreements to be reviewed, which businesses, sectors or types of agreements do you consider it would be best directed towards?</p> <p>How long do you consider a review period should be?</p>
29.	Do you have any other suggestions for changes we could make to make monitoring and identifying new land agreements easier?

Section 3: Options to enable and enforce compliance with existing rules

Where prevention is not feasible, minimising the impact would be the next priority, followed by compliance or enforcement activities. We want to be able to incentivise and assist compliance and take proportionate action in the event of non-compliance. Enforcement, using the full force of the law, is generally reserved for serious non-compliance.

OPTIONS TO DETECT EXISTING ANTI-COMEPTIVIE LAND AGREEMENTS 		
Why?	Aim	Discussion
OPTION 6: REQUIREMENT FOR SOME BUSINESSES TO DISCLOSE INFORMATION ON CERTAIN AGREEMENTS		
We understand that a barrier to monitoring whether existing land agreements harm competition is the lack of information readily available about burdened and benefitted parties.	<p>Improve transparency of agreements.</p> <p>Remove one of the practical barriers to the Commission enforcing current prohibitions.</p> <p>Provide the Commission with a more effective means of information gathering than the status quo.</p> <p>Promote compliance with the Commerce Act.</p>	<ul style="list-style-type: none"> • Risk that the requirements could be very broad, creating unnecessary work or uncertainty for Commerce Commission and businesses. • To mitigate this, requirement could be targeted, for example, certain sectors, dominant businesses in a sector, and/ or any business with a particular type of agreement in place (for example, one which impedes the development of land or the use of a site for a competing business) • Complementary to other options.

Questions	
30.	Are there particular businesses or types of agreements that you consider the information disclosure requirement should apply to? If so, what are these?
31.	Do you have any other suggestions for changes we could make to make monitoring and identifying existing land agreements easier?

OPTIONS TO ENABLE VOLUNTARY COMPLIANCE




Why?	Aim	Discussion
OPTION 7: INTRODUCE A SUNSET PERIOD, AFTER WHICH SOME EXISTING AGREEMENTS WILL BE UNENFORCEABLE		
<p>Many land agreements have a long duration and are likely to run well past the date by which a business will be seeing a return on its initial investment.</p>	<p>Enable investment but reduce the impact land agreements have on competition once they are in place.</p>	<ul style="list-style-type: none"> • Which land agreements this would apply to, and how the sunset period would be determined, would be complex. • Could either be applied on a case-by-case basis, based on information supplied by businesses, which would be time-consuming to determine, or there could be one set limit for different categories of businesses, or levels of investment.
OPTION 8: MAKE IT EASIER TO REMOVE A LAND AGREEMENT		
<p>Seeking agreement of all benefitting parties to remove a land agreement, or removal through the Courts, can be a time-consuming and expensive processes.</p>	<p>Make voluntary removal of non-compliant agreements easier.</p> <p>Reduce the time and costs involved in removing a registered land agreement.</p>	<ul style="list-style-type: none"> • Would change an established process and may have implications for other land agreements. • We would need to limit the types of land agreements that this process applied to. • Potentially complex to establish suitably narrow parameters when applying changes across the whole economy, and if it applied too widely could result in significant changes to a settled system. • Would not address any land agreements that businesses chose to keep in place.

Questions

32.

If we were to introduce a sunset clause for certain types of agreement, do you have a view as to which businesses or sectors, or types of agreements, it should apply to?

33.	Do you consider that there should be a presumption of unenforceability for certain land agreements? If so, which agreements should these be?
34.	Do you consider there should be an automatic removal on application for certain land agreements, if no objection is filed? If so, which agreements should these be?
35.	Do you consider some land agreements should be automatically time bound? If so, which agreements should this apply to?
36.	Are there any other options that you consider would help promote voluntary compliance?

OPTION TO MAKE ENFORCEMENT SIMPLER AND MORE EFFECTIVE 		
Why?	Aim	Discussion
OPTION 9: CHANGES TO SECTIONS 27 AND 28 OF THE COMMERCE ACT		
If the prohibitions are exceedingly time-consuming or complex to enforce, this will lessen the effectiveness of enforcement efforts.	To make enforcement more practical and efficient.	<ul style="list-style-type: none"> • Could involve widening the prohibitions created for groceries to include other sectors or putting greater burden on businesses to demonstrate that a land agreement is not anti-competitive (as they would be best placed to have information to explain the rationale for the land agreement). • Legislative changes are time-consuming, and we would need to better understand whether there was a strong case for making them. • Changes would need to be carved out so that they do not affect agreements other than those relating to use of land.

Questions	
37.	Do you consider changes to sections 27 and 28 of the Commerce Act are needed?
38.	Do you have any other suggestions for how to make the enforcement of the prohibitions in sections 27 and 28 of the Commerce Act simpler and more effective?

Section 4: There are risks to making changes that affect land

In our discussion of these options, we have focussed on the individual advantages and disadvantages of each. In addition, we identified three overarching risks that we will need to keep in mind when contemplating any changes:

Land agreements serve many useful and necessary purposes, which we do not wish to curtail

We recognise that maximising competition is not the only consideration in the use of land agreements, and there may be cases where we would not want to make it easier to remove the protections they afford. For example, there are land agreements designed to protect natural values and access, including QEII Trust Open space covenants and private covenants that protect biodiversity, cultural heritage, retired land and special areas of interest. In considering any of the options above, careful attention will be given to whether and how options might apply in relation to such land agreements.

Land banking can also limit access to sites

There is a risk that any action to limit the use of covenants or similar arrangements may result in some businesses seeking to limit competitors' access to sites through other means, such as land banking. Land-banking is where a business acquires and holds land without specific plans to use that land for their operations within a set timeframe. The acquisition and holding of new sites as they become available may sometimes form part of a legitimate long-term strategy by a business to grow their operations. However, holding these sites can have anti-competitive effects, such as the potential to prevent or slow entry and expansion by competitors, which become more likely (and more damaging) the longer the land has been held without being utilised.

We have not assessed the likelihood that businesses would move to land banking as a strategy if we were to restrict the use of land agreements. However, we note that there may be other mechanisms to address land banking in future, with several local authorities taking increasing interest in land banking. In 2022 Christchurch City Council approved higher rates for vacant properties and in 2023 Wellington City Council announced plans to launch a review into rates, part of which would look at how to discourage land-banking¹⁹.

Any potential changes to existing land agreements need to consider the implications for property rights

If we were to progress changes that would impact existing land agreements, we would need to consider the implications for property rights. There is generally an expectation that government should not interfere with accrued rights and duties – that is, parties would expect that the terms of an agreement would not be changed once they had entered into it. There are some circumstances where changes may be made even if they impact existing arrangements, but these need to be given particular

¹⁹ [Wellington land-bankers could pay more as council begins major rating overhaul | Stuff.co.nz](#)

attention. This is something we are considering, even as we developed the initial, high-level options above.

Questions	
39.	Are there any other risks or potential unintended consequences you would like us to be aware of?

Section 5: Considering how to avoid ‘over-capturing’ land agreements

We want to ensure that any existing provisions in the Commerce Act that refer to covenants or land agreements and possible future changes (such as widening sections 27 and 28, as discussed above), do not unduly prevent businesses entering into arrangements and recording these on the Land Titles Register when they need to.

This section seeks views on whether the Commission’s authorisation process is sufficient to address these concerns. It also invites views on whether we should consider an exemption to relevant provisions for agreements or covenants with certain purposes, and the possible options to achieve such an exemption.

Taking forward any changes in this regard would be subject to there being evidence that the existing rules are creating issues for businesses.

Questions	
40.	Do you consider existing provisions in the Commerce Act have the potential to ‘over-capture’ land agreements, by prohibiting land agreements you consider to have necessary purpose? Please provide examples.

WE SEEK VIEWS ON WHETHER THE COMMISSION’S AUTHORISATION PROCESS IS SUFFICIENT TO ADDRESS THESE CONCERNS

Under the Commerce Act, businesses can apply to the Commission for ‘authorisation’ of an agreement or covenant that might breach the provisions of the Commerce Act which prohibit anti-competitive conduct. Authorisation allows firms to undertake conduct that would otherwise breach the Commerce Act, and the Commission will grant authorisation when it is satisfied that the public benefit of the agreement outweighs the competitive harms²⁰. New Zealand’s courts have defined a public benefit as: anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress.

Agreements and covenants prohibited under sections 27 and 28 of the Commerce Act are both included in the Commission’s authorisation regime.

²⁰ [Authorisation-Guidelines-December-2020.pdf \(comcom.govt.nz\)](#)

We consider the authorisation regime provides a robust framework, supported by necessary expertise, for decisions around whether the benefits of an anti-competitive agreement or restriction are outweighed by the competitive detriment. However, we understand that, given the range of factors needing to be considered in each case, assessments can be lengthy.

Questions	
41.	Do you consider the ability of the Commerce Commission to provide 'authorisation' sufficient to mitigate the risk that the Commerce Act could over-capture land agreements? If not, why not?

WE WOULD LIKE YOUR VIEWS ON WHETHER WE SHOULD INCLUDE AN EXEMPTION TO RELEVANT PROVISIONS TO PROTECT CERTAIN PURPOSES

There are some circumstances in which a party may want to enter into a land agreement that limits competition, but that they consider is necessary regardless.

If the authorisation process was found to be inappropriate to deal with these, we could look into creating an exception to certain provisions in the Commerce Act which would allow for anti-competitive covenants or agreements to be used where it is reasonably necessary for the protection of certain rationales.

One of the challenges is knowing when a 'rationale' or purpose for an agreement or covenant is one that should be protected, and how that assessment would differ from that already in existence as part of the authorisation regime.

We suggest two possible options:

1. **Create criteria** - Under this option, if a party could demonstrate that the covenant or agreement met certain criteria, then it could remain in place. This could include if the land agreement was required for a business reason, it contributed to New Zealand's collective financial, social, environmental or cultural wellbeing or was required in order to comply with other Government standards or requirements in legislation. In tandem, the business would have to provide evidence that the land agreement has a duration that is no longer than necessary to achieve this purpose and could not be achieved by other means.
2. **Create a test** - Instead of a list of criteria, we could create a test whereby the benefit of the land agreement would be assessed against its anti-competitive effect.

THERE ARE RISKS TO CREATING AN EXEMPTION

We consider that either option would be challenging to develop and implement, and has the potential to duplicate the authorisation process, as decision-making would still be required as to whether a land agreement met the criteria.

We also consider that providing for exemptions may leave the opportunity for parties to use these to undermine competition. It will be important that there are checks in place to limit the ability to use these for an anti-competitive purpose, and therefore we would like your views on the need for an exemption and feedback on how it could be constructed.

Questions	
42.	Do you have a view on how we can identify when land agreements are beneficial, and how this can be weighed up against their impact on competition?
43.	Do you have an example of when an exemption to sections 27, 28 or 30 could be used, and the authorisation process would not be appropriate?
44.	Do you consider criteria or a test would be most suited for this type of exemption?
45.	Do you have a view on what criteria would be appropriate for an exemption? Can you provide examples of agreements that you consider would meet these criteria?

Summary of questions in this document

Questions	
1.	Have you ever been deterred or prevented from using a site or property for your business as a result of a land agreement? If so, what did it say and what was the nature of the land agreement?
2.	What features did you require for the site e.g. access to foot traffic?
3.	What impact did this have on your business, e.g. did you find another suitable site?
4.	Is there a sector you consider is more likely to be impacted by difficulty accessing a suitable site? What features of the sector makes you think this and how is this problematic?
5.	Has your ability to compete been impacted by the terms of a land agreement which required you not to do something? If so, please describe what the land agreements required, and the impact on your subsequent choices. Your ability to compete could include: starting a new business, expanding an existing business, offering lower prices, creating or supplying new products or services, or supplying a new customer group.
6.	Has your ability to compete been impacted by the terms of a land agreement which required you to do something? If so, please describe the requirement, and the impact on your subsequent choices.
7.	If you have been party to a land agreement, was this in place when you decided to occupy the site or property, or did you agree to it afterwards?
8.	In this document we mostly talk about the impact land agreements have as a result of restricting access to suitable sites.

	Are there other impacts land agreements can have on competing businesses, for example restricting your choices around goods or services by preventing you using a certain supplier?
9.	Are there other features that you consider could be a 'risk factor', where a land agreement may be more likely to impact competition?
10.	<p>We have identified three broad rationales for businesses using land agreements: to recoup an initial investment, to protect ongoing operations, or to protect them from future dispute.</p> <p>Do you agree with these categories?</p> <p>Are there any other rationales for using land agreements that we have not covered here?</p>
11.	<p>Are you party to an agreement that benefits your business, either by requiring another party to do something, or by requiring them not to do something?</p> <p>If so, please provide details of the agreement (the type of agreement, the purpose of the agreement and its duration). If you have multiple land agreements, please provide the most recent example</p>
12.	Did the agreement achieve this aim?
13.	Have you ever used a land agreement to protect your place in the market? If so, how?
14.	If you benefit from a land agreement, did you consider any alternative options to the land agreement? If so, what were these and why did you choose the land agreement?
15.	Are you aware of any competition impacts from the alternatives we suggest? If so, what are these?
16.	<p>If you are party to a land agreement, did you record this agreement with LINZ?</p> <p>What type of agreement is it?</p>
17.	<p>Were you aware of the prohibitions around anti-competitive covenants and other agreements in the Commerce Act, prior to reading this document?</p> <p>If not, what would have been the best way for this to have been communicated to you?</p>

18.	<p>Have you used a template to create a land agreement?</p> <p>If so, what type of agreement was it?</p> <p>If so, did it contain restrictive clauses, and did you include these in your agreement?</p>
19.	<p>Have you removed, or attempted to remove, a registered land agreement? If so, what type of agreement was this?</p> <p>Were you successful in doing so?</p>
20.	<p>Do you consider interventions should target:</p> <ul style="list-style-type: none"> • Existing agreements / Future agreements / Both / Neither
21.	<p>Do you consider the focus of interventions should be on (please select all that apply):</p> <ul style="list-style-type: none"> • Prevention / Detection / Compliance / Enforcement
22.	<p>Do you consider the options outlined to prevent new anti-competitive agreements would achieve this aim:</p> <ul style="list-style-type: none"> • Increase awareness and understanding of existing rules - Yes / No / Somewhat / Don't know • Amend agreement templates - Yes / No / Somewhat / Don't know • Introduce checkpoints in the registration process - Yes / No / Somewhat / Don't know
23.	<p>Do you consider the options outlined to detect new anti-competitive agreements would achieve this aim:</p> <ul style="list-style-type: none"> • Introduce a requirement for new agreements to provide a description of their purpose when they are recorded on the Land Titles Register - Yes / No / Somewhat / Don't know • Introduce a requirement for certain types of agreements to be reviewed after a period of time - Yes / No / Somewhat / Don't know
24.	<p>Do consider the option outlined to detect existing anti-competitive agreements would achieve this aim:</p> <ul style="list-style-type: none"> • Introduce a requirement for some businesses to disclose information on agreements - Yes / No / Somewhat / Don't know

25.	<p>Do you consider the options outlined to better enable businesses to voluntarily comply would achieve this aim:</p> <ul style="list-style-type: none"> • Introduce a sunset clause whereby agreements become unenforceable after a certain time - Yes / No / Somewhat / Don't know • Make it easier for businesses to voluntarily remove covenants - Yes / No / Somewhat / Don't know
26.	<p>Do you consider that changing sections 27 and 28 would be more effective at deterring or prohibiting anti-competitive land agreements? - Yes / No / Somewhat / Don't know</p>
27.	<p>Do you have any other suggestions for changes we could make to help better prevent anti-competitive land agreements being created and/ or recorded on the Land Titles Register?</p>
28.	<p>If we were to introduce a requirement for certain agreements to be reviewed, which businesses, sectors or types of agreements do you consider it would be best directed towards?</p> <p>How long do you consider a review period should be?</p>
29.	<p>Do you have any other suggestions for changes we could make to make monitoring and identifying new land agreements easier?</p>
30.	<p>Are there particular businesses or types of agreements that you consider the information disclosure requirement should apply to? If so, what are these?</p>
31.	<p>Do you have any other suggestions for changes we could make to make monitoring and identifying existing land agreements easier?</p>
32.	<p>If we were to introduce a sunset clause for certain types of agreement, do you have a view as to which businesses or sectors, or types of agreements, it should apply to?</p>
33.	<p>Do you consider that there should be a presumption of unenforceability for certain land agreements? If so, which agreements should these be?</p>
34.	<p>Do you consider there should be an automatic removal on application for certain land agreements, if no objection is filed? If so, which agreements should these be?</p>

35.	Do you consider some land agreements should be automatically time bound? If so, which agreements should this apply to?
36.	Are there any other options that you consider would help promote voluntary compliance?
37.	Do you consider changes to sections 27 and 28 of the Commerce Act are needed?
38.	Do you have any other suggestions for how to make the enforcement of the prohibitions in sections 27 and 28 of the Commerce Act more practical and efficient?
39.	Are there any other risks or potential unintended consequences you would like us to be aware of?
40.	Do you consider existing provisions in the Commerce Act have the potential to ‘over-capture’ land agreements, by prohibiting land agreements you consider to have necessary purpose? Please provide examples.
41.	Do you consider the ability of the Commerce Commission to provide ‘authorisation’ sufficient to mitigate the risk that the Commerce Act could over-capture land agreements? If not, why not?
42.	Do you have a view on how we can identify when land agreements are beneficial, and how this can be weighed up against their impact on competition?
43.	Do you have an example of when an exemption to sections 27, 28 or 30 could be used, and the authorisation process would not be appropriate?
44.	Do you consider criteria or a test would be most suited for this type of exemption?
45.	Do you have a view on what criteria would be appropriate for an exemption? Can you provide examples of agreements that you consider would meet these criteria?



Te Kāwanatanga o Aotearoa
New Zealand Government

BRM 9846