



COVERSHEET

Minister	Hon Dr Duncan Webb	Portfolio	Commerce and Consumer Affairs
Title of Cabinet paper	Review of anti-competitive land agreements: release of discussion document	Date to be published	1 September 2023

List of documents that have been proactively released

Date	Title	Author
June 2023	Release of Discussion Document: Review of anti-competitive land agreements	Office of the Hon Dr Duncan Webb
3 July 2023	Release of Discussion Document: Review of anti-competitive land agreements CAB-23-MIN-0280 Minute	Cabinet Office

Information redacted

NO

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In Confidence

Office of the Minister of Commerce and Consumer Affairs

Cabinet Economic Development Committee

Release of discussion document: Review of anti-competitive land agreements

Proposal

- 1 This paper seeks your agreement to release the discussion document *Review of anti-competitive land agreements* for public consultation for six weeks in June 2023. The purpose of this consultation is to gather information about the issues associated with land agreements that may lessen competition and to inform any possible remedies.

Relation to government priorities

- 2 The discussion document progresses an action in response to the Commerce Commission's market study into residential building supplies. This study came out of Labour's 2020 Election Manifesto commitment to initiate two new market studies to ensure New Zealanders are paying a fair price for groceries and building supplies as the economy recovers from COVID-19.

Executive Summary

- 3 On 6 December 2022, the Commerce Commission (the Commission) published the final report on its market study into residential building supplies. In this report, the Commission recommended an economy-wide review into the use of land covenants and exclusive leases (including other contractual provisions with similar effect) to assess whether a wider multi-sector solution is needed to address their impacts on competition.
- 4 The use of these instruments has been identified by the Commission, in previous market studies, as having the potential to impede competition between merchants, which could be indicative of a more general problem in the economy.
- 5 The Government response to the market study, considered at Cabinet on 8 May 2023 and announced on 17 May [CAB-23-MIN-0160 refers], agreed with the Commission's recommendation to carry out this review. To initiate this review, I am seeking Cabinet's approval to release a discussion document, attached as Appendix One, for a six-week public consultation.
- 6 This document seeks views on the scope of the problem and asks questions designed to gather a quality evidence base. It also outlines high-level options for feedback.
- 7 The ultimate question is whether the settings around land agreements (a general term to mean any legal agreements that a party can enter into, to either restrict the way land can be used, by whom, or require it to be used in a certain way) are insufficiently robust to protect against the use of land agreements for anti-competitive purposes and, if so, what the most appropriate legislative or regulatory response might be.

- 8 Following consultation, submissions will be analysed and I will report back to Cabinet with further analysis of the problem and, if necessary, proposals to address this.

Background

- 9 On 6 December 2022, the Commerce Commission (the Commission) published the final report on its market study into residential building supplies. In this report, the Commission identified that land covenants, exclusive leases and other contractual provisions with similar effect appeared to be limiting competition, primarily by restricting new entry and expansion of businesses. This is the third market study that has identified these issues.
- 10 The Commission recommended an economy-wide review into the use of land covenants and exclusive leases (including other contractual provisions with similar effect) to assess whether a wider multi-sector solution is needed to address their impacts on competition.
- 11 The Government response to the market study, approved by Cabinet on 8 May 2023 [CAB-23-MIN-0160 refers], agreed to proceed with the review of covenants and other agreements.

A review of covenants and other land agreements is timely

- 12 Competition between businesses is a key driver of the prices, quality, and services offered to New Zealanders. It is important to building a productive economy, and in delivering good consumer outcomes in the long-term. This is more relevant than ever during a cost-of-living crisis.
- 13 We want to be sure that consumers are not being charged more than they should be. Competition between businesses is an important way of disciplining prices, in addition to improving quality, ranges, and services.
- 14 A competitive market requires there to be space for new entrants, or expansion by existing players. If there are costs and/ or impediments faced by an entrant into a market that an incumbent (existing business) does not face, we call these factors ‘barriers to entry’.
- 15 In three of its market studies, the Commission identified that the use of covenants and similar agreements may hinder entry and expansion, which indicates this is something Government should be looking into more closely.
- 16 In certain circumstances, land agreements can be used in a way that creates barriers to entry. 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. 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 lowering quality.

- 17 We took swift action to make legislative changes in relation to this issue in the groceries sector. However, having seen this issue arise in successive studies, we now want to take the opportunity to take a more considered, multi-sector approach.
- 18 While the Commission's studies mostly focussed on land covenants, they also identified the use of certain lease clauses as potentially problematic. Therefore, I am using the term 'land agreements' in the discussion document 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. It does not include any of the tools under the national or regional planning frameworks (for example, resource consents).

To initiate this review, I propose to release a discussion document

- 19 The information gathered by the Commission in a number of discrete areas suggested that land agreements in those areas negatively impacted competition. There is a high likelihood that this is an economy-wide problem. However, I consider more information is needed before we can decide whether there is a need to make any changes.
- 20 I also consider that seeking further input on the nature and extent of these arrangements, as well as possible responses to potential competition issues, will better inform any Government response.
- 21 Therefore, I would like to use public consultation to gather information on the scale and nature of the problem – for example, whether there are sectors particularly affected, – what possible changes might be, and as an opportunity to consider the potential unintended consequences of making those changes.
- 22 I am seeking Cabinet's agreement to progress with the publication of the discussion document *Review anti-competitive land agreements*, attached at Appendix One. It comprises five chapters:
- 22.1 **Chapter One:** Describes why competition is important, and how land agreements have the potential to impact this;
 - 22.2 **Chapter Two:** Seeks views on the rationale for land agreements, and what alternatives there may be to land agreements that restrict competition;
 - 22.3 **Chapter Three:** Describes how land agreements are formed and the rules specific to competition;
 - 22.4 **Chapter Four:** Explores how well our existing system works in preventing and enabling enforcement action against anti-competitive land agreements; and
 - 22.5 **Chapter Five:** Seeks views on potential options to better protect competition, including: options to prevent and detect future anti-competitive covenants and agreements; options to enable and enforce compliance with existing rules; and, how to create flexibility in the system where needed.

- 23 The more examples of covenants and other agreements we are able to consider, the more reliably we will be able to determine what measures will be effective in promoting competition without unduly interfering with legitimate purposes served by covenants in different sectors.
- 24 The key questions I am seeking public feedback on are outlined in more detail below.

Public consultation is designed to gather information to help define the nature and scale of the problem, and inform future actions

The discussion document seeks views as to what might make land agreements more likely to have an anti-competitive effect

- 25 The harm to competition from any land agreements depends on the facts of the situation, for example, the duration of a restriction and the availability of substitute products, or other suitable sites. The Commission is responsible for establishing whether any land agreement impacts competition (and breaches the Commerce Act 1986) and taking appropriate action. This requires a case-by-case analysis to understand whether there is an impact on competition and, if so, the extent of the impact on competition.
- 26 Rather than examine individual cases, the discussion document asks questions to try to establish whether there are patterns or trends that indicate potential harm to competition. This could be characteristics of businesses and their site requirements, or of the agreement itself.
- 27 It is important to understand this better because it will allow any potential options for change to be targeted to where they are most needed.
- 28 For example, the Commission identified that, because many supermarket sites are built on large footprint sites in urban or peri-urban areas, there are a limited number of sites that are viable for supermarket development. This means that anything that impacts the availability of 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 retail business, as there are likely to be fewer alternative sites suitable for a superstore development, and more alternative sites suitable for a high street store.

It asks what reasons there are for putting land agreements in place, and whether there are alternatives available

- 29 Businesses use land agreements for a multitude of reasons – many unrelated to competition – and it is often difficult to understand what the original rationale for a covenant was, particularly when they have been in place for many years, and land has since been sold numerous times.
- 30 We want to understand whether there are circumstances where there may be a legitimate purpose for land agreements that may have the effect of restricting competition, and whether and how these types of agreements should continue. We also need to be alert to the possibility that such ‘reasons’ are a thin veneer for an anti-competitive purpose.

- 31 From the Commission’s market studies, we understand that agreements such as covenants are used to:
- 31.1 **Recoup an initial investment** – When the Commission investigated the residential building supplies market, it found that businesses reported the primary purpose of 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.
 - 31.2 **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 for this type of covenant was that it can prevent potential disputes over who is liable for any subsequent clean-up of site contamination.
- 32 The discussion document asks whether the benefits sought can be achieved by another way, with less impact on competition.

The discussion document explores how effective our current land registration and competition laws are at preventing, and taking action against, anti-competitive covenants

- 33 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, through successive market studies, the Commission has identified covenants that are used to restrict the availability of land to competitors.
- 34 This indicates that our laws could be working better, but it is unclear why the existing provisions are not providing sufficient deterrence.
- 35 While the Commerce Act provides enforcement tools, it does not provide for any oversight of land agreements when they are created or registered. The law on what people can do with land and how changes must be recorded is contained in the Property Law Act 2007 and the Land Transfer Act 2017.
- 36 Our analysis of the interactions between these systems – the creation and registration of land agreement and compliance and enforcement tools – indicates there are three main barriers to the system working effectively to prevent anti-competitive covenants:
- 36.1 **Minimal audit control over the creation of new agreements** – Covenants and other agreements are private contracts, 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 the contracts are made. Registration is the first point at which Government (through the Registrar-General of Land) becomes involved in a covenant or other land agreement, however that system is designed to ensure that we have an accurate record of land registrations, rather than to vet the contents of agreements.

- 36.2 **Difficulty monitoring existing agreements** – The Commission is responsible for compliance with the Commerce Act, and therefore has a role in detecting land agreements which could lessen competition. However, gathering information to actively monitor agreements is a time-consuming task, and it is difficult to target efforts where they are most needed.
- 36.3 **Compliance and enforcement action is costly and complex** – There are practical difficulties facing a party wishing to remove or vary existing covenants on a voluntary basis, meaning this can be costly and time-consuming. Where enforcement action is taken by the Commission, it often involves looking at multiple covenants and agreements and in-depth market analysis. We understand that, as a result of the time and complexity involved in analysis, it is not feasible for the Commission to carry out large-scale enforcement activity.

The discussion document also tests potential options to better protect competition

- 37 I propose that the discussion document seeks views on possible options at the same time as exploring the nature of the problem. While options development would conventionally happen after an issues paper, I consider that, in this case, the market studies have provided enough information to enable the development of high-level options.
- 38 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.
- 39 The options proposed in the paper are designed to address the barriers described above, and are divided into:
- 39.1 options designed to prevent and detect new land agreements that may harm competition; and
- 39.2 options to help us identify and remedy existing land agreements.
- 40 The discussion document seeks views on the effectiveness and feasibility of each option.

Options to better prevent and detect future anti-competitive covenants and land agreements

- 41 These options focus on preventing future anti-competitive agreements and, where this is not possible, enabling earlier detection of such agreements. Focusing on future agreements would be simpler as it would not impact existing property rights.
- 42 To prevent future anti-competitive agreements, we could look to increase understanding of existing rules in sections 27 and 28 of the Commerce Act, to avoid businesses unintentionally entering into agreements that breach the rules, or work with organisations that provide templates for contracts and agreements to make sure they do not contain sections that encourage the use of exclusivity clauses. A more interventionist approach could be to look into creating a checkpoint when agreements

are registered with Land Information New Zealand, so that we have visibility and the opportunity to engage with parties before an agreement is registered. Such an approach would be a significant change from the current role of the Registrar-General of Land, which is to ensure there is an accurate record of land titles, with no vetting of the contents of agreements.

- 43 To detect new covenants and agreements which may harm competition, we could explore ways to help the Commission to identify certain agreements to investigate further and allow monitoring over time. This could either be through requiring new agreements to include a description of their ‘purpose’ when they are registered, or a requirement for certain types of businesses to review agreements with the Commission.

Options to enable and enforce compliance for existing land agreements

- 44 We understand that one of the significant barriers for the Commission at the moment is lack of visibility over existing agreements. To help the Commission detect existing anti-competitive covenants and agreements, we could consider introducing a requirement for some businesses to disclose information on certain agreements. This could be targeted towards certain sectors, dominant businesses in certain sectors, and /or any business with a particular type of agreement in place, depending on the outcomes of the consultation.
- 45 To facilitate voluntary compliance, we could look at options to make removal of covenants easier, or introduce a sunset period, after which some existing covenants will be unenforceable. This may provide businesses with a cost-effective way to remove covenants when they are no longer needed, or when they are identified as non-compliant.
- 46 Finally, the discussion document describes options for strengthening the prohibitions in sections 27 and 28 of the Commerce Act, for example by widening the prohibitions so that a covenant or agreement would be deemed to substantially lessen competition if it impeded the use of land that would compete with the activities of a party who has a demonstrable interest in the covenant.

The discussion document also considers how to ensure our laws do not ‘over-capture’ conduct

- 47 Concerns have been raised in the past as to whether the current rules in section 30 of the Commerce Act (which prohibit land covenants between competitors that contain cartel provisions, for example, by fixing prices or restricting output) risk over-capturing covenants that businesses put in place for what they consider to be legitimate business reasons. Specifically, section 30 could create difficulties for a party who acquires land that was previously held by a competitor, or an interest in that land. The discussion document asks for further evidence of when this situation may arise and whether other businesses share these concerns. It also asks whether there is a risk that any potential changes to sections 27 and 28 could result in similar concerns.
- 48 Under the Commerce Act, businesses can apply to the Commission for ‘authorisation’ of an anti-competitive agreement or a covenant that may substantially lessen competition. Authorisation allows firms to undertake conduct that would otherwise

breach the Commerce Act. The discussion document seeks views on whether the Commission's authorisation process is sufficient to address these concerns.

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

Following analysis of submissions, I will report back to Cabinet with next steps

- 50 As noted above, the evidence received through consultation will be used to determine whether changes are needed to better protect competition. Following submissions, I intend to return to Cabinet with further analysis of the problem and, if necessary, proposals to address this.
- 51 Once we have a clearer picture of the problem, options could be packaged together to address specific scenarios – either to target new land agreements, existing agreements, or a particular aim (such as focussing on detection).

Treaty of Waitangi considerations

- 52 In many cases there will be covenants on land to protect Māori interests and taonga and care needs to be taken to ensure that the ability to use covenants or other agreements for this purpose is not curtailed.
- 53 For the purposes of the discussion document, land agreements relating to Māori land will be out of scope, as will any land agreements designed to protect Māori interests or taonga.

Financial Implications

- 54 There are no financial implications from the release of the attached discussion document.

Legislative Implications

- 55 The release of the discussion document does not raise any legislative implications. Following consultation, if legislative change is needed to progress any changes, Cabinet approval will be sought.

Impact Analysis

Regulatory Impact Statement

- 56 As requested by the Treasury, the Ministry of Business, Innovation and Employment (MBIE) QA panel has reviewed the discussion document and determined that it contains sufficient impact analysis to support Cabinet's decision to release it. Therefore, a separate regulatory impact statement (RIS) is not required at this stage.

- 57 The MBIE panel found that the discussion document partially meets the RIA requirements. This is due to the format of the document. The first two parts seek information on the scope and scale of the problem. Without this, it is not yet possible to fully assess the costs and benefits of options for stakeholders. Following analysis of submissions, if any changes are proposed as part of this review, a full RIS will be completed at a later stage to inform Cabinet's final decisions.

Climate Implications of Policy Assessment

- 58 The Climate Implications of Policy Assessment (CIPA) team has been consulted and confirms that CIPA requirements do not apply to this proposal as it not expected to result in any significant, direct emissions impacts.

Population Implications

- 59 There are no population implications in regard to the proposals in this discussion document.

Human Rights

- 60 The discussion document is consistent with the New Zealand Bill of Rights Act 1990 (BORA) and the Human Rights Act 1993.
- 61 Some options proposed in the discussion document may engage BORA rights if pursued, for example, any requirement to supply information would engage freedom of expression. Following consultation, if legislative change is needed to progress any changes, an assessment of BORA implications would be carried out.

Consultation

- 62 The following agencies have been consulted: the Ministry for the Environment, Ministry of Housing and Urban Development, Ministry for Primary Industries, Ministry of Justice (MoJ), Te Arawhiti, Te Puni Kōkiri, the Treasury, Commerce Commission, and Land Information New Zealand.
- 63 MoJ noted that any changes that apply to existing covenants or land agreements would impact existing private property rights. People are entitled to the peaceful enjoyment of their property, and measures which may impact or remove existing property rights require good justification. The Legislation Guidelines 2021 state that compensation should generally be paid where the Government removes a person's property. There is also potential for changes to have retrospective effect. These matters will be considered carefully when developing any potential changes after analysing submissions, and MBIE officials would continue to consult with MoJ on this matter.

Communications

- 64 I propose to release the discussion document in June 2023 for a six-week public consultation.

- 65 MBIE will issue a media statement on its release, alongside publication on the MBIE website. Officials may also contact relevant stakeholders to inform them of the documents release.

Proactive Release

- 66 I intend to proactively release a copy of this this paper within 30 business days of decisions being confirmed by Cabinet in whole with appropriate redactions under the Official Information Act 1982.

Recommendations

The Minister of Commerce and Consumer Affairs recommends that the Committee:

- 1 **note** that the Commerce Commission's market study into the residential building supplies sector:
 - 1.1 **identified** that land covenants, exclusive leases and other contractual provisions with similar effect may impede competition between merchants, primarily by restricting new entry and expansion of businesses; and
 - 1.2 **recommended** an economy-wide review into the use of land covenants and exclusive leases (including other contractual provisions with similar effect) to assess whether a wider multi-sector solution is needed to address their impacts on competition;
- 2 **note** that the Government response to the Commerce Commission's market study, approved by Cabinet on 8 May 2023, recommended progressing this review;
- 3 **note** that a first step will be to gather more information on the use of land agreements, such as covenants, and their purpose, via a discussion document;
- 4 **note** that the discussion document also sets out high-level options for changes to better address anti-competitive land agreements;
- 5 **approve** the release of the discussion document *Review of anti-competitive land agreements*, subject to any minor or technical amendments, attached at Appendix One, for a six-week public consultation.

Authorised for lodgement

Hon Dr Duncan Webb

Minister of Commerce and Consumer Affairs

Appendix One: *Discussion document: Review of anti-competitive land agreements*