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Competition Policy Team
Consumer & Competition Branch
Ministry of Business, Innovation & Employment
via email: competition.policy@mbie.govt.nz

Submission:

Discussion Document – Review of Anti-Competitive Land Agreements

This submission is from Gull New Zealand Limited.

Submission To:

**Ministry of Business, Innovation and
Employment**

On:

Review of Anti-Competitive Land Agreements

By:

Gull New Zealand Limited



Business Overview

Gull New Zealand was launched in 1998, with the building of its state-of-the-art terminal in Mount Maunganui, on the North Island's central East Coast, Gull's tanks were relocated from Marsden Point by barge, a feat, some say, "impossible". The terminal, with a total storage capacity of 90 million litres, is significantly larger than the other Mount Maunganui installations.

Gull then made its first retail sale of petrol in 1999 and has grown its network to over 115 unmanned, manned and marina-branded sites around New Zealand, with Gull Norton Road appearing the North Island site in 1999, and Gull Maheno, the inaugural South Island, twenty years later in 2019. These days Gull sells over 500 million litres of fuel annually, representing an approximate 8% market share of New Zealand's liquid fuel volumes.

Gull's sister company Terminals New Zealand Limited owns and operates one of New Zealand's largest coastal bulk fuel import terminals in Mount Maunganui.

Gull welcomes the opportunity to submit on the discussion document and is pleased that finally anti-competitive restrictive covenants are in the spotlight. We have been excluded from many sites for over 15 years. But it is pleasing to now see that progress has been made and it is our view that many of these restrictive covenants are now unenforceable under the Commerce Act.

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?

Yes, multiple times via restrictive covenants being placed on the property title by oil-majors preventing any future fuel retailing being undertaken on the site (see attached examples).

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

The right to undertake our proposed activity of fuel retailing.

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

Unable to proceed with the proposed site. In some cases yes, but in many others no (see attached examples).

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?

Yes, petroleum retailing as the industry has consolidated over the last decade, with many sites no longer trading, these are sites Gull actively targets for new to industry sites. While the majors have rationalised, Gull as an independent low-cost operator is seeking growth and many of these former sites are ideal.

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.

Yes, as per comments above. Gull was unable to establish a competing business.

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. 48 [IN-CONFIDENCE] 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. 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. Do you agree with these categories? **YES**

Are there any other rationales for using land agreements that we have not covered here?

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?

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. If you are party to a land agreement, did you record this agreement with LINZ? What type of agreement is it?

17. Were you aware of the prohibitions around anti-competitive covenants and other agreements in the Commerce Act, prior to reading this document?
YES

If not, what would have been the best way for this to have been communicated to you? 49 [IN-CONFIDENCE]

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?

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?

Yes, only this year a restrictive covenant preventing future fuel retaining from Caltex, successfully removed at Dunsandel.

20. Do you consider interventions should target: • Existing agreements / Future agreements / Both / Neither

Neither. Your proposed interventions are 10 years too late for Gull and the Commerce Act now adequately covers any existing agreement e.g., anti-competitive restrictive covenants being unenforceable.

21. Do you consider the focus of interventions should be on (please select all that apply): • Prevention / Detection / Compliance / Enforcement

22. Do you consider the options outlined to prevent new anti-competitive agreements would achieve this aim: • 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. Do you consider the options outlined to detect new anti-competitive agreements would achieve this aim: • 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. Do consider the option outlined to detect existing anti-competitive agreements would achieve this aim: • Introduce a requirement for some businesses to disclose information on agreements - Yes / No / Somewhat / Don't know 50 [IN-CONFIDENCE]

25. Do you consider the options outlined to better enable businesses to voluntarily comply would achieve this aim: • 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

The process is easier enough as it stands. I don't think we should be rewarding companies' historic anti-competitive behaviours, with an "easier" process, notwithstanding they are likely to be unenforceable anyway.

26. 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

27. 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?

28. 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? How long do you consider a review period should be?

Waste of time and added bureaucracy and cost. It is clear that certain restrictive covenants are anti-competitive, whether they already exist or are produced going forward under the Commerce Act they are clearly illegal and unenforceable. So not worth the paper they are written on.

Personally, I don't care if oil-majors waste time and money on restrictive covenants (either applying them or removing them) that are nowadays unenforceable. However, perhaps as a deterrent the company who applied the anti-competitive restrictive covenant should be required to pay the reasonable legal costs of the competitor requesting its removal.

29. Do you have any other suggestions for changes we could make to make monitoring and identifying new land agreements easier?

Agree required to state purpose, but maybe ask question/disclaimer, Is there anything in this agreement that could be considered anti-competitive behaviour and refer them to Commerce Act sections

30. Are there particular businesses or types of agreements that you consider the information disclosure requirement should apply to? If so, what are these?

Retail Fuels industry – Restrictive covenants.

Leases.

31. Do you have any other suggestions for changes we could make to make monitoring and identifying existing land agreements easier?

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?

Isn't this already the case under the Commerce Act, regarding restrictive covenants on land?

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?

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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?

Possibly, but education/communication first.

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 'overcapture' 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?