

Commerce (Grocery Sector Covenants) Amendment Bill

Government Bill

As reported from the committee of the whole House

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Key to symbols used in reprinted bill

As reported from the committee of the whole House

text inserted

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Hon Dr David Clark

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The Parliament of New Zealand enacts as follows:**1 Title**

This Act is the Commerce (Grocery Sector Covenants) Amendment Act **2022**.

2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent. 5

3 Principal Act

This Act amends the Commerce Act 1986.

Part 1

Amendment to Part 2 of Act (which relates to restrictive trade practices) 10

4 New sections 28A to ~~28B-28C~~ inserted

After section 28, insert:

28A Certain grocery-related covenants are treated as prohibited and unenforceable 15

(1) A covenant to which this section applies must be treated, for the purpose of section 27 or 28 (as the case may be), as having the purpose, or as having or being likely to have the effect, of substantially lessening competition in the relevant market.

(2) This section applies to any of the following in which a designated grocery retailer has an interest: 20

(a) a restrictive or positive covenant that has the purpose, or has or is likely to have the effect, of impeding the development or use of land or a site as—

(i) a retail grocery store; or 25

(ii) any other retail store that is likely to compete with a retail grocery store operated by the designated grocery retailer:

(aa) a restrictive or positive covenant, and the provisions of any other contracts, arrangements, understandings, or covenants, if—

(i) the restrictive or positive covenant has 1 or more of the same parties as the contract, arrangement, understanding, or covenant; and 30

(ii) taken together, the restrictive or positive covenant and the provisions have the purpose, or have or are likely to have the effect, of impeding the development or use of land or a site as—

(A) a retail grocery store; or 35

(B)	any other retail store that is likely to compete with a retail grocery store operated by the designated grocery retailer:	
(b)	an exclusivity covenant or other provision in a lease that has the purpose, or has or is likely to have the effect, of impeding another person from operating—	5
(i)	a retail grocery store; or	
(ii)	any other retail store that is likely to compete with a retail grocery store operated by the designated grocery retailer:	
(c)	an exclusivity covenant or other provision in a lease, and the provisions of any other contracts, arrangements, understandings, or covenants, if—	10
(i)	the exclusivity covenant lease has 1 or more of the same parties as the contract, arrangement, understanding, or covenant; and	
(ii)	taken together, the exclusivity covenant or other provision in the lease and the provisions have the purpose, or have or are likely to have the effect, of impeding another person from operating—	15
(A)	a retail grocery store; or	
(B)	any other retail store that is likely to compete with a retail grocery store operated by the designated grocery retailer.	
(3)	However, this section does not apply to—	
(a)	a covenant that is reasonably necessary for environmental impact reasons connected with a retail fuel site within the meaning of the Fuel Industry Act 2020; or	20
(b)	a covenant in respect of which the Commission has granted an authorisation under section 58 or given a clearance under section 65A.	
(3A)	The functions of the Commission under this Act include monitoring covenants to which this section may apply.	25
(4)	In this section, unless the context otherwise requires,—	
	covenant means any covenant or other provision referred to in subsection (2)	
	designated grocery retailer means all of the following:	30
(a)	Foodstuffs North Island Limited, Foodstuffs South Island Limited, and Woolworths New Zealand Limited;	
(b)	a person that is designated as a designated grocery retailer by the Governor-General by Order in Council made under section 28B ;	
(c)	a person that is a successor to a person referred to in paragraph (a) ;	35
(d)	a person that is a franchisee, or a transacting shareholder (within the meaning of the Co-operative Companies Act 1996), of a person referred to in paragraph (a), (b), or (c) ;	

- (e) a person that is an interconnected body corporate or associated person (within the meaning of section 47) of a person referred to in **paragraph (a), (b), (c), or (d)**
- exclusivity covenant** includes, without limitation, a right of first refusal
- grocery product** means goods in any of the following product categories: 5
bread, dairy products, eggs or egg products, fruit, vegetables, meat, fish, rice, sugar, manufacturer-packaged food, and medicine other than prescription medicine
- retail grocery store** means a place at which a material part of the business being carried on is the business of supplying 1 or more categories of grocery products to consumers (for example, a butchery, fishmonger, bakery, or pharmacy). 10
- (5) A designated grocery retailer **has an interest** in a covenant—
- (a) if the person is or was a party to the covenant; or
- (b) if the person is or was a party to any contract, arrangement, or understanding that resulted in the giving of the covenant or to the inclusion of the covenant in a lease; or 15
- (c) if the person required, or is deemed by section 28(6) to have required, the giving of the covenant; or
- (d) if the person gives effect to, carries out, or enforces the terms or provisions of the covenant; or 20
- (e) if the person takes any action described in section 28(5).
- (6) **Subsection (1)** does not limit any other provision of this Part.
- (7) If this section applies, the reference in section 61(6) to any lessening in competition that would result, or would be likely to result, includes any lessening that this section provides must be treated as resulting. 25
- 28AA Process for voluntary removal of grocery-related covenant from register of land**
- (1) This section applies if—
- (a) a designated grocery retailer is satisfied that they have an interest in a covenant— 30
- (i) to which **section 28A** applies; and
- (ii) that is noted on the record of title created under section 12 of the Land Transfer Act 2017 for the burdened land, the benefited land, or both; and 35
- (b) as at the commencement date, the designated grocery retailer would, if not for Part 2, be entitled to enforce the covenant under section 301 or 307B of the Property Law Act 2007.
- (2) The designated grocery retailer may—

- (a) revoke the covenant; or
 - (b) modify the covenant so that **section 28A** no longer applies.
 - (3) The revocation or modification must be effected using the process for the notation of covenants set out in section 116 of the Land Transfer Act 2017.
 - (4) However, despite section 116(5) of the Land Transfer Act 2017, the relevant covenant instrument or covenant variation instrument may be executed by the designated grocery retailer acting alone. 5
 - (5) This section is repealed on the second anniversary of the commencement date.
 - (6) In this section,—
 - burdened land** or **benefited land**, in relation to a covenant, means the land that, if not for Part 2, would be burdened by or would benefit from (as the case may be) the covenant 10
 - commencement date** means the day after the date on which the Commerce (Grocery Sector Covenants) Amendment Act **2022** receives the Royal assent
 - designated grocery retailer** has the same meaning as in **section 28A** 15
 - has an interest** has the same meaning as in **section 28A**.
- 28B Process for designations for purpose of section 28A**
- (1) The Governor-General may, on the recommendation of the Minister, make an Order in Council designating a person as a designated grocery retailer for the purpose of **section 28A**. 20
 - (2) The Minister may recommend to the Governor-General that a person be designated as a designated grocery retailer only after receiving a recommendation from the Commission.
 - (3) The Commission may recommend to the Minister that a person be designated as a designated grocery retailer only— 25
 - (a) after consulting the person about the proposed designation (including the Commission’s reasons for proposing to recommend the designation); and
 - (b) if the Commission has taken into account the following criteria:
 - (i) whether the person carries on, or is likely to carry on, a business of supplying all or a majority of categories of grocery products to consumers; and 30
 - (ii) whether designation of the person as a designated grocery retailer would be likely to promote competitive neutrality (that is, a level playing field) or to otherwise promote competition, having regard to the extent to which the person supplies, or is likely to supply, groceries in competition with 1 or more designated grocery retailers. 35
 - (4) The Commission’s recommendation must advise the Minister whether the Commission considers that those criteria are met.

- (5) In deciding whether to make a recommendation, the Minister may do any of the following:
- (a) accept the Commission’s recommendation if the Minister is satisfied that those criteria are met:
 - (b) reject the Commission’s recommendation: 5
 - (c) request that the Commission reconsider any matter (such as an error, an oversight, or competing policy interests):
 - (d) make any other decision that the Minister considers is in the public interest.
- (6) The Commission must make the recommendation publicly available as soon as practicable after making it, including a statement of its reasons for making the recommendation. 10
- (7) An order made under this section is secondary legislation (*see* Part 3 of the Legislation Act 2019 for publication requirements).
- 28C Commission may require designated grocery retailer to supply information about contract, etc, to which section 28A may apply** 15
- (1) For the purpose of assessing compliance with the provisions listed in **subsection (2)**, the Commission may, by written notice, require a designated grocery retailer to—
- (a) supply to the Commission information relating to any contract, arrangement, understanding, or covenant (including any process relating to the negotiation or renegotiation of that contract, arrangement, understanding, or covenant)— 20
 - (i) to which **section 28A** may apply; or
 - (ii) that contains a provision to which **section 28A** may apply; and 25
 - (b) supply that information within the time and in the manner specified in the notice.
- (2) The provisions are—
- (a) sections 27, 28, **28A**, 36, and 47 of this Act; and
 - (b) sections 7, 8, 23, and 26B of the Fair Trading Act 1986. 30
- (3) Part 7 applies to a notice under **subsection (1)** as if it were a notice given under section 98.
- (4) This section does not limit any of the Commission’s other functions, duties, or powers under this Act or any other legislation.
- (5) In this section, **designated grocery retailer** has the same meaning as in **section 28A**. 35

Part 2
Transitional and savings provisions

5 Schedule 1AA amended

In Schedule 1AA,—

- (a) insert the Part set out in the **Schedule** of this Act as the last Part; and 5
- (b) make all necessary consequential amendments.

Schedule
New Part 4 inserted into Schedule 1AA

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Part 4	
Provisions relating to Commerce (Grocery Sector Covenants) Amendment Act 2022	5
13 Interpretation	
In this Part, unless the context otherwise requires,—	
Amendment Act means the Commerce (Grocery Sector Covenants) Amendment Act 2022	10
commencement date means the day after the date on which the Amendment Act receives the Royal assent	
covenant has the same meaning as in section 28A	
designation date , in relation to a person that becomes a designated grocery retailer after the commencement date, means the day on which that person becomes a designated grocery retailer (for example, if the person is designated as a designated grocery retailer under section 28B , the designation date is the day on which the Order in Council making the designation comes into force).	15
14 Amendment Act applies to existing covenants	
(1) Section 28A applies in relation to any action referred to in section 27 or 28 that is taken on or after the commencement date, whether the covenant was given before, on, or after the commencement date.	20
(2) If a person becomes a designated grocery retailer after the commencement date, section 28A applies in relation to any action referred to in section 27 or 28 that is taken on or after the person’s designation date, whether the covenant was given before, on, or after the designation date.	25
15 Transitional arrangements for voluntary removal of grocery-related covenant initiated before repeal of section 28AA	
(1) This clause applies to a revocation or modification that is initiated under section 28AA before the date specified in section 28AA(5) (the repeal date).	30
(2) Section 28AA , as it was immediately before the repeal date, continues to apply in relation to that revocation or modification on and after the repeal date.	

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Legislative history

19 May 2022	Introduction (Bill 122–1), first reading and referral to Economic Development, Science and Innovation Committee
16 June 2022	Reported from Economic Development, Science and Innovation Committee (Bill 122–2)
21 June 2022	Second reading