

Legislative statement: Commerce (Grocery Sector Covenants) Amendment Bill – Third Reading

Overview of the Bill

The Commerce (Grocery Sector Covenants) Amendment Bill (**the Bill**) amends the Commerce Act 1986 (**the Act**) to implement the Government's response to one of the Commerce Commission's recommendations relating to access to suitable sites for retail grocery stores in its final report for the Market Study into the Retail Grocery Sector.

The Bill as introduced would treat the kind of covenants identified by the Commerce Commission as having the purpose, effect, or likely effect of substantially lessening competition for the purposes of sections 27 or 28 of the Act. These are: restrictive or positive covenants over land, and exclusivity covenants or other provisions in leases in places such as malls or shopping centres. The effect of this is make those covenants or provisions unlawful and unenforceable. It also means that the general provisions of the Act, such as those dealing with penalties, other orders and authorisations, will apply.

Types of covenants and other provisions targeted by the Bill

New section 28A, as inserted by the Bill, now applies to a theoretically wider class of covenants and other provisions than the Bill as introduced. This can include a restrictive or positive covenant, an exclusivity covenant or other provision in a lease, or any provisions in a contract, arrangement or understanding with a party who is also party to the covenant or lease. The Bill would affect these covenants or provisions in any case where two conditions are met:

- a) a designated grocery retailer (as defined by the Bill) has an interest in the covenant or other provision(s), and
- b) the covenant, other provisions, or some combination of them, has/have the purpose, effect or likely effect of impeding land or a site from being used to operate a retail grocery store or any other retail store that is likely to operate in (less direct) competition with the designated grocery retailer.

The Bill makes it explicit that the concept of an 'exclusivity covenant' includes, without limitation, a right of first refusal. Examples of these lease terms secured by major grocery retailers were considered by the select committee. Whether the particular term has the purpose, effect or likely effect of impeding use of land by a competitor would still need to be judged on the facts.

New section 28A also defines a designated grocery retailer and the different ways in which that grocery retailer may have an interest in a covenant or provision to which the Bill applies. This is cast widely to ensure that a designated grocery retailer cannot evade the provision by acting through other related persons or using other arrangements to obtain the same result. Initially, the three major grocery retailers, Foodstuffs North Island, Foodstuffs

South Island, and Woolworths New Zealand, and their related parties will be designated grocery retailers. The new section 28B allows for other grocery retailers to be designated by Order in Council if they meet certain thresholds.

In the event a grocery retailer is newly designated by Order in Council, new section 28A may apply to any covenants in which they have an interest even if those covenants precede the designation.

Exceptions to the new provisions are set out in subsection 28A(3). They exclude:

- a) Covenants that are reasonably necessary for environmental impact reasons connected with retail fuel sites (petrol stations). Sites of petrol stations can be contaminated with fuel residues which would have to be removed, by the polluter. If there have been multiple fuel retailers on-site, this may mean liability is unclear. Covenants reasonably necessary to avoid these situations may nonetheless be prohibited elsewhere in Part 2 of the Act.
- b) Cases where the Commerce Commission has granted an authorisation under section 58 of the Act (i.e. the public benefits arising from the covenant exceed the detriments) or given a clearance under section 65A of the Act.

Other notable provisions

The Bill's provisions commence immediately and will apply to covenants that already in existence when it receives Royal assent, as well as to covenants given prospectively.

The Bill adds new section 28AA to make it easier for designated grocery retailers to voluntarily remove or modify existing covenants recorded on the Land Register that are made unenforceable by the Bill. It specifies when a designated grocery retailer may execute the change on their own, without getting the permission of other parties with an interest in the land. This section is a transitional provision only and will be repealed two years after the Bill receives the Royal assent.

Finally, the Bill now includes new section 28C, which empowers the Commerce Commission to require information from designated grocery retailers about any covenants, contracts, arrangements or understandings to which (or containing any provision to which) section 28A may apply. This amendment was made by supplementary order paper so that the Commerce Commission can proactively obtain this information in order to assess compliance with new section 28A, as well as other specified provisions in the Commerce Act and Fair Trading Act 1986. The reference to provisions in the Fair Trading Act, which the Commerce Commission is also responsible for enforcing, reflects concerns about the possibility of designated grocery retailers using the fact an exclusivity covenant has been defeated by the Bill to place improper pressure on their lessors to provide more favourable lease terms.