



Review of anti-competitive land agreements - Submission form

How to use this form

MBIE is seeking your views on the topics covered in the discussion document “review of anti-competitive land agreements”, which can be found here [[Review of anti-competitive land agreements | Ministry of Business, Innovation & Employment \(mbie.govt.nz\)](#)].

This document provides template for you to return your submission. All questions are optional, and we have included them to guide your submission. You may answer as many or as few as you wish, and you are also welcome to respond in another format, if that would be more convenient for you.

Please send your written submission (either using this form or another format) to:

- competition.policy@mbie.govt.nz, or
- Competition and Consumer Policy
Building, Resources and Markets
Ministry of Business, Innovation & Employment
PO Box 1473
Wellington 6140
New Zealand

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Name (first and last name)

Email

Is this an individual submission, or is it on behalf of a group or organisation?

Business name or organisation

Fletcher Building

Is there any information you would like to be withheld? Please state which question/information you would like to be withheld? If applicable, please also provide a separate version of this form without the sensitive information.

Not applicable

Chapter One: What is competition and how can land agreements lessen this?

QUESTION 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?

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

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

QUESTION 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?

Please type your submission below. Please indicate the question(s) to which you are responding.

Q1. No, to the best of our knowledge no Fletcher Building (FB) company has been deterred or prevented from using a site or property for its business because of a land agreement.

Q2. N/A.

Q3. N/A

Q4. We expect that the use of anti-competitive land agreements occurs more commonly across the retail and hospitality sectors where footfall and location are critical to the success of a business – especially in the context of a shopping mall or other retail precinct. Fletcher Building has seen their use on occasion through our business activities but as noted above they have not created any detriment to the relevant Fletcher Building business. We also note that it is commonplace in residential developments for developers to register covenants on the new titles to protect certain visual amenity values of the new subdivision they have established, to ensure the quality of future homes in the development and to ensure activities which are complimentary to residential developments, which gives peace of mind to new homeowners.

QUESTION 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.

QUESTION 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.

QUESTION 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?

QUESTION 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?

Please type your submission below. Please indicate the question(s) to which you are responding.

Q5. Not to the best of our knowledge.

Q6. N/A

Q7. N/A

Q8. We are aware in the building products industry that there are on occasion covenants registered on land titles which require a landowner to use a specific supplier or retailer of products should they develop their property. We have not been party to such covenants but have become aware of the practice. We assume that some other industries may also have similar arrangements.

QUESTION 9: Are there other features that you consider could be a 'risk factor', where a land agreement may be more likely to impact competition?

Please type your submission below. Please indicate the question(s) to which you are responding.

Q9. The more far reaching the land agreement the more there is a risk of it having an anticompetitive effect that breaches the Act. Each location and situation will have unique or specific circumstances as to the assessment of the relevant market but clearly if there is a limited supply of land which can be used for a specific activity and a large proportion is prevented from being used for a certain activity or which is required to commit to certain obligations with a specific business, the more this will restrict competition. Another risk factor may also be the disproportionate contractual position between the affected parties (ie, a large corporate entity contracting with a less sophisticated and less well-advised counter party).

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

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

QUESTION 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

QUESTION 12: Did the agreement achieve this aim?

QUESTION 13: Have you ever used a land agreement to protect your place in the market? If so, how?

Please type your submission below. Please indicate the question(s) to which you are responding.

Q.10 Yes, we do agree with these three broad categories. For Fletcher Building tenant entities, the primary reason is to recoup the initial investment in taking on and fitting out a new site which can be a costly exercise and also often means that as a tenant it is required to commit up front to a longer initial lease term. And secondly to give the business a better opportunity to properly establish itself in a new location. If sales fall due to a competing business that has opened in the immediate vicinity of the premises this can prevent the ability for the store to recoup the initial investment and challenge the viability of the ongoing operations in light of the lease and annual rental commitments it will be locked into for a fixed period of time.

We do not consider that the use of land agreements to avoid disputes is a common reason for why land agreements may be put in place. As noted above, the primary reason is so that the business entering into the land agreement and seeking protection under its terms can have a degree of certainty for a period of time whereby it can ensure that its business in a new location can be established to the extent needed to recover the significant expenditure on the investment. This can particularly be the case where a retailer is entering a new location for its goods and services and needs some initial security over its investment to make the decision to proceed.

Often landlords will offer up such terms to incoming tenants to give them that security and to justify certain lease and rental terms.

We don't, however, necessarily agree with categorising no complaints or no objection covenants in the same manner as land agreements which expressly prevent a certain parcel of land being used for a certain type of business or activity. These covenants are often used when a business is acquiring land for development purposes. When land is acquired for development, the developer is required to take a risk that it will be able to obtain consents for the relevant development work and activity. When land is acquired from a vendor who is retaining adjoining land or an interest in adjoining land or settlement will not occur for some time it is usual for developers to ask the vendor to agree to no objection and complaints covenants to give the developer (as purchaser) some protection from that vendor lodging submissions in objection to its consent applications which could delay or substantially complicate that consenting process. Most vendors are comfortable to agree to such covenants in the sale and purchase agreement and registered over their retained land as they will receive substantial benefit from the sale of the land and also the future development of the land they have sold. We do not view such agreements and covenants as being anticompetitive in nature as they do not prevent a parcel of land being used for a certain type of activity but rather provide that a party will not object (and will support) the land being used for certain activities.

Often the covenants will also extend to neighbouring owners not complaining about certain activities where they are undertaken in compliance with applicable planning rules and consent conditions. This is largely to ensure that all parties (including any new purchaser of a property) are aware of any environmental effects of the adjoining activities and these effects can be understood and reasonably managed.

Q11. Yes, refer to the above comments. Also, we have historically included restraint of trade terms in our lease documents if the landlord we are taking a lease from will have balance land that could be used by a competing business, and it is reasonable to take steps to prevent a competitor from occupying the adjacent property.

Q12. When Fletcher Building entered into some of these leases, where it was a brand-new development of the land (and the landlord had not yet secured tenants for the rest of the development) the restraint of trade clauses helped support the tenant's decision to take on the new site in this new location and give the business greater confidence as to its ability to recoup its initial investment and lease commitments in the new site. Please also see our comments at questions 40 and 42.

Q13. Only as described above via restraint of trade terms in a lease agreement to prevent the landlord's adjacent balance land (if there was any) from being leased by a competitor's business. We do not view no objection/no complaints covenants as being anti-competitive in nature for the reasons set out above.

QUESTION 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?

QUESTION 15: Are you aware of any competition impacts from the alternatives we suggest? If so, what are these?

Please type your submission below. Please indicate the question(s) to which you are responding.

Q14. No. We would only contemplate a restraint of trade clause where we are acquiring a lease from landlord that owns or has control of adjacent land.

We also note that seeking a restraint of trade clause was part of arm's length negotiations with a landlord. Usually, a landlord will have no intention of using their remaining land for a lease to a direct competitor of the tenant as that may compromise the security of the lease and the agreed rental from the tenant. The landlord ultimately wants to ensure that their tenants succeed so that they are able to meet their obligations under the lease and are more likely to exercise their lease renewals.

Q15. We consider that your suggestion for a time limited agreement is a reasonable option to consider and would manage the concern for a contracting party wanting to utilise such land agreements to enable them to recoup their initial investment and to ensure that it has a reasonable period of time to establish its business in a new location. Presumably the duration of the restrictions would be dependent on the circumstances. In terms of resource consent conditions, given these are limited to environmental effects, we are not convinced this is an alternative. In addition, as consents typically range for 15 to 35 years, these may constraint activities for an unreasonable period.

It is also important to distinguish between an anti-competitive provision in a land agreement that is contractual in nature only so only binding on the party under that agreement – as opposed to a covenant that is registered on the title and binding on successors in title. Often a land agreement will only prevent the landlord from allowing a competing business to take occupation on adjoining land owned by the same landlord while that landlord owns the adjoining property (and is not binding on successors). This means that as soon as the landlord disposes of the adjoining site, this covenant no longer has any effect.

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

QUESTION 16: If you are party to a land agreement, did you record this agreement with LINZ?

What type of agreement is it?

Please type your submission below. Please indicate the question(s) to which you are responding.

Q16. As noted above, the usual form of land agreement which a FB company may be party to was in the form of a restraint of trade clause contained in a lease of premises. First and foremost, this is a contractual term contained in the lease agreement. Only in limited circumstances has this agreement been carried through into an encumbrance or land covenant that is registered over the land it was preventing from being used for a competing business. In summary, only rarely have covenants been registered on the title through the LINZ registration process and any such covenant is for a limited period as it is only for so long as the lease was in place.

Chapter Four: How well is the current system working?

QUESTION 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?

QUESTION 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?

Please type your submission below. Please indicate the question(s) to which you are responding.

Q17. Yes, Fletcher Building has been aware of the Commerce Commission's concerns over anti-competitive covenants set out in land agreements, especially after the Building Products Market Study together with an education session that we had with the Commerce Commission on this specific issue.

Q18. Historically, when entering into new leases for particular Fletcher Building businesses, where a landlord has owned adjoining land and has agreed, we have used template restraint of trade clauses in the lease when a new lease is being negotiated. We also have standard no complaints covenants and encumbrances that we use in some of our businesses that undertake development activities but, as noted above, we do not consider these to be anticompetitive as they do not prevent land from being used for a certain business or activity; they simply prevent land owners from objecting to or complaining about consent applications and/or certain types of development/business activities which are otherwise compliant with applicable district or regional plan rules or resource consent conditions.

QUESTION 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?

Please type your submission below. Please indicate the question(s) to which you are responding.

Q19. Yes, we endeavour to remove historic land covenants that are redundant or no longer relevant to the business. This can be a difficult and sometimes costly process as all parties to the covenant must consent to the e-dealing. If the land in question has been subdivided over time, there could be multiple parties who need to be involved and sign consent documents for removal. We have been successful in removal, but it was a time-consuming and relatively costly process. We would welcome changes to the land registration rules to enable a party which solely benefits from a restrictive covenant over land to be able to unilaterally register a removal or discharge of that covenant and where that bears no detriment to the other parties to the covenant.

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

QUESTION 21: Do you consider the focus of interventions should be on (please select all that apply):

- Prevention / Detection / Compliance / Enforcement

QUESTION 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

QUESTION 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

QUESTION 24: Do you 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

QUESTION 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

QUESTION 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

Please type your submission below. Please indicate the question(s) to which you are responding.

Q20. We consider that interventions should target new (but not existing) agreements. In terms of existing agreements, it is incredibly difficult to search for registered land covenants at LINZ, given the limited nature of LINZ's search function. It is therefore difficult for parties to identify any existing agreements which need to be removed. Our view is that enforcement should only apply if a party is seeking to enforce a covenant against a third party (as opposed to it being registered and a party not having any knowledge of this historical agreement). If the land agreements are contained in existing leases, these will in any event expire on the expiration of the lease (so are already time bound).

Q21. We consider there should be an event approach to prevention, awareness, and compliance. The current enforcement measures are likely to be sufficient if these first 3 areas are reinforced and communicated well to the public.

Q22:

Increase awareness and understanding of existing rules – somewhat. Certainly, increasing awareness will likely reduce the number of new anti-competitive agreements being entered into but we don't believe that it would prevent them entirely, particularly for parties who do not obtain legal advice before entering into a land agreement.

Amend agreement templates – yes. We assume you mean here amending market template agreements such as those published by the ADLS for the sale and purchase of land and the deed of lease and the LINZ templates for registration of instruments? Certainly, if these templates were updated and included drafting notes to flag awareness of the applicable legal principles this would have a far-reaching effect.

Introduce checkpoints in the registration process – somewhat but only where the relevant anti-competitive land agreement is being registered in the form of a covenant on a title. It also imposes an additional task on LINZ to police Commerce Act compliance which is not currently their remit. Presumably this would require LINZ to essentially make a ruling on whether a particular clause included in an instrument being registered was sufficiently anticompetitive to breach the Act. This can be a challenging assessment to make in certain circumstances. As noted, many land agreements are contractual in nature only and are not registered on a title and having checkpoints in the registration process won't prevent these.

Q23:

Introduce a requirement for new agreements to provide a description of their purpose when they are recorded on the Land Titles Register – somewhat but again only where the relevant land agreement is being registered. Also, we could be dealing with a restraint of trade clause in a lease being registered and the purpose in that instance would be the grant of a lease and it just happens to include an anti-competitive covenant? Equally it may be a covenant that is being registered over land which covers a number of different matters, one of which is restricting the use of that land. How would that purpose be described?

We do question any increased obligations on LINZ in this space and whether it is reasonable for them to manage this. It could cause significant confusion, cost, and delay on registration of e-dealings.

Introduce a requirement for certain types of agreements to be reviewed after a period of time – somewhat and we assume that here you are referring only to those land agreements

which are registered on a title as a covenant. This would likely not assist with any unregistered anti-competitive land agreement terms. If there are industries that commonly utilise land agreements to manage competition and such covenants are registered, then yes this would assist with detection of some long running covenant restrictions and assist with checking in to see if they are still justified but it is only part of the picture.

Q24:

Introduce a requirement for some businesses to disclose information on agreements – yes, we consider that implementing such a requirement would result in the detection of certain anti-competitive land agreements (provided that a business did in fact hold such records). We do consider that there would need to be some considerable thought put into the nature and types of businesses/industries which the Commerce Commission applied this requirement to as the task could certainly create a considerable amount of work for both the Commission and businesses, and we question whether the benefit of such review would ultimately justify that level of work. Our view is that the better approach is to obtain feedback from the market on where they have been impacted by the terms of a land agreement.

Q25:

Introduce a sunset clause whereby agreements become unenforceable after a certain time – yes, we consider that this is a useful, efficient, and cost-effective way to manage compliance in respect of existing and new agreements. However, care would need to be taken as to how far reaching this automatic sunset provision would apply as we are conscious that there is a significant grey area as to whether a provision in a land agreement is anti-competitive or not (as this will depend on a number of factors such as the local area, location, the nature of the businesses, the duration of the covenant etc). It may be better to approach it (certainly in the first instance) on an industry-by-industry basis? A reasonable sunset period will likely be different depending on each set of circumstances.

Make it easier for businesses to voluntarily remove covenants – yes definitely. For unregistered agreements this can be achieved by way of a deed of variation with the other contracting party to remove the relevant clause albeit this still requires the other party to execute such deed. If there is an anti-competitive provision in a land agreement it would be helpful if the party that benefits from that provision was able to confirm in writing to the other party that such provision was no longer enforceable. And certainly, in respect of registered land agreements we agree that making it easier for a party to unilaterally remove or vary a covenant to remove the non-compliant terms would be very beneficial. It would save significant time and cost for all parties involved. We agree again, however, that clear parameters would need to be set as to what covenants this process could apply to and would also require LINZ to “police” the process to the extent of checking to ensure that the noncompliant provisions being removed were being removed by the party that has the sole benefit of that covenant.

Q26. Do you consider that changing sections 27 and/or 28 would be more effective at deterring or prohibiting anti-competitive land agreements?

Arguably somewhat but we are concerned that more legislative change may be unnecessary and could create further complexity. It may be a better approach to spend more time and effort on educating people as to the scope and application of these sections and the types of terms they need to be more mindful of and the implications of a breach. We are also not clear on what changes to these sections MBIE would propose as presumably the concept of such land agreements not substantially lessening competition in a market would need to remain and it is more of an education process to ensure that people can assess in their

circumstances whether their proposed terms might result in a substantial lessening of competition in a certain market.

QUESTION 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?

Please type your submission below. Please indicate the question(s) to which you are responding.

We wonder whether there may be some merit in some clear examples and guidance being made available on the MBIE and Commerce Commission websites as to what the Commerce Commission would consider to be a land agreement that would be in breach of either sections 27 or 28? Seeing some practical examples would likely help clarify the extent of what is meant by “substantial” in this context.

QUESTION 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?

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

Please type your submission below. Please indicate the question(s) to which you are responding.

Q28. Given that Fletcher Building has not been exposed to anti-competitive land agreements which have been detrimental to its businesses we are not in a position to comment on this question.

Q29. As noted above, we consider that there should be programme of education to increase awareness and a better understanding of the provisions and application of sections 27 and 28 given that these sections primarily operate on a self-assessment premise.

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

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

Please type your submission below. Please indicate the question(s) to which you are responding.

Q30. Given that Fletcher Building has not been exposed to anti-competitive land agreements which have been detrimental to its businesses we are not in a position to comment on this question.

Q31. We refer to our comments above.

QUESTION 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?

QUESTION 33: Do you consider that there should be a presumption of unenforceability for certain land agreements? If so, which agreements should these be?

QUESTION 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?

QUESTION 35: Do you consider some land agreements should be automatically time bound? If so, which agreements should this apply to?

QUESTION 36: Are there any other options that you consider would help promote voluntary compliance?

Please type your submission below. Please indicate the question(s) to which you are responding.

Q32. We are not able to comment on the types of businesses or sectors such a sunset date provision should apply to but agree that this would be a helpful way to manage anticompetitive terms in land agreements that are both registered and unregistered. Such a provision should primarily focus on those land agreements which prevent certain parcels of land from being used for certain businesses and/or activities which on the balance of probabilities have the effect of or likely to have the effect of substantially lessening competition in a market. Query which party should have the onus of providing that the test under the Act has or has not been met?

Q33. Yes, and this goes hand in hand with the sunset clause provision so that by the relevant sunset date the anti-competitive clause contained in the land agreement in question is no longer enforceable by the party that has the benefit of it.

Q34. We are not sure that automatic removal is needed if the legislation provides that the clause in question is no longer enforceable? Also, this would presumably only apply to registered covenants and would not apply to unregistered land agreements which in certain circumstances can be equally binding on parties especially where there has been no changes in ownership of the affected land. We consider that an ability for the party in breach of the Act to unilaterally remove the offending covenant off the title is a good step but subject to the comments on this set out above under Q25.

Q35. Yes, we do think that this is likely to be a helpful way to mitigate the risk of breaching the Act. For example, it may be reasonable that a period of 10 years post-investment is given to the party having the benefit of the relevant land agreement to recoup their investment and stabilise their new business operation in the relevant location. However, that time period will likely depend on the nature of the “market” in question, whether there is in fact a breach of sections 27 or 28 and the extent of the initial investment, and the likely time period needed to recoup that investment.

Again, it comes back to the parties having a real ability to self-assess from the outset whether the relevant anti-competitive land agreement is likely to breach the Act.

Q36. None other than those mentioned in this submission (specifically increasing awareness and statutory interpretation guidance and updating standard templates).

QUESTION 37: Do you consider changes to sections 27 and 28 of the Commerce Act are needed?

QUESTION 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?

Please type your submission below. Please indicate the question(s) to which you are responding.

Q37. No for the reasons stated above.

Q38. One further option could be for the Commerce Commission to have a cost-effective and speedy process for the public to ask an expert team on whether their existing or proposed new land agreement may be likely to breach sections 27 or 28. We understand that an authorisation process is already available but we are not clear on the extent of this and whether there is a way in which this authorisation team could be enhanced to help the public seek advice on whether their land agreement complies with the Act or not. We appreciate that this may not be straight forward as for the Commission to assess the circumstances of each land agreement they need to know more about the parties, the nature of their businesses, the extent and nature of the land agreement and the nature of the market in the location of the land in question. This legislation essentially works on the basis of a self-

assessment in the first instance and if there was able to be some simple guidance available from the Commission this may aid prevention, detection, compliance and also enforcement.

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

Please type your submission below. Please indicate the question(s) to which you are responding.

Q 39. The legislation is very general in its effect and there is the risk that even now sections 27 and 28 are limiting terms in contracts that are potentially not anti-competitive to the extent of being in breach of the Act but through caution are removed. This exposes a business owner to unnecessary risk exposure or the benefits arising from such land agreements are lost.

As noted in the Discussion Document there are frequently certain land agreements which have a positive effect by protecting certain businesses or activities (and encouraging their growth and expansion) including those that may have a public purpose or protect the environment etc. We do also agree that in some circumstances land banking (either by purchasing or by leasing wider areas to control the use of land) could arise. While we expect that this may be constrained due to the economic and commercial factors (i.e., increased cost) which arise from holding land indefinitely for no direct income, this will result in a much worse outcome than land agreements which are, more often than not, time bound.

There may on occasion be some economic and market benefit to a land agreement preventing competition for a limited period of time in some locations as a local community may ultimately benefit from a new business taking on a new site and establishing their business in a new location.

We don't consider that potential changes to existing land agreements would have a material effect on principles of property rights as any changes to a registered instrument should only be in respect of the specific anti-competitive clause and made by the party which has the sole and exclusive benefit to that provision. It should be able to be done by way of a variation instrument to remove that clause or replace it with one which is compliant.

Criteria for assessing importance: wider well being

QUESTION 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.

Please type your submission below. Please indicate the question(s) to which you are responding.

Q40. Yes, we do. For example, you might have a clause in a lease and in a corresponding covenant on a title which prevents a neighbouring site from being used for a competing business. It may be that on the face of that clause it breaches one or other of sections 27 and 28 but in fact upon further analysis in to the relevant "market" the ultimate effect of that clause is that it does not meet the threshold of substantially lessening competition in the market. However, the benefit of that clause is that it gives the new tenant or purchaser some peace of mind that by taking on a new lease or purchasing a new site and undertaking fit out and other works at the property where it is not at immediate risk of a competitor occupying the adjoining property. In some locations the anti-competitive provisions may support competition and provide other economic benefits to the community by encouraging a business to take the plunge of taking on a new site and supplying new customers in a new location.

'authorisation' sufficient to mitigate the risk that the Commerce Act could over-capture land agreements?:

If not, why not?

Please type your submission below. Please indicate the question(s) to which you are responding.

Q41. Yes. Please see our comments above at Q38 and the potential to expand and simplify this authorisation process for land agreements that may be affected by sections 27 or 28. Also, if a contracting party was in doubt about whether their land agreement was compliant or not it would force them to consider carefully as to how important that provision is for them and if, on balance, the time and cost that would be spent on getting an authorisation would outweigh the ultimate benefit of the relevant agreement then that might end up reducing the number of authorisations needed and in time reduce the extent of anticompetitive land agreements in the market.

QUESTION 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?

QUESTION 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?

QUESTION 44: Do you consider criteria, or a test would be most suited for this type of exemption?

QUESTION 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?

Please type your submission below. Please indicate the question(s) to which you are responding.

Q42. It will likely be very different for each sector or industry, but we consider that when considering anti-competitive terms in the context of land it comes down to whether there is other available land in the same location or market which would mean that there was no substantial lessening of competition. So, it may end up being that the Commerce Commission would have to rely heavily on the real estate industry to obtain advice as to the availability of suitably zoned land in certain locations. For example, what may be considered anticompetitive in Auckland is likely to be considered very differently in much smaller centres with a limited amount of, for example, commercial or industrial zoned land.

Q43. Arguably anything which served a public purpose of benefit to a community and/or the environment. Some careful thought would need to be put into the scope and extension of that “public benefit” outcome. Also, an exemption could be used to encourage a new business to set up in a new location as doing so may provide certain good and services to a community that needed them and to promote business activity and job opportunities, perhaps in smaller centres?

Q44. Yes, as with any exemption to a statutory rule, definition and clear criteria is critical for the public to consider whether they may be eligible for an exemption.

Q45. The authorisation process is arguably more appropriate where it is unclear whether the contractual terms in question would result in substantially lessening competition in a market - whereas an exemption is likely more suited to specific types of agreements or covenants that can be easily categorised. For example, those which provide a public purpose or other public benefit is a key one. Also, perhaps terms which prevent land being used for noisy or disruptive activities next to a school or childcare centre or activities which could disrupt a public service facility such as a radio transmission tower?