

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

Overview

The Commerce (Grocery Sector Covenants) Amendment Bill amends the Commerce Act 1986 to prohibit and make unenforceable certain restrictive covenants over land, and sites in places such as malls or shopping, in which designated grocery retailers (as defined in the Bill) have an interest.

The Bill's provisions will apply to covenants in existence at the time of entry into force, as well as covenants that come into existence after entry into force.

New Section 28A of the Commerce Act 1986

The Bill inserts a new sections 28A and 28B into the Commerce Act 1986.

New section 28A

Section 28A provides that the covenants to which section 28A applies must be treated, for the purposes of sections 27 or 28 of the Commerce Act as having the purpose, or as having or being likely to have the effect of, substantially lessening competition in the relevant market. The effect of this is to prohibit the making of such covenants and make any existing or future covenants to which section 28A applies unenforceable.

Section 28A applies to only those covenants in which a designated grocery retailer (see definition below) has an interest. The covenants are:

- a) A restrictive covenant over land or a site that has the purpose, or is likely to have the effect of restricting or preventing the use of the land or site as a grocery retail store; and
- b) An exclusivity covenant in a lease that has the purpose, or is likely to have the effect of restricting or preventing another person from operating a retail grocery store on the same site (such as a shopping centre or shopping mall).

Such covenants are often given over land that is close to the site of a supermarket operated by a designated grocery retailer. They can make it difficult or impossible for other grocery retailers to open stores in competition with the designated grocery retailer.

A designated grocery retailer has an interest in a covenant if:

- a) it is or was a party to the covenant,
- b) it is or was a party to any contract, arrangement, or understanding that led to the giving of the covenant or to its inclusion in a lease.
- c) it is a person or associated person referred to in sections 27 or 28 of the Commerce Act.

The reason for application of the prohibition to existing covenants is that many existing restrictive land covenants are not time limited or have a term of more than twenty years. Many active exclusivity covenants over sites involving grocery retailers have terms of more than twenty years when the right of renewal is taken into account. Extending the prohibition to existing covenants has the potential to provide an immediate improvement in competition in the retail grocery market. It will make it easier for grocery retailers looking to enter the market or for existing retailers looking to expand their operations.

Section 28 of the Commerce Act 1986

Section 28 of the Commerce Act 1986 prohibits covenants that have the purpose of, or is likely to have the effect of substantially lessening competition in a market. The effect of section 28A is that covenants that meet the criteria set out in section 28A fall within the prohibitions in section 28.

Definitions

Section 28A includes definitions of the following terms that are used in the Bill:

- grocery product
- designated grocery retailer
- retail grocery store

Grocery Product

This term is used in sections 28A and 28B (which deals with designations of major grocery retailers) and in the definition of “retail grocery store”. It is defined as:

“... goods in any of the following product categories: 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

This term is used in new s28A of the Commerce Act set out above. A retail grocery store is:

a place at which a material part of the business being carried on involves supplying 1 or more categories of grocery products to consumers (for example, this includes butcheries, fishmongers, bakeries, liquor stores, and pharmacies).

Designated grocery retailer

This term is used in new sections 28A and 28B of the Commerce Act. There are three parts to this definition. A designated grocery retailer is:

- a) *Foodstuffs North Island Ltd; Foodstuffs South Island Ltd; and Woolworths New Zealand Limited or a successor of one of these businesses.*

- b) *A person that is designated as a major grocery retailer by the Governor-General by Order-in-Council made on the recommendation of the Minister under section 28B;*
- c) *a person that is a franchisee, or a transacting shareholder of a person referred to in paragraphs (a), (b) or (c) above.*
- d) *A person that is an interconnected body corporate or associated person (within the meaning of section 47 of the Commerce Act) of a person referred to in paragraphs (a), (b) or (c) above.*

Exceptions to s28A

New section 28A will not apply to covenants relating to retail fuel sites (petrol stations) as defined in the Fuel Industry Act 2020 where the covenant was entered into for environmental reasons. 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.

New section 28A will also not apply to covenants where the Commerce Commission has granted an authorisation under section 58 of the Commerce Act, i.e. an authorisation has been granted given wider public benefits; or given a clearance under section 65A of the Commerce Act.

New section 28B of the Commerce Act 1986

New section 28B sets out the process to be followed to add further designated grocery retailers. The Minister may only recommend to the Governor-General that a person be designated if the Commerce Commission has made such a recommendation to the Minister.

The Commission may recommend to the Minister that a person be made a designated grocery retailer if the following criteria are satisfied:

- a) The Commission has consulted with the person, and has informed the person of the Commission's reasons for proposing to make the recommendation; and
- b) The Commission has taken into account the following criteria:
 - (i) Whether the person is, or is likely to be, in business supplying all or a majority of the categories of grocery products to consumers
 - (ii) designation of the person as a designated grocery retailer would promote competition and competitive neutrality ("a level playing field") having regard to the extent to which the person is in competition with other designated grocery retailers.

The Minister may accept the Commission's recommendation, or reject or reconsider it, or make any other decision if the Minister considers it to be in the public interest.

Commencement

The Bill will commence on the day after it receives Royal assent.