

The Commerce Act

# Anti-competitive land covenants



## What is a land covenant?

The word “covenant” is defined in section 2 of the Commerce Act as ‘a covenant annexed to or running with an estate or interest in land’. This includes:

- restrictive land covenants (which prevent or restrict certain conduct) and positive covenants (which require the burdened landowner to perform a positive act)
- land covenants against land (for example, registered on the Record of Title) or against another interest in land (for example, an exclusivity arrangement in a lease)
- a proposed land covenant.

## How can covenants harm competition?

In certain circumstances, land covenants can harm competition by raising barriers to entry or expansion in a particular market, making it harder for competitors to compete effectively and gain scale. For example, a land covenant could raise barriers to entry or expansion by:

- preventing land from being used to operate a certain type of business, or
- limiting the freedom of landowners to choose what or how they buy or sell, or who they do business with. For example, a covenant might grant preferential rights to a particular supplier in the supply of product to the landowner.

The party benefiting from the land covenant may enjoy reduced competition, enabling it to maintain or increase its market share, increase prices, reduce quality, service and innovation, and potentially worsen terms to the detriment of consumers.

Some types of land covenants (for example, restrictive land covenants) run with the land, meaning they bind any third parties who subsequently acquire or lease that land. It is not uncommon for these land covenants to last in perpetuity. This means that harm to competition can continue to occur even after the land is sold.

## What land covenants are unlawful?

This fact sheet focuses on our approach to Section 28 of the Commerce Act. Section 28 prohibits the **requiring, giving, carrying out, or enforcing of a covenant** that has the **purpose, effect, or likely effect of substantially lessening competition in a market**. Such covenants are also unenforceable.

However, the Commission notes that in some circumstances, land covenants may also be unlawful under section 27 (which relates to anti-competitive agreements) and section 30 (which relates to cartel conduct).

An agreement between competitors to restrict output or allocate markets through the imposition of land covenants may constitute a ‘cartel provision’ in breach of section 30 of the Commerce Act. For example, if competitors have agreed to allocate regions they each operate in, and give effect to this by lodging restrictive covenants on their sites preventing the others from ever operating on their sites, this may constitute a ‘cartel provision’.

[Further Guidance on sections 27 and 30 is available here.](#)

Finally, the Commission notes that under section 28A of the Commerce Act, certain grocery-related covenants that impede the development or use of land as a retail grocery store are prohibited and unenforceable regardless of whether they have the purpose, effect, or likely effect, of substantially lessening competition in a market.

# Our approach to assessing whether a covenant is in breach of the Commerce Act

Our approach to assessing whether a covenant has the purpose, effect, or likely effect of substantially lessening competition in a market under section 28 is the same as our approach to assessing these elements under section 27. This is set out in more detail in our [Agreements that substantially lessen competition Fact Sheet here](#).

To assist readers to better understand our approach to assessing land covenants specifically, we have provided some additional guidance below.

## The combined effect of land covenants can be assessed

Where there are multiple land covenants that benefit the same person or an associated person, section 3(6) of the Commerce Act provides that the land covenants can be assessed together to determine whether the effect or likely effect of them is, or is likely to be, to substantially lessen competition. Therefore, land covenants may individually not substantially lessen competition, but multiple land covenants, assessed together may breach section 28.



## Factors to consider when assessing the effect, or likely effect, of substantially lessening competition in a market

In assessing the impact of a land covenant on competition, the Commission would consider:

### 1. The scope of the relevant market

The scope of the relevant market provides a framework to help identify and assess the close competitive constraints suppliers of products or services that are affected by the land covenant face. It will not be necessary to define the scope of the relevant market in all cases. In assessing the scope of the relevant market, we typically consider:

- what products or services are seen as close substitutes for the products or services that are affected by the land covenant (the relevant product market)

- the geographic location of suppliers who are close substitutes for the supply of the products or services that are affected by the land covenant (the relevant geographic market).

[You can read more about how we define markets in our Mergers and Acquisitions Guidelines here.](#)

### 2. The effect or likely effect of the land covenant on competition in the relevant market

Only a land covenant that has the purpose, effect, or likely effect of substantially lessening competition is prohibited under section 28. A lessening of competition will be substantial if it is real, of substance, or more than nominal. A lessening of competition does not need to be felt across an entire market for that lessening to be substantial. A lessening of competition that adversely affects a significant section of the market may be enough to amount to a substantial lessening of competition.

To assess the effect or likely effect on competition, the Commission's approach is to compare the likely state of competition 'with' the relevant land covenant, with the likely state of competition 'without' the land covenant. This is sometimes referred to as the 'counterfactual' or 'with and without' test.

See our [Mergers and Acquisitions Guidelines here](#), which provides more information on how we assess effects on competition.

A substantial effect on competition is more likely to occur where:

- the land covenant has a broad scope and/or long duration. Ordinarily, the broader the scope of the land covenant, the greater the potential anti-competitive effect. Similarly, a covenant with a long duration would usually result in greater harm to competition than a land covenant with a short timeframe
- The effect of the land covenant is to strengthen or reinforce barriers to entry or expansion by competitors (for example, where zoning or regulatory restrictions mean there is limited availability of suitable land)
- Existing competition in the relevant market is already limited.

Whether a land covenant breaches section 28 will depend on the circumstances of the case and each case must be considered on its merits. However, below we identify some types of land covenants that may be at heightened risk of breaching section 28, and we describe some of the factors that we would expect to consider when assessing their effect or likely effect on competition.

**A. Land covenants that restrict the use of land for specified purpose(s), for example, to prevent a competitor of the original covenantor from operating on a site**

As noted above, covenants that restrict the use of land for specified purposes may increase barriers to entry and expansion for competitors, enabling the party benefiting from the covenant to enjoy reduced competition. Factors relevant to the effect of this type of land covenant on competition include:

- The availability of other land in the relevant geographic market that would be suitable for the use that is restricted by the land covenant
- The extent and nature of alternative businesses in the relevant geographic market that currently provide the goods or services that are restricted by the land covenant.

**Example**

Company A owns several petrol stations in a central city. It has recently consolidated its offering in the central city, selling two nearby sites it previously operated as service stations but, before doing so, lodged a restrictive land covenant preventing any future owners from operating a petrol station on the sites.

This land covenant may have an anti-competitive effect by preventing competing petrol stations from entering or expanding their presence in the central city.

Relevant factors in an assessment of this land covenant would likely be:

**The availability of suitable sites for competitors of Company A to establish themselves in the relevant geographic market.**

In assessing the availability of other suitable sites, the following matters may be considered:

- what sites are available for sale or able to be potentially purchased by competitors in the area
- characteristics of a site required for the operation of a competing business. For example, minimum site size, access requirements, and location. For example, a competing petrol station may only be viable if located on a busy road
- whether there are any legal requirements or restrictions that impact the suitability of sites for the specified purpose, such as regulatory requirements or planning restrictions. For example, on what sites does local government regulations permit the operation of a competing petrol station.

If there are many suitable sites for a competitor of Company A to establish themselves in the area, the land covenant is less likely to harm competition.

The extent to which competitors in the area have already been able to establish a presence in the central city on other sites. If several competing petrol stations are already present within the relevant area, the land covenant is less likely to harm competition.



**B. Land covenants that limit landowners' freedom to choose what they buy or sell, or who they do business with**

Land covenants that limit landowners' freedom to choose who they do business with may shield the party benefiting from the covenant from competition to the detriment of competing businesses. Factors typically considered in determining whether this type of land covenant harms competition include:

- The extent of the restriction contained in the covenant, including its duration and scope
- The extent and nature of alternative customers or suppliers of the goods or services that are not restricted by the land covenant
- The availability of suitable substitutes to the goods or services that are restricted by the land covenant.

**Example**

Company B sells building materials. As part of a deal with Company B, a residential property developer who owns a large development site agrees to lodge a land covenant on the site requiring any subsequent owners of sections to purchase timber from Company B for construction on their section.

The Commission would consider whether competing building suppliers might be harmed by the inability to access the subsequent owners of sections as customers. In assessing this, the Commission would likely consider:

**The availability of customers for a competitor of Company B to supply in the area.**

If there are a number of customers that are not constrained by land covenants in the relevant geographic market to whom competitors of Company B may supply timber for construction, a land covenant covering a single area is less likely to harm competition.

The Commission would consider the percentage of the market for timber that is likely to be foreclosed to competition. A key consideration is whether the extent of foreclosure would prevent competitors achieving efficient scale.

**The availability of other products within the product market that competitors may supply.** If the relevant product market encompasses a wide range of building products which subsequent owners of sections are not constrained from purchasing, competitors of Company B are less likely to be foreclosed, and the land covenant may be less likely to harm competition.



## Exceptions

There are several exceptions to section 28 outlined in sections 43 to 46 of the Commerce Act. For example, section 28 does not apply:

- to land covenants in connection with the sale of a business or shares in a body corporate insofar as the land covenant solely protects the purchaser in respect of the goodwill of the business, such as non-compete covenants
- if the only parties that are or would be bound by, or entitled to benefit from, the land covenant are or would be interconnected bodies corporate.

## Authorisations

Under the Commerce Act, the Commission can authorise a land covenant that lessens competition where it is satisfied that the benefits to the public outweigh the harm. [Read more about authorisations here.](#)

## Penalties

If the courts find an individual or body corporate has breached the Commerce Act, penalties may be heavy:

- for an individual, a maximum of \$500,000
- for a body corporate, the greater of:
  - \$10 million, or
  - three times the commercial gain, or, if this cannot be easily established, 10% of turnover.

Every separate breach of the Act (even if done by the same person or business) may incur a penalty.

This fact sheet provides guidance only. It is not intended to be definitive and should not be used in place of legal advice. You are responsible for staying up to date with legislative changes.

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