



COVERSHEET

Minister	Hon Dr Duncan Webb	Portfolio	Commerce and Consumer Affairs
Title of Cabinet paper	Grocery Industry Competition Bill: Approval for Introduction	Date to be published	1 June 2023

List of documents that have been proactively released

Date	Title	Author
November 2022	Grocery Industry Competition Bill: Approval for Introduction	Office of the Minister of Commerce and Consumer Affairs
10 November 2022	Grocery Industry Competition Bill: Approval for Introduction – Minute of Decision	Cabinet Office
2 November 2022	Post-implementation Review: Commerce (Grocery Sector Covenants) Amendment Bill	MBIE

Information redacted

YES / NO [select one]

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Some information has been withheld for the reasons of free and frank opinions, confidential advice to government and confidentiality.

Post-implementation Review: Commerce (Grocery Sector Covenants) Amendment Bill

Coversheet

Purpose of Document	
Decision sought:	N/A (post-implementation review of decisions already made)
Advising agencies:	Ministry of Business, Innovation and Employment (MBIE)
Proposing Ministers:	Minister of Commerce and Consumer Affairs
Date finalised:	2 November 2022
Problem Definition	
<p>The Commerce Commission’s final report for its market study into the retail grocery sector includes findings on the major grocery retailers’ practice of giving restrictive land covenants and exclusivity covenants in leases targeted at impeding land use by potential competitors. We consider that these covenants are likely to have the effect of impeding competition in the grocery sector through limiting the availability of suitable sites for use as retail grocery stores.</p>	
Executive Summary	
<p>The Commerce Act 1986 prohibits covenants and provisions in leases that substantially lessen competition in a market. In response to the Commerce Commission’s final report, the major grocery retailers voluntarily removed covenants over various sites, to the extent feasible, or otherwise sought to distance themselves from the covenants in question. However, these measures were slow and costly, and would not provide certainty or uniform outcomes on a sector-wide basis.</p> <p>We considered two options to address the competition problem, with option 1 being the status quo and option 2 being an amendment to the Commerce Act to specifically prohibit restrictive covenants and exclusivity covenants in leases that benefit a designated grocery retailer by impeding the use of the site for retail grocery stores. Option 2 was in line with the Commission recommendation, which we support. In our view, the second option would best achieve the policy objective of promoting competition in the retail grocery sector and the associated criteria for assessing options.</p> <p>We considered that this measure would be most effective if part of a package of measures, which are to be given effect by the Grocery Industry Competition Bill (presently before Cabinet). In addition, the prohibition must be monitored and enforced by a well-resourced regulator that has sufficient powers to detect and address attempts to circumvent the prohibition, such as through land banking. Given this, we expect the benefits for competition in the retail grocery sector arising from the prohibition in itself to</p>	

be modest. However, the prohibition does, as part of a package of reforms, contribute importantly to that competition by helping facilitate access to suitable sites.

The proposals were given effect in the Commerce (Grocery Sector Covenants) Amendment Act 2022, which came into force on 29 June 2022.

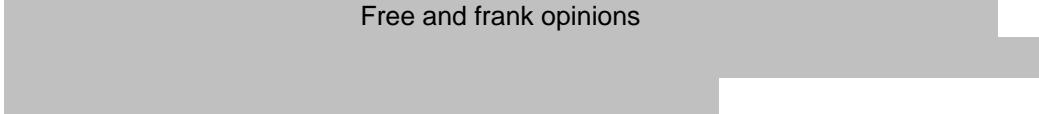
Submissions to the Commission's market study, and to the select committee considering the Bill, were generally supportive of improving site availability by addressing restrictive covenants and exclusivity covenants in leases.

Our post-implementation assessment of the proposals is still consistent with our original expectations, but we would be able to better understand the impact of the proposals over a longer evaluation period. Subsequent reviews and evidence suggests that the competition problems caused by restrictive covenants and exclusive terms in leases may be more widespread than originally understood. This may be impeding well-functioning land markets and competition in other sectors.

Limitations and Constraints on Analysis

The reason for this post-implementation review of the Commerce (Grocery Sector Covenants) Amendment Act 2022 is the considerable time constraints that precluded us from producing a regulatory impact statement to support decision-making by Cabinet to enable the Bill to be introduced to the House on 19 May 2022 (Budget night).

Assessing those amendments some four months after enactment, we face a few further limitations on the quality of our analysis:

- As with all the reforms developed as part of the Government's response to the Commerce Commission's market study into competition in the retail grocery sector, we are heavily dependent on the evidence and analysis conducted by the Commission. This includes the scope of options it examined and consulted stakeholders on.
- Details of covenants and lease arrangements obtained by the Commission in the course of its market study are commercially sensitive, and have not been shared with us.
-  Free and frank opinions
- There is limited information available about the actual impact of the amendments on the major grocery retailers, their competitors (or prospective competitors) and land owners. However, in addition to undertaking three investigations into historical use of covenants in the grocery sector under sections 27, 28 and 47 of the Commerce Act 1986, the Commission has developed a plan to assess compliance with these amendments using its monitoring function under new section 28D of the Commerce Act 1986 and is actively recruiting for staff to undertake this work.

- We would not necessarily expect any change in behaviour by other grocery retailers, consistent with the objective of improving competition, to be observable as a result of the amendments within four months of enactment, and in advance of wider reforms contributing to the same objective. Accordingly, we are planning further monitoring and evaluation activity in future, which will be aided by the Commission publishing annual reports on the state of competition in the grocery industry following the enactment of the upcoming Grocery Industry Competition Bill.

Responsible Manager(s) (completed by relevant manager)

Catherine Montague
 Manager, Competition Policy
 MBIE

Signed:.....
 Dated: 2 / 11 / 2022

Quality Assurance (completed by QA panel)

Reviewing Agency:	MBIE
Panel Assessment & Comment:	None provided

Section 1: Diagnosing the policy problem

What is the context behind the policy problem?

Government response to the Commerce Commission’s study into competition in the retail grocery sector

1. This paper is a post-implementation review of proposals agreed by Cabinet on 16 May 2022 and given effect in the Commerce (Grocery Sector Covenants) Amendment Act 2022 (**the Amendment Act**). The Amendment Act prohibits certain land covenants and exclusivity clauses in leases that impede the use of sites for grocery retail. It came into force on 29 June 2022. A post-implementation review is required as Cabinet decisions relating to the proposals given effect in that Amendment Act were not informed by a regulatory impact statement.¹ Accordingly, MBIE undertook to complete and present to Cabinet the analysis summarised in this paper.

¹ Cabinet Economic Development Committee paper, Commerce (Grocery Sector Covenants) Amendment Bill – Approval for Introduction, proactively released here: <https://www.mbie.govt.nz/dmsdocument/22641-commerce-grocery-sector-covenants-amendment-bill-approval-for-introduction-proactiverelase-pdf>

2. The context for the problem and proposals outlined in this post-implementation review is the Commerce Commission's (**the Commission**) market study into competition in New Zealand's retail grocery sector. The Commission's findings and recommendations for this market study were published in its final report on 8 March 2022.² The findings relevant to the government's response to the Commission's final report are summarised in a regulatory impact statement produced by MBIE: *Government Response to the Commerce Commission Grocery Sector Market Study – Policy decisions (the original RIS)*.³ Due to the fast-tracking of the reforms relating to grocery sector covenants, this original RIS was not prepared in time to include an analysis of options to inform the Cabinet's consideration of those proposals. However, it provides a full summary of the state of competition in the retail grocery sector.

The state of competition in the retail grocery sector

3. The following features of the retail grocery sector identified by the Commission are particularly notable for the purposes of this paper:
 - a. Groceries are an essential purchase for all New Zealanders and make up a significant proportion of household spending. In the year to September 2021, more than \$22 billion was spent at supermarkets and grocery stores.⁴
 - b. Competition in the retail grocery sector is not currently working well for New Zealand consumers.
 - c. The retail grocery sector is characterised by a duopoly of two major grocery retailers (Foodstuffs and Woolworths), who are each other's closest competitors, and a 'fringe' of smaller retailers. The strategies of the major grocery retailers – and their brand differentiation – are nationally co-ordinated, resulting in little competition on price dimensions except for promotional price competition, which is often driven (and funded) by suppliers.
 - d. The major grocery retailers have consistently been enjoying excessive profits, and the price of groceries in New Zealand is comparatively high internationally.
 - e. No large-scale retail grocer with an offering comparable to PAK'nSAVE, Countdown or New World has entered the sector in the last decade.⁵ In 2006, the

² Commerce Commission, *Final report – Market study into the retail grocery sector*, dated 8 March 2022, (Henceforth called **Final report**) available here: https://comcom.govt.nz/data/assets/pdf_file/0024/278403/Market-Study-into-the-retail-grocery-sector-Final-report-8-March-2022.pdf

³ MBIE, *Regulatory Impact Statement: Government response to the Commerce Commission Grocery Sector Market Study – Policy decisions*, 6 May 2022, available here: <https://www.mbie.govt.nz/dmsdocument/22638-regulatory-impact-statement-government-response-to-the-commerce-commission-grocery-sector-market-study-policy-decisions-proactiverelase-pdf>

⁴ Statistics NZ "Retail trade survey: September 2021 quarter" (23 November 2021) at Table 1, excludes GST, available at: <https://www.stats.govt.nz/assets/Uploads/Retail-trade-survey/Retail-trade-survey-September-2021-quarter/Download-data/retail-trade-survey-september-2021-quarter.xlsx>.

⁵ Commerce Commission, *Final report*, at 2.27.

Warehouse launched Warehouse Extra, a chain of hypermarkets which included grocery offerings. Plans to continue with the format were abandoned in 2008 and stores were converted to the standard stores.

- f. For most consumers, convenience and price are the key considerations that inform their choice of grocery store.⁶ Convenience includes things like being able to purchase a wide range of groceries in a single location – in a ‘one-stop’ shop – and other convenience factors such as time/distance of travel.
 - g. Major grocery retailers are uniquely placed to cater to consumer preferences for convenience. They have large stores which stock a wide range of grocery products, enabling consumers to do one-stop shopping.
 - h. Most consumers visit a physical store to purchase groceries. A small proportion shop online, and this demand is expected to continue growing. It is not clear what the market share of the online grocery market is between the major grocery retailers and other grocery retailers. However, the Commission does not consider that consumer preferences will change at such a pace to remove the benefits of a physical ‘bricks-and-mortar’ store in the near future.⁷
4. While there has been entry and expansion by a range of grocery retailers (e.g. online retailers), the Commission considers that entry and expansion is likely to be particularly beneficial if it relates to grocery retailers able to offer a convenient one-stop shopping option in competition with the major grocery retailers. It considers that the New Zealand market could sustainably accommodate at least one more large-scale rival and that reducing current constraints on entry and expansion would help to facilitate this additional competition.
 5. The Commission identified several conditions preventing or slowing entry and expansion in the grocery sector, including access to suitable sites for grocery retail.
 6. Because many supermarket sites are built on large footprint sites in urban or peri-urban areas, there are a limited number of sites that are viable for supermarket development. A requirement for successful entry and expansion on a regional or national basis is access to suitable sites in areas where existing grocery retailers are present.
 7. The Commission identified two conditions of entry and expansion that may impact site availability or development – planning regulations, and restrictive covenants and exclusivity covenants in leases.⁸
 8. Planning regulations, created under the Resource Management Act 1991 (**RMA**) (which has been reviewed and reforms are underway), can set limitations on land-use through District Plans and Regional Plans, which can have the effect of stopping, or

⁶ Commerce Commission, Final report, at chapter 4).

⁷ Commerce Commission, Final report, at 5.97.

⁸ Commerce Commission, Final report, at 6.57.

delaying the development of a site for a supermarket. The consenting process is also costly, time consuming and uncertain. Additionally, the RMA provides for submissions on consents and appeals, which can slow the process of development. However, there are restrictions to stop these from being used for anti-competitive purposes.⁹

9. In the past, the RMA has resulted in some lengthy delays to development, and generally the RMA process can be time consuming and costly. The Commission identified a few aspects of the current planning regime which can impede or slow entry and expansion by grocery retailers.¹⁰

What are covenants?

10. A covenant is a legally binding promise that dictates what can and cannot be done on a piece of land or at a specific site in the future.
11. The Commission referred to two types of covenants used in the retail grocery sector:
 - a. A 'restrictive covenant' is a promise to do something or refrain from doing something with land. It involves restrictions on how that land can be developed or used. A restrictive covenant is annexed to or runs with an estate or interest in land, meaning that it binds any third parties who subsequently acquire (or lease) that land. A restrictive covenant is usually recorded on the Land Title Register in accordance with the Land Transfer Act 2017. For consistency with terms used in the Property Law Act 2007, the Bill refers to 'a restrictive or positive covenant'.
 - b. An 'exclusivity covenant' is a provision contained in a lease agreement that restricts competitors (e.g. rival supermarkets or specialist retailers, such as butchers, bakeries) from operating on adjacent or proximate premises. These exclusivity covenants in leases are mainly used in relation to shopping centres, malls or commercial developments. Although the lease is an agreement between the original landlord and tenant, the lease can be assigned to future landlords and tenants.
12. There are typically at least two parcels of land relevant to a land covenant: the land burdened by the covenant and the land entitled to the benefit of the covenant (e.g. the neighbouring property or properties). However, covenants can also be given 'in gross', whereby they specify a beneficiary (who may enforce the covenant), rather than being attached to benefiting land.

⁹ Commerce Commission, Final report, at 6.62, 6.65.

¹⁰ Commerce Commission, Final report, at 6.65.

Established regulatory environment

13. The Commerce Act 1986 contains two prohibitions¹¹ that may apply to these covenants:
 - a. Section 27 prohibits entering into or giving effect to a contract, arrangement or understanding containing a provision that has the purpose, effect, or likely effect of substantially lessening competition in a market.
 - b. Section 28 prohibits conduct in relation to any covenant that has the purpose, effect, or likely effect of substantially lessening competition in a market.
14. Any covenant contravening these prohibitions is unenforceable. Pecuniary penalties and other remedies, such as damages, may also be imposed by the Court. On finding a contravention, the Court may also vary the contract or covenant.
15. Covenants (e.g. entitlements and procedural matters relating to covenants) are also governed by the Property Law Act 2007 and the Land Transfer Act 2017.

How is the status quo expected to develop?

Degree of competition in the retail grocery sector

16. The original RIS discussed why the Commission expects the situation described above (the status quo) to continue, without intervention. Market conditions and the outlook for major grocery retailers are relatively stable, including because poor conditions for entry and expansion appear to be entrenched. Absent a significant entry event, major retailers would continue to enjoy cost advantages in the acquisition and distribution of groceries, which limits the ability of smaller retailers to compete directly on price.
Commercial Information
17. Entry or expansion by a retailer able to operate on a similar scale to the incumbents was identified as the most likely way to materially increase competition in the market. The Commission assessed the likelihood of this happening as low without intervention.¹²
18. Costco has recently opened a store in Auckland, and appears to be actively looking for more store sites in Auckland, Christchurch and Wellington. It operates as a wholesale club store selling a limited range (about 4,000 product types at any time) in large pack sizes, therefore aimed at a niche customer market (usually with higher incomes).
Commercial Information

¹¹ For completeness, we note that the prohibition against cartels in section 30 of the Act could in theory also apply once the relevant provisions of the Commerce Amendment Act 2022 come into force on 5 April 2023. This will prohibit covenants that fix prices, restrict output, or allocate markets for goods or services that are supplied or acquired by the parties to the covenant in competition with each other. However, in practice, we expect it would be rare for the two major grocery retailers to agree a land transaction with each other that included a promise not to develop the land for a retail grocery site.

¹² Commerce Commission, Final report, at 5.92-5.100, and 6.24.

Other reforms agreed by Government

19. In its main response to the Commission's report, the Government agreed to a package of reforms which are to be given effect in the Grocery Industry Competition Bill.¹³ These reforms will include measures to encourage the major grocery retailers to provide wholesale access to groceries to new or expanding independent grocery retailers, which relates to one of the key barriers to competition identified by the Commission. This should facilitate competition, particularly by existing grocery retailers who already have retail sites or new entrants that use the regime as a stepping-stone to develop their own direct grocery supply arrangements. However, any expansion by new entrants, particularly on a national scale, will require access to multiple suitable sites and this will not be specifically addressed in that Bill.
20. Confidential advice to Government
The Government has been developing reforms to planning laws independently of the Commission's market study, stating that the Resource Management Act 1991 has not delivered on its desired environmental or development outcomes, nor consistently given effect to the principles of the Treaty of Waitangi. The Government plans to repeal the RMA and replace it with three new pieces of legislation.
21. Confidential advice to Government

Existing law or non-regulatory measures

22. Reliance by the major grocery retailers on the anticompetitive covenants identified by the Commission is likely to reduce to some degree without intervention. This is on account of greater enforcement by the Commission and voluntary commitments/efforts by the major grocery retailers.
23. Some of the restrictive and exclusivity covenants identified by the Commission could potentially contravene existing prohibitions in the Commerce Act. As a result of its market study, the Commission has opened three investigations into historical conduct relating to covenants in the retail grocery sector (each investigation relating to multiple covenants). This could result in enforcement of existing prohibitions in the Commerce Act and major grocery retailers being better deterred from these practices in future.

¹³ Cabinet, *Response to the Commerce Commission's Retail Grocery Sector Study* [CAB-22-MIN-0186: <https://www.mbie.govt.nz/dmsdocument/21393-response-to-the-commerce-commissions-retail-grocery-sector-market-study-minute-of-decision-proactiverelease-pdf>] and *Grocery Sector Reform: Regulation of Access to Grocery Wholesale and Collective Bargaining Exemption* [CAB-22-MIN-0303: <https://www.mbie.govt.nz/dmsdocument/23724-grocery-sector-reform-regulation-of-access-to-grocery-wholesale-and-collective-bargaining-exemption-minute-of-decision-proactiverelease-pdf>].

24. However, to prove a contravention of existing prohibitions requires complex analysis of the impact of the covenant on the state of competition in the relevant market. As noted by the Commission in making its recommendation, this makes the prohibition difficult and expensive to enforce (potentially requiring proof of the impact of more than one such covenant), whether for the Commission or for a competitor seeking to establish stores on multiple sites encumbered by these covenants. We do not consider it a viable long-term way to induce entry or expansion by competing grocery retailers.
25. The major grocery retailers accepted the Commission's concerns about the covenants it identified and have generally sought to surrender the benefit they enjoy from them.
 - a. Foodstuffs North Island indicated a willingness to immediately start removing all existing restrictive land covenants and exclusivity provisions in leases, and to make no further use of them in the future. In addition, it is supportive of the development and implementation of an industry-wide solution addressing restrictive covenants and exclusivity covenants in leases.
 - b. Foodstuffs South Island indicated it is generally supportive of removing existing restrictive covenants on land that it owns. In addition, it is willing to provide a binding undertaking that any covenants would not be enforced on land that has been sold and it would not register new restrictive covenants on land as part of the process of selling property. It is also supportive of a review of the use of covenants in other contexts.
 - c. Woolworths NZ has said it supports removing covenants and lease restraints. It supports the Government making restrictive and exclusivity covenants unenforceable after a certain period following investment in a new site.
26. The Commission accepted, however, that the major grocery retailers may face practical difficulties in removing existing restrictive covenants on a voluntary basis. Records of longstanding covenants may not have been kept, or where known, the support of affected parties would need to be obtained or a court order made under the Property Law Act 2007. An undertaking not to enforce a covenant that cannot easily be removed is not ultimately enforceable by the Commerce Commission. It can also be reversed over time, and so is likely to provide little assurance to competitors wishing to use the site or operate on multiple sites.
27. Therefore, voluntary efforts to remove the impact of these covenants are not expected to be uniform or reliable in the long-run without regulatory intervention.

What is the policy problem or opportunity?

28. The Commission concluded from evidence it examined during the market study that competition in the retail grocery sector is not working well for consumers. The Commission identified several conditions preventing or slowing entry and expansion in the grocery sector (retail and wholesale). For the purposes of this paper, the policy problem relates to access to sites that are suitable for grocery retail stores.

29. In the course of its market study, the Commission identified more than 90 restrictive covenants on land (60 of which are either not time-limited or have a term of over 20 years) and over 100 exclusivity covenants (90 of which are either not time-limited or have a term of over 20 years) in leases entered by the major grocery retailers. The majority of these are in major urban areas – Auckland, Wellington, and Christchurch.¹⁴
30. Subsequently, the New Zealand Food and Grocery Council obtained evidence of lease arrangements with the major grocery retailers over sites in shopping complexes that suggests the constraints placed on direct or indirect competitors operating in these areas are more far-reaching than the Commission identified.¹⁵ Practices revealed by this evidence include:
- a. providing the major grocery retailer with exclusivity over a broadly defined range of retail activities (beyond sale of groceries)
 - b. providing the major grocery retailer with a right of first refusal over subsequent sale of land and future lease arrangements
 - c. constraints on who the lessor can lease other (less proximate) sites they own to.
31. The Commission did not have direct evidence of the impact of covenants on competition, but confidential evidence showed restrictive covenants had significantly reduced the value of the burdened land over which they had been lodged. The Commission considered this indicated “that retailers may expect the benefits of lodging restrictive covenants (e.g. increased sales and/or profits as a result of reduced competition) to outweigh any foregone asset value incurred as a result.”¹⁶
32. There have also been a number of high-profile disputes between the two major grocery retailers, and to a lesser extent, with other potential competitors, that further indicate the impact of these covenants. Such disputes between the major grocery retailers are often long running and costly,¹⁷ while smaller land developers and potential competitors have little choice but to comply.¹⁸ A major grocery retailer seeking to enter

¹⁴ Commerce Commission, Final report, at 6.77-6.80.

¹⁵ The New Zealand Food and Grocery Council's submission to the Economic, Science and Innovation Committee can be accessed from the Commerce (Grocery Sector Covenants) Amendment Bill page on the Parliament website: [a54c760bf50d80e6980f937764b51d2e2ec1a9bd \(www.parliament.nz\)](https://www.parliament.nz/a54c760bf50d80e6980f937764b51d2e2ec1a9bd)

¹⁶ Commerce Commission Final Report, paragraph 6.84, page 212.

¹⁷ For example, a dispute between Woolworths and Foodstuffs North Island related to a covenant a lease relating to the development of neighbouring land purchased by Foodstuffs North Island in Highland Park, Pakuranga, as reported by Newsroom, 20 September 2021: <https://www.newsroom.co.nz/supermarkets-stand-off-despite-promise-to-commerce-commission>

¹⁸ For example, a recent new entrant to grocery retail 'Four Candles' has publicly commented that finding sites was difficult, in part because of covenants. As reported by NZ Herald, 1 March 2022: <https://www.nzherald.co.nz/business/grocery-business-comings-and-goings-in-nzs-supermarket-scene/PC6ZKNVU5T7NNUPSABD4G4KBEA/>

or expand over multiple sites that may be subject to covenants could face significant costs.

33. We consider that these exclusivity covenants have the effect of reducing potential sites for development and inhibit entry or expansion by other grocery retailers capable of placing competitive constraint on the major grocery retailers. This is particularly the case where there are no other suitable sites in the vicinity and the covenant is of sufficient duration. Such covenants may also have a cumulative effect if more are lodged over time.
34. Submissions to the Commission's market study proceedings were generally supportive of improving site availability by addressing restrictive covenants and exclusivity covenants in leases, as well as other impediments, such as planning laws or alleged land banking practices.
35. We do not expect the impediment to competition created by these covenants to be adequately removed over time without regulatory intervention.

What objectives are sought in relation to the policy problem?

36. The overall objective underpinning this policy problem (among others for which responses are being developed) is to ***promote competition in grocery markets (both the retail market, and the supply of goods to the retail market) for the long-term benefit of consumers within New Zealand.*** Achieving this objective would result in competition benefits to consumers.
37. Whilst there has been entry and expansion by a range of niche grocery retailers (e.g. online retailers), the Commission considers that entry and expansion is likely to be particularly beneficial if it relates to grocery retailers able to offer a convenient one-stop shopping option in competition with the major grocery retailers. It considers that the New Zealand market could sustainably accommodate at least one more large-scale rival and that reducing current constraints on entry and expansion would help to facilitate this additional competition. Removing unnecessary barriers to the availability of, and access to, suitable sites for grocery retail is seen as a means to achieve this policy objective.

Section 2: Deciding upon an option to address the policy problem

What criteria will be used to compare options to the status quo?

38. For consistency with the way we assessed the related reforms in the original RIS, the following six criteria are used to compare the options:

Figure 1: Criteria used in this Regulatory Impact Statement



39. No criterion will be given greater weighting than another criterion in the options analysis. However, there is some overlap between the criteria and some potential trade-offs between different criteria.
40. An example of overlap is that two of the six criteria - enabling competitive markets and ability to support economic growth – overlap and link directly to the desired objective (refer to paragraph 36 above).

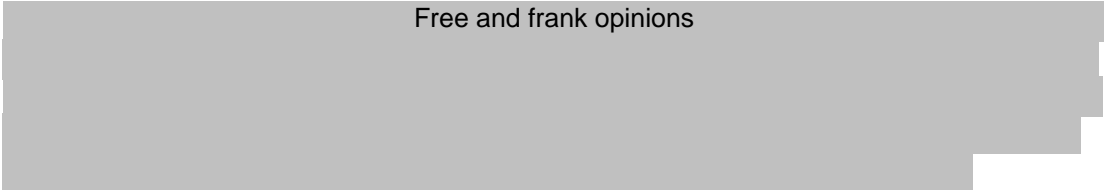
- 41. In terms of how these two criteria overlap, we argue that improved competition generates opportunities for economic growth by signalling opportunities for profits where firms should focus investment and innovation.
- 42. There are also some trade-offs between criteria. For example:
 - a. An option that provides high levels of certainty over time because it is consistent and less likely to change may be less durable by lacking the flexibility to accommodate circumstances as they change over time.
 - b. An option that is timely and can be implemented rapidly may also be less certain and efficient because the details may not be well understood by the relevant stakeholders (such as the major retailers) if they have not had time to prepare for the change.

What scope will options be considered within?

- 43. The scope of options we considered for addressing the problems the Commission identified with covenants in the grocery retail sector has been limited in two ways:
 - a. by the scope of options developed and tested by the Commission in the course of its market study
 - b. (in the case of the preferred option) by the limited time for policy development following the publication of the Commission's final report, given proposals in response to this recommendation were accelerated for introduction on Budget night.

What options are being considered?

- 44. Options relating to planning laws and covenants are likely to be complementary, as these can both place significant constraints on site availability.

45.  Free and frank opinions

- 46. Options considered in this section therefore include:
 - **Option 1** – Counterfactual (enforcement of existing prohibitions and voluntary measures by the beneficiaries of the covenants in question)
 - **Option 2** – Implement new prohibitions against restrictive covenants and exclusivity clauses in leases relating to grocery retail activities (**preferred**). This is

the option given effect in the Amendment Act.¹⁹

47. Framing the options assessment in this way allows us to compare the counterfactual (Option 1) against our original expectations of how Option 2 would perform, including the expected marginal costs and benefits of this intervention. In Section 3 of this paper, we consider how Option 2, as provided in the Amendment Act, has performed to date and can revise future expectations if relevant. The original and revised Option 2 scenarios relative to the counterfactual are then assessed against the objective and criteria for the purposes of this post-implementation review.

Option 1 – Counterfactual

48. In the absence of regulatory change, the constraint covenants place on availability of land for grocery retail would reduce modestly over time through a combination of:
- a. greater scrutiny of covenants and enforcement of existing prohibitions by the Commission
 - b. reduced reliance by the major grocery retailers on anticompetitive covenants existing for their benefit.
49. For reasons given in the section '*How is the status quo expected to develop?*', we expect these factors to be insufficient to materially improve the prospects of entry or expansion by a competitor seeking to establish a network of stores across New Zealand. There could also be doubts about how lasting the impact would be. MBIE does not view this as a viable long-term solution to the problem identified.

Option 2 – Implement new prohibitions against restrictive covenants and exclusivity clauses in leases relating to grocery retail activities (preferred option)

Option as agreed by Cabinet

50. This option involves amendments to the Commerce Act consistent with the Commission's recommendations 2A and 2B in its final report. The amendments would deem the following to contravene section 27 or 28 of the Commerce Act, without the need to assess their impact on competition:
- a. restrictive covenants in which a major grocery retailer has an interest if they have the purpose, effect or likely effect of impeding development or use of a site for grocery retail
 - b. exclusivity covenants or other terms in a lease in which a major grocery retailer has an interest if they have the purpose, effect or likely effect of impeding grocery retail at the same site.

¹⁹ We acknowledge there are subtle differences between this and the option recommended by the Commerce Commission.

51. This would include cases where the major grocery retailer or any party affiliated with them or acting on their behalf is or was a party to the covenant. The concept of grocery retailers 'having an interest' in either kind of covenant would be used to cover situations in which they or any party affiliated or acting on behalf of them has secured the benefit of the covenant without technically being a party to it.
52. There would also be an ability to designate other grocery retailers in future, on the advice of the Commission, to ensure they do not seek to limit access to suitable sites through similar covenants. We refer to this class of grocery retailers that includes the major grocery retailers, their successors, subsidiaries and interconnected bodies, as well as any other retailers who may be designed in future as '**designated grocery retailers**'.
53. Any existing or future covenants or lease arrangements described by these prohibitions would be unenforceable. There would be pecuniary penalties commensurate with those in the Commerce Act 1986 for contravening these prohibitions or attempting or conspiring to do so. This option would also involve some other provisions necessary for its effective implementation, such as:
 - a. an exception for covenants entered into for environmental reasons connected with a retail fuel site
 - b. an exception for any covenants or lease arrangements for which the Commission has granted authorisation or clearance (e.g. on the basis they are in the public interest despite being anticompetitive).
54. The Commerce Commission would have regulatory responsibility for these provisions as an extension of the existing prohibitions in sections 27 and 28. However, this option would be supported by reforms (expected to be introduced later this year in a Grocery Industry Competition Bill) establishing a regulator for the grocery sector. The regulator's functions would include monitoring compliance with these prohibitions and any other activities (e.g. land banking) that might be used to secure a similar anticompetitive benefit, such as the power to require information from participants in the grocery sector (or associated land owners) about relevant terms of land acquisitions, lease arrangements and intentions for use of land they own.

Option as enacted

55. Some modifications to the amendments were made during a truncated select committee process.
56. A key change made by the select committee was to widen the class of covenants imposed by designated grocery retailers to include covenants that have the purpose, effect or likely effect of impeding development or use of land or a site as a retail grocery store or 'any other retail store that is likely to compete with a retail grocery store operated by the designated grocery retailer'. This had the effect of widening the class of stores that are the target of the covenants from the traditional concept of retail grocery store (such as greengrocers, butchers, bakeries, fish mongers and pharmacies) to also include other retail stores that stock products that compete with a

supermarket (such as fashion, electronics, and hardware retailers) or are likely to in future. This change meant that the intervention could address wider concerns about the efficient use of land in shopping developments and competition in the retail sector.

57. Other modifications were not material to our overall assessment of the option in this paper, but we outline them for completeness. In general these amendments sought to minimise the ability of designated grocery retailers to circumvent the provision. That is, the option as implemented includes the following characteristics:
- a. the deeming provisions can extend to any side-agreements between one or more of the same parties if they contribute to the purpose, effect or likely effect referred to above
 - b. the retail activity targeted by an exclusivity covenant or other term in a lease need not be 'at the same site', to account for the possibility the lessor has other sites which could be made subject to a similar promise
 - c. a temporary process is provided to make it easier for a designated grocery retailer to voluntarily revoke or modify covenants recorded on the record of title (bypassing the procedure under the Land Transfer Act 2017) if it is a covenant rendered unenforceable by these amendments
 - d. the Commission is given an explicit monitoring function (in advance of wider functions and powers as grocery regulator) in respect of contracts, arrangements, understandings or covenants to which the deeming provisions may apply for the purposes of assessing compliance with the Commerce Act and provisions in the Fair Trading Act 1986 that may be relevant to the process of land owners renegotiating existing leases with designated grocery retailers.

What option is *expected* to best address the problem, meet the policy objectives, and deliver the highest net benefits?

Expected benefits

58. In advising Government on these proposals, we expected the amendments in Option 2 (as agreed by Cabinet) would be significantly more effective than the counterfactual in addressing the constraint the covenants at issue have been placing on site availability for those competing or looking to compete with the major grocery retailers. What contribution this makes to the overall conditions for entry and expansion by competitors (and therefore 'competitive markets') would depend on a range of other factors, including:
- a. population growth and consumer demand for physical supermarkets
 - b. the constraint planning laws and systems continue to place on site availability for grocery retail Free and frank opinions
 - c. the extent to which incumbent retailers use their purchasing power strategically to inhibit entry or expansion by other means (e.g. land banking, discussed below).

59. These more targeted prohibitions would provide parties with far greater certainty than existing prohibitions in the Commerce Act that the covenants identified as problematic are not enforceable and therefore not a barrier to use of sites for grocery retail.
60. We would expect this option to make a net-positive contribution to the overall objective of 'improving competition in the retail grocery market' and specific criteria of 'enabling competitive markets'. This is because it would remove one of the material constraints the Commission has identified to entry or expansion by a large-scale competitor in the grocery retail market. In addition, it would enable a more contestable market for sites in shopping developments, thereby facilitating competition for a wider range of consumer products that are also sold in supermarkets.

Potential threats and mitigation measures

61. We also considered some potential threats to this objective that might result from Option 2 relating to:
 - a. over capture of covenants that may have procompetitive justifications
 - b. incentivising land banking by major grocery retailers.
62. As the Commerce Commission acknowledges, there are some situations in which procompetitive justifications could be advanced for the kind of arrangements that would be caught by these prohibitions.
63. Despite the Commission's conclusion that none of the justifications it has been able to examine are likely to outweigh the harm to competition, there is some risk of deterring or penalising arrangements that are ultimately procompetitive. Woolworths NZ raised this risk in its submission to the select committee. We were mindful of this risk during the process of drafting the amendments. Making the possibility of authorisation available was also expected to help to mitigate this risk.
64. Option 2 would prohibit covenants but may result in major grocery retailers seeking to limit competitors' access to sites through other means, such as land banking. While use of restrictive covenants by major grocery retailers is likely to have been a preferred strategy, land-banking also has the potential to prevent or slow entry and expansion by competitors.
65. The Commission is aware of cases where major grocery retailers have acquired and held land (including suitable store sites) without specific plans to use that land for their operations within a set timeframe. It said during its market study it knows of over 200 sites held (including under lease) or previously held by major grocery retailers which either were not used or have ceased to be used for supermarket development.
66. The acquisition and holding of new sites as they become available may sometimes form part of a legitimate long-term strategy by the major grocery retailers to grow their operations. However, grocery retailers may also have anticompetitive reasons for acquiring and holding suitable sites, which is more likely (and more damaging) the longer the land has been held without being utilised. In these cases, the purchase of

the land may contravene section 27 (anticompetitive agreement) or section 47 (anticompetition acquisition).

67. To mitigate this risk, the powers and functions given to the grocery regulator by legislation to be introduced in late 2022 would enable them to monitor activities such as land banking that may arise under this option, and to address the impact they may have on site availability for competitors. In the interim, the Commission will be empowered to monitor compliance with the amendments and obligations under the Fair Trading Act that may be relevant in the process of implementing the amendments.

Overseas evidence

68. Our views on the expected impacts and benefits of the option were also informed by overseas evidence. Bans on the use and enforceability of restrictive covenants have been used successfully as a remedy by overseas competition authorities to address competition concerns in their jurisdictions' retail grocery sectors.
69. For example, in September 2009 in Australia, the Australian Competition and Consumer Commission (**ACCC**) accepted undertakings from Coles and Woolworths Australia to cease their practice of entering into leases with exclusivity covenants. The result of these undertakings was an increase in the number of shopping centres with more than one supermarket and Aldi was able to grow from 170 stores at the time of the undertaking to 590 stores in 2021. Woolworths NZ has acknowledged that the ACCC's actions had a positive impact on competition.^{20 21}

What are the marginal costs and benefits *expected* from the option?

Affected groups <i>(identify)</i>	Comment <i>nature of cost or benefit (e.g. ongoing, one-off), evidence and assumption (e.g. compliance rates), risks.</i>	Impact <i>\$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts.</i>	Evidence Certainty <i>High, medium, or low, and explain reasoning in comment column.</i>
Additional costs of the preferred option compared to taking no action			
Regulated groups	Loss of profits as a result of greater exposure to competition from other retail stores. However, we place little weight on these losses to the extent they are	Unknown. It is unclear what proportion of covenants and lease terms affected by the amendments would have been abandoned voluntarily. It is also unclear how many sites	Low

²⁰ Transcript of Commerce Commission Grocery Market Study Conference – Day 5 (28 October 2021) at page 22 (lines 25-36)

²¹ Other examples of overseas jurisdictions that have imposed or recommended similar bans include the United Kingdom Groceries Market Investigation (Controlled Land) Order 2010 made by the Competition Commission, and a recommendation of the Competition Commission of South Africa in its Retail Market Inquiry.

	<p>inconsistent with competition.</p> <p>Costs associated with renegotiating lease arrangements that would otherwise have continued to run.</p> <p>Obligations to supply information to the Commission.</p>	<p>competitors will access, that they wouldn't have accessed otherwise, and the reduction of major grocery retailer profits attributable to these outcomes.</p> <p>Minimal.</p> <p>Minimal.</p>	
Regulators	Monitoring major grocery retailers' implementation of the amendments and, if required, taking enforcement action.	Confidentiality	High
Others (e.g. wider govt, consumers, etc.)	N/A	N/A	N/A
Total monetised costs		Confidentiality	
Non-monetised costs		Low	
Additional benefits of the preferred option compared to taking no action			
Regulated groups	Some savings resulting from ability to bypass the more costly procedure in the Land Transfer Act for revoking/modifying covenants on the title. However, this may result in greater action for the same spend (which likely benefits the retailer's reputation).	Low	Low
Regulators	N/A	N/A	
Others (e.g. wider govt, consumers, etc.)	Benefits to competitors and consumers to the extent the amendments contribute to greater competition in the grocery retail sector.	Low to medium, in isolation from other reforms we view as necessary to promote competition in this sector.	Low
Total monetised benefits		N/A	
Non-monetised benefits		Low to medium	

Section 3: Delivering an option

How has the preferred option (the policy) *actually* been implemented?

70. The Commerce (Grocery Sector Covenants) Bill was introduced on 19 May (Budget night), considered by the Economic Development, Science and Innovation Committee for four weeks and enacted with amendments on 29 June. The Amendment Act came into force immediately.
71. The select committee process on the Bill provided us with further evidence on the potential impacts of the provisions. The Economic Development, Science and Innovation Committee received 22 submissions, the majority of which were either strongly supportive of the Bill or supportive of its intent and purpose. Submissions in support included Consumer NZ and the New Zealand Food and Grocery Council. This process largely confirmed our original expectations at the policy development stage. However, some new risks were also raised.
72. In summary, the main points from submissions were:
 - a. The Bill was an initial step, but it would be necessary for the Government to adopt a full suite of measures to ensure any meaningful improvements in competition in the retail grocery sector. For example Night'n Day and the National Māori Authority raised this point. While others, such as the Dairy and Business Owners' Group, thought the Bill was ineffective at addressing the underlying competition problems in the grocery sector.
 - b. If the Bill is to be effective, it needs a well-resourced regulator with sufficient powers to monitor and enforce the provisions. Without this, there is a risk that the major grocery retailers would circumvent the provisions to continue to impede competition or to extract super rents from landlords through other means.
 - c. The retrospective effect of the Bill could undermine business confidence particularly if due compensation is not payable. However, this concern was not expressed by Foodstuffs North Island or Foodstuffs South Island, and was not explicit in the submission from Woolworths.
 - d. The major grocery retailers' use of restrictive covenants and exclusive covenants in leases was more widespread than anticipated. The lack of competition, and high cost of food, has been having detrimental impacts on communities, particularly rural and low-income communities.
73. Since then, very little of the Amendment Act's impact has been visible to us.
74. The Commission has formally initiated three investigations (into Woolworths New Zealand, Foodstuffs North Island, and Foodstuffs South Island) concerning the historical use of covenants in the grocery sector. These were initiated under the existing provisions of the Commerce Act (sections 27, 28, and 47), rather than the new provisions introduced by the Amendment Act because the covenants preceded the Amendment Act. The Commission advises that its investigations have been

progressing well, although progress has been hampered in some cases by the speed of response to its information requests.

75. In terms of the new prohibitions, the Commission has developed a monitoring plan to assess compliance of any new covenants entered into, and any existing covenants enforced, by the three designated grocery retailers on or after 30 June 2022. The plan will involve issuing notices to the three designated grocery retailers, requesting information on:
 - a. any new or existing covenants they have entered into, or have or are considering giving effect to, that in any way restrict the ability of retail grocery stores to compete with the major grocery retailers
 - b. any third party covenants the major grocery retailers are aware of, regardless of the parties who entered into the covenants
 - c. any covenants that they have or are considering removing
 - d. any covenants they are reviewing for the purposes of assessing compliance with section 28A.
76. The Commission's monitoring will also include monitoring of contracts, arrangements, understandings or covenants to which the deeming provisions may apply for the purposes of assessing compliance with the Commerce Act and provisions in the Fair Trading Act 1986 as referred to at paragraph 57.d above.
77. The Commission advises that it is recruiting for staff to undertake these monitoring functions and intends to issue its first formal information request in the coming months.
78. Woolworths made a supplementary submission defending many of the practices identified by the NZ Food and Grocery Council as potentially anticompetitive, such as tying a supermarket's rent in a shopping centre to its turnover. One of these practices is now affected by the amendments if it has the purpose, effect or likely effect of impeding development or use of a site for grocery retail or any retail store that is likely to compete with the designated grocery retailer: namely lease terms providing a right of first refusal to the lessee (eg to renew the lease within a number of years of its expiry or to purchase the site). Woolworths argues that these terms provide the lessee with a degree of certainty that can incentivise investment in the premises and have been considered by Australian courts to protect legitimate interests of the lessee.
79. The amendments were designed to provide relative certainty over the legal status of the covenants or other terms they described. The absence of issues raised by parties now affected by the amendments is consistent with this outcome. However, evidence of disputes over the effect of the amendments, or unintended consequences, may yet arise as the Commission begins to request information or if disputes are not able to be resolved between the parties.
80. There is some limited evidence at this stage that the bespoke process provided for revocation of covenants from the title is being used by lawyers acting on behalf of the

major grocery retailers. As of 22 September 2022, 10 revocations have been lodged against a total of 58 titles under this process.²² They were all lodged by the same firm in Dunedin. Other revocation applications and some applications to modify covenants appear to be pending.

81. Foodstuffs North Island remains committed to voluntarily removing covenants that exist for its benefit and commented shortly after the amendments were enacted that it is “working through the process of reviewing and taking steps to proactively agree variations to leases to remove exclusivity arrangements.” The company also says it does not land bank.²³
82. There was also some evidence that restrictive covenants may pose a wider problem for competition in land markets and the retail sector more generally.
83. The Commission’s draft report into its residential building supplies market study stated that the Commission had identified restrictive land covenants and exclusive lease terms benefiting merchants that may in some cases impede the entry and expansion of competitors in the supply of key building materials.²⁴ This follows the Commission’s earlier findings as part of its retail fuel market study that certain covenants were impeding competition in that market. The Commission has made a draft recommendation for the government to further consider the economy-wide use of restrictive land covenants and exclusive leases.
84. MinterEllisonRuddWatts sent an advisory to clients about the reforms on 15 September 2022.²⁵ The law firm pointed out that the Auckland District Law Society’s form of lease remains the most widely used form of commercial lease across the country. Although few leases adopt the standard form lease without amendment, the current edition contains clauses that restrict the uses to which tenants can put the premises. In particular, the tenant must obtain the landlord’s consent to use the premises for anything other than the specified business use. The landlord is allowed to withhold consent whether the proposed use is in substantial competition with the business of other occupiers in the same property.

Evaluation of the policy as *actually* implemented

85. This section attempts to compare the expected impacts of the policy, as implemented, with what we so far know about its actual impacts. The aim is to evaluate its overall

²² This data was sourced from the Office of the Registrar General of Land

²³ As reported by the NZ Herald, [Foodstuffs North Island axes 78 of 135 anti-competitive covenants after crackdown - NZ Herald](#)

²⁴ Commerce Commission, *Residential building supplies market study draft report*, 4 August 2022, available here: https://comcom.govt.nz/_data/assets/pdf_file/0028/289360/Draft-report-Residential-building-supplies-market-study-4-August-2022.pdf

²⁵ MinterEllisonRuddWatts, *Covenants in the crosshairs of the Commerce Commission*, 15 September 2022, available here: <https://www.minterellison.co.nz/our-view/covenants-in-the-crosshairs-of-the-commerce-commission>

success. We also consider in this section whether the implemented policy could be improved upon.

86. This exercise is constrained by the limited time horizon since enactment and inactivity of the regulator. We therefore draw inferences from the absence of evidence that the amendments have caused any problems, unintended consequences or visible disputes.

#	Evaluation question	MBIE response
1	To what extent have the objectives and expected benefits been achieved?	<p>The policy so far appears to have achieved its purpose of removing the constraints the covenants in question have been imposing on access to suitable land for grocery retail. This makes, in our view, a modest contribution to the overall objective of promoting competition in the grocery retail sector for the long-term benefit of New Zealand consumers.</p> <p>The fact there is not yet any evidence of failures (e.g. competitors or land owners raising issues) available to us, or of disputes over the effect of the amendments, is consistent with the expected benefits, including the relative certainty the amendments were intended to provide parties with an interest in a site that was burdened by a relevant covenant.</p>
2	How confident are we in attributing any outcomes to the policy?	<p>Not confident, as we lack visibility of the actual impacts the amendments have made at a site-by-site level and the extent to which this improves prospects of entry or expansion.</p> <p>However, the fact there is no evidence of failures (e.g. competitors or land owners raising issues) gives us some assurance.</p>

#	Evaluation question	MBIE response
3	At what cost have these outcomes been secured?	<p>The short and intense policy and legislative process for the Bill imposed some direct costs and opportunity costs on officials, the Government and members of Parliament. These are unquantified and borne within existing baselines.</p> <p>Due to its focus on undertaking three investigations into historical use of covenants in the grocery sector under sections 27, 28 and 47 of the Commerce Act, the Commission has not yet commenced monitoring activities under the new section 28D powers, so the additional costs it incurred so far have been minimal.</p> <p>The clarity and certainty of the provisions of the Bill should have resulted in minor reductions in the costs to major grocery retailers of voluntarily removing the covenants, but some additional costs would have been incurred to ensure compliance with mandatory provisions.</p>
4	Could the benefits have been achieved in a less burdensome way (e.g. without regulation)?	<p>Our limited options analysis, set out in this paper, leads us to doubt the outcomes could have been achieved without the kind of legislative change that was made.</p> <p>In Australia, a similar outcome was achieved by the ACCC through negotiating enforceable undertakings with the major grocery retailers, but this option was not available to the Commission under New Zealand legislation. We also consider that a ban in primary legislation is more effective than undertakings through providing stronger deterrence.</p>
5	Have there been any unintended effects?	We are not so far aware of any unintended effects of the amendments.
6	Overall, how consistent are the outcomes with our expectations during policy development?	<p>The limited information so far available provides us with no basis to doubt the outcomes have been consistent with our expectations.</p> <p>The evidence on the nature and extent of the problem provided by the New Zealand Food and Grocery Council at select committee suggests that the Amendment Act may have wider impact than initially anticipated in promoting efficient land use in shopping developments and competition in the wider retail sector.</p>

#	Evaluation question	MBIE response
7	How might this change over time?	<p>It is possible the targets of these prohibitions may find other ways to inhibit their rivals from accessing suitable sites that either were not anticipated in the way the amendments were drafted or through other means, such as land banking. This would tend to undermine the amendments' effectiveness in improving conditions for entry or expansion. If disputes over the effect of the amendments arise and result in judicial proceedings, it is possible this would expose areas of ambiguity or unintended consequences in the amendments. This could reduce certainty for affected parties and potentially require further amendments.</p> <p>However, to counter this, a new dedicated Grocery Commissioner at the Commission, along with new dedicated funding, is likely to increase the Commission's monitoring and enforcement of these provisions, and to provide the sector with guidance to improve certainty for all parties.</p>
8	What scope is there for simplification or improvements to the policy?	<p>We find this difficult to judge at this early stage. The Commission will be charged with monitoring the provisions and may report to Government on any developments. This will provide opportunities for adaptation and improvement to the provisions if required.</p> <p>However, this process has identified that the problems with restrictive covenants and exclusivity terms in leases may be more widespread than initially expected. Confidentiality</p> <p>[Redacted]</p>

Expected and actual impacts of the option compared to the counterfactual

	Option 1 – Counterfactual	Option 2: Implement new prohibitions against covenants affecting grocery retail activities – expected impact	Option 2: Implement new prohibitions against covenants affecting grocery retail activities – actual and revised expected impact
Competitive markets	0	+ Would remove the constraint these covenants place on site availability, which is a necessary condition of entry or expansion by a large-scale competitor in grocery retail. However, it most increases prospects of entry or expansion in concert with other reforms (notably access to wholesale networks) and is limited in its contribution to competition for grocery retail in its own right.	++ No evidence available so far is inconsistent with the original assessment. However, we consider the provisions are likely to have wider benefits for competition in land markets and for a wider retail sector.
Economic growth	0	0 Does not improve on the counterfactual over and above the economic benefits associated with competition (attributed above).	0 No cause to revise this view.
Proportional	0	+ Prohibitions would be targeted to address the problems identified without unreasonable impact on other business activity or investment decisions.	+ Events (or the absence of events) so far would tend to confirm this assessment. Although there was some widening of scope of covenants and other arrangements deemed to contravene the Commerce Act, the provisions remain relatively precise in our view.
Durable	0	0 This depends on how the option is implemented, but we hesitate to characterise grocery-specific prohibitions as durable in the context of Part 2 of the Commerce Act.	0 We still hesitate to characterise the amendments as durable. They were designed to deal with specific practices in a particular sector, which is somewhat

			at odds with the general framework of Part 2 of the Commerce Act. They are a reasonable attempt to anticipate 'gaming' tactics by major grocery retailers, but their success will not be apparent in the short-term. The designation process in new section 28C provides some flexibility to adjust the target of the deeming provisions in future. Confidentiality
Certain	0	++ New prohibitions would provide affected parties with far greater certainty about the lawfulness of the covenants described than is available from existing prohibitions in the Commerce Act 1986.	++ Events (or the absence of events) so far are consistent with this assessment.
Timely	0	0 Requires legislative change, but could be implemented relatively quickly by affected parties.	+ The pace at which these amendments were made, though it increased risk of regulatory failure, can be viewed as beneficial, in that investigating the possible acquisition or lease of suitable land is one of the first priorities for competitors considering entry or expansion in New Zealand.
Overall assessment	0 Modest improvements to access for retail sites over time. Current impediments to access would largely continue.	+ 4 Expected to materially improve site availability, and therefore contributes to conditions for entry or expansion by a large-scale competitor, with very modest risks.	+ 6 Appears to have materially improved site availability, and therefore to have contributed in a timely manner to conditions for improved competition in the retail grocery sector and for land markets, with very modest risks.

Example key for qualitative judgements:

- ++ much better than doing nothing/the status quo/counterfactual
- + better than doing nothing/the status quo/counterfactual
- 0 about the same as doing nothing/the status quo/counterfactual
- worse than doing nothing/the status quo/counterfactual
- much worse than doing nothing/the status quo/counterfactual

What further monitoring, evaluation or review will occur?

87. MBIE administers the Commerce Act 1986. Consistent with our general regulatory stewardship responsibilities, we intend to continue actively monitoring the effect of the amendments in question.
88. In doing this, we intend to work closely with the Commission and the new Grocery Commissioner who we expect will actively obtain information about the practical impact of the amendments in the performance of its own functions. Although the Commission is independent, a new function of the Commission will be to prepare and publish annual reports on the grocery industry. This provides an opportunity for further insight into the impact of these specific provisions over time, which will enable us to conduct internal reviews of the policy and respond to any issues as they may arise.
89. Furthermore, if the Commission continues to recommend in its final report for the residential building supplies market study that the government carry out a review of the use of restrictive land covenants and exclusive leases across the economy, then we anticipate this will provide a further opportunity for review and wider improvement.