New Zealand Law Society
Te Kāhui Ture o Aotearoa

Level 4, 17–21 Whitmore Street, Wellington
PO Box 5041, Wellington 6140 · DX SP20202, Wellington
04 472 7837 · inquiries@lawsociety.org.nz

lawsociety.org.nz

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Competition Policy
Building, Resources and Markets
Ministry of Business, Innovation & Employment
Wellington

By email: competition.policy@mbie.govt.nz

Re: Review of Anti-Competitive Land Agreements

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (the **Law Society**) welcomes the opportunity to comment on the Ministry of Business, Innovation and Employment's (**MBIE's**) July 2023 discussion document (the **Discussion Document**) on the use of land agreements and whether a wide, multi-sector, solution is needed to address their impacts on competition.

1.2 The comments that follow are confined to a series of high-level responses to the questions posed in Chapter 5 of the Discussion Document, which are focused on potential changes to the current system. To the extent that the earlier chapters of the Discussion Document seek more data on anti-competitive effects (and any positive outcomes), the Law Society suggests that this information is better obtained from industry participants and benchmarked against the findings of the three recent Commerce Commission market studies.

1.3 This submission has been prepared with the assistance of the Law Society's Commercial and Business Law Committee and Property Law Section.

1.4 In making this submission, the Law Society has not sought to explore more fully the current difficulties associated with the application of the Resource Management Act 1991 (the **RMA**) in ways that can have anti-competitive effects. In our view, there is adequate background information available in the Commerce Commission market studies about the lack of clarity and apparently inconsistent application of the RMA, along with discussion about how the recently-passed Natural and Built Environments Act 2023 can be made to work better and lessen the risk of being gamed to produce anti-competitive effects.

2 Responses to chapter 5 questions

2.1 *Section One: Overview*

Question	*Response*
20	While the Law Society generally has reservations about measures that are designed to have retrospective effect, we acknowledge it would be

	undesirable to have a two-tier regime. Therefore, for consistency, we consider that any measures should target both existing and new agreements on a broadly consistent (in terms of outcomes) basis.
21	In keeping with the preceding comment, we consider that interventions should seek to generate consistent outcomes. As a result, it is difficult to see that this can be achieved without the entire assortment of prevention, detection, compliance and enforcement measures. Without a comprehensive approach, there is an inherent risk of gaps that can be exploited and a continuation of anticompetitive initiatives and outcomes.
22	In short, a comprehensive approach towards preventing new anti-competitive agreements is more likely to achieve all of the relevant policy goals, by: • increasing awareness and understanding of existing and new rules; and • implementing suitable self-regulatory mechanisms/gatekeepers (such as introducing checkpoints in the registration process). There could be better awareness, even in the legal profession, that land agreements could be anticompetitive in industries outside the grocery sector. There may be little knowledge of the rules and requirements for compliance. Published guidance on anti-competitive land covenants would assist with raising awareness, particularly so if available via such channels such as the Toitū te Whenua Land Information New Zealand (**LINZ**) website or the Law Society's Property Law Section. In addition, the Law Society recommends direct engagement with professionals. This could be done by publishing articles in industry publications or contributing to educational webinars. This would likely increase awareness and understanding of existing rules. The Law Society is aware of providers or publishers of template land agreements which contain restrictive clauses as a default. These primarily relate to deeds of lease. These templates contain clauses that prohibit certain business uses and are seen as a protective stance to protect a community of like tenants without any disruptive factors. It is also understood that at times restrictive provisions are added to the templates by parties. Save for the provisions in the deeds of lease which are common and seen to be accepted in the marketplace, the Law Society suggests that other uses of restrictive provisions are occurring at an industry level (that is, drafted and circulated within a specific industry rather than being promoted by the template publishers themselves). The Law Society considers that raising awareness of the existing rules would encourage publishers and industry participants to review the existing agreements in use.

23	Of the options listed, we comment: • Introducing a purposes statement may go some way towards detection – but, on the basis that past behaviour is the most likely indicator of future behaviour, our initial response is that those statements will need to be reviewed against objective/measurable criteria. • We are supportive of the concept of regular reviews. Market environments and behaviours change over time, and the pace of change is generally becoming more rapid. In saying that, while regular reviews are likely to have a benefit, they are also likely to be costly to implement. In addition, land agreements are used for a variety of reasons, and many land covenants, for example height restrictions or native planting covenants, are intended to continue for an extended period. • It would be helpful if those drafting covenants inserted "self-policing" provisions, requiring the covenant to be reviewed for its ongoing relevance after, say 20 to 30 years. • We support a requirement for new agreements to provide a description of their purpose when registered on the Land Titles Register.
24	In our view, the disclosure of anti-competitive agreements must be a goal, and a first necessary step. However, the benefits and risks of this option will be heavily dependent on how any disclosure requirements were targeted.
25	Efforts to encourage voluntary compliance is a key element of any new regime. As a result, we are supportive of the concepts of: • regular reviews; and • measures that support voluntary removal of restrictive covenants. The Law Society is aware that land agreements are difficult and costly to extinguish if all the interested parties do not consent to their surrender, whether they contain anti-competitive provisions or not. Many land agreements have no expiration and restrict activities indefinitely. They often reflect the needs or commercial desires of businesses from decades prior and constrain later development or business activity. Examples of this include restrictions on further subdivision in rural or suburban areas. Over time as cities expand, these areas become urban and it would be desirable for the properties to be further subdivided. For these types of covenants in particular, the Law Society suggests there could be a legislative mechanism or a fast-track process for the Territorial Authority to vary or extinguish a covenant where, for example it is in conflict with a District Plan. Any process would need to protect the vested interests of, for example, mortgagees and multiple landowners.

	More generally, it would assist if the process to extinguish was simplified so businesses could voluntarily remove any registered land agreements faster and at lower cost. This could be undertaken using a similar process to that for lapsing caveats or notices of claims on titles under section 143(1)(b) of the Land Transfer Act 2017. Lapsing caveats requires application to the Registrar General of Land (RGL) for lapse on a prescribed form, with the notice then served on the caveator as the interested party by the RGL. Unless the caveator gives notice to the RGL that they have applied to the High Court, the caveat lapses by operation of law. Sunset provisions may be challenging to implement, due to the range of circumstances and purposes for which agreements are used.
26	While we suspect the measures aimed at changing the application of sections 27 and 28 of the Commerce Act will have the most efficacy in relation to the grocery sector (and then the two other sectors targeted by Commerce Commission market studies), we are broadly supportive of a more uniform application across all or most market sectors. However, this would ultimately depend on what changes are made.

2.2 *Section 2: Options to better prevent and detect new anti-competitive covenants and agreements*

Question	*Response*
27	As noted above, we are concerned that any gatekeeper type system must include an element of review. We are mindful of the comment that this would have significant resourcing implications. However, we suggest that (as a first step) an element of self-certification by the applicant would go some way toward managing those knock-on issues. This would need to be paired with suitable monitoring and enforcement mechanisms to identify and address instances of incorrect self-certification (for example, auditing a certain number of agreements, and consequences where an incorrect self-certification is made). While these checks and balances have cost implications, so too does the current system which the Commerce Commission has concluded is not working.
28	In keeping with our comments above, we consider that there should be a uniformity of approach. In general, we are concerned that, absent a uniform approach, the scope for regulatory gaming remains "live". Nonetheless, we acknowledge the Commerce Commission may be better placed to determine where frontline measures are most needed in terms of market impacts/benefit to the economy. See also our comments at question 23. We do not take a position on what review period would be appropriate but observe that any review period

	should be tailored to the business or sector, and the increasing pace of market change should be seen as a driver for shorter/more frequent reviews.
29	The Law Society suggests that in addition to purpose, the land agreement should record which industry or sector the land agreement is to be used in (for example, '*Category – Land Development, Purpose – Height restriction'*). On registration, the industry category of the land agreement would be selected from a set list of sectors. The list should be available from a drop-down menu. The purpose could also be selected from a drop-down menu of commonly used statements with the ability to add free text if further explanation was required. Compulsory sector categorisation and description of purpose registration would assist with identification of different types of land agreements and so detection of anti-competitive land agreements. Identifying sector categories of land agreement may also enable a targeted approach to reviewing certain types of agreements after a period of time. For example grocery category land agreements could be easily found using a filtered search in the registry. It would be useful to have the law changed to include encumbrances in section 317 of the Property Law Act, to enable owners to seek modification or extinguishment of provisions in encumbrances which are either redundant or which fall foul of section 27. The definition of encumbrances would need to be limited to those encumbrances registered containing land agreements.

2.3 *Section 3: Options to enable and enforce compliance with existing rules*

Question	***Response***
30	As above, our starting point is that of uniformity of approach. We do not necessarily agree with the suggestion that a "broad" requirement could create unnecessary work or uncertainty. However, we accept that any enforcement regime must answer cost/benefit questions. The Commerce Commission is likely be better placed to determine whether certain sectors or particular types of agreements require attention in the form of information disclosure requirements.
31	We do not have any other suggestions for changes to improve monitoring/identification.
32	We suggest that the Commerce Commission is likely to be better placed to determine whether certain sectors require greater attention.
33	Again, a uniform approach may lend itself to a presumption of unenforceability being a suitable starting point.

	In terms of agreement types, a first filter may be those agreements that fail to measure up against a short list of criteria that are designed to filter out the most common examples of anti-competitive effects. For example, this could include conditions which are regularly seen that do not allow owners to make a choice of their own building products supplier or land agents.
34	In keeping with the response to question 33, the same front-end criteria for registration should be applied as a back-end check, with conditions that are inconsistent with these warranting automatic removal.
35	On a uniformity basis, and in keeping with our response to question 23, we suggest that regular reviews against a specified set of criteria should be considered. That said, it is important to recognise there are many variables and many different types of anti-competitive provisions covering an array of undertakings.
36	In terms of measures to promote voluntary compliance, an amnesty period where parties are encouraged to address legacy agreements that are unlikely to measure up in the future may be beneficial. As noted above, additional education and promotion of the use of self-review clauses for lawyers and those sectors where these types of agreements are most prevalent may also promote voluntary compliance.
37	As stated above, our preferred starting point is a uniformity of approach. We question the view that the time and cost of legislative changes should push them down the queue of regulatory responses. Intuitively, if the existing regime is demonstrated to not be working for key industries, then it seems unlikely that it will be working efficiently across the board. The only point of difference may be a factor of size/overall market impact. Even in a small sector, the impact of anti-competitive measures is likely to be just as material for those concerned (whether as an industry participant or a consumer of products and services).
38	In some cases, it can be difficult for a party who is in a weaker negotiating position to refuse to enter into an arrangement which might lessen competition in a market, and once the arrangement has been entered into, there is then no meaningful way for the person who is in the weaker negotiating position to refuse to comply with the arrangement on the basis that it is anti-competitive. This is because in many cases they will be unable to demonstrate to the stronger party that the arrangement is in fact a breach of sections 27 and 28. Greater compliance could be obtained if persons who have entered into potentially anti-competitive arrangements were able to self-report to the Commerce Commission (without the risk of facing a penalty), for the purpose

	of the Commerce Commission investigating whether the arrangement is actually anti-competitive and therefore unenforceable. However, we note that it may be desirable to limit its availability to "small" operators who, unlike large commercial organisations, are unlikely to have the means to obtain expert competition law advice. We also recognise that this suggestion could impose a significant burden on the Commerce Commission's resources.

2.4 *Section 4: There are risks to making changes that affect land*

Question	*Response*
39	We are mindful of the various initiatives towards greater intensification of housing development in urban areas, with the consequent need for further infrastructure and services. As a knock-on issue, some care is needed to avoid unintended consequences when considering imposing greater hurdles for introducing some forms of land agreement. Many landlords seek to control the tenancy mix of their properties by including covenants that could be interpreted as anti-competitive (for example, by preventing tenants from changing the nature of their businesses, or assigning its lease to a different business). There can be economic reasons behind this, as some agreements provide for 'percentage rent' (where the rent payable is determined in part by reference to a tenant's sales). Where this is the case, the landlord has a direct interest in preventing a tenant's income being reduced by virtue of a competing tenancy.

2.5 *Section 5: Considering how to avoid 'over-capturing' land agreements*

Question	*Response*
40	Without hard evidence, it seems difficult to see that existing provisions in the Commerce Act, which are seen by the Commerce Commission as being ineffective, might 'over-capture' land agreements that have a necessary or functional purpose.
41	We consider that authorisation by the Commerce Commission is the only likely tenable safety valve with which to mitigate the risk of 'over-capture'. An approach where established/published criteria is applied by an independent has a better prospect of avoiding some of the apparent failings of the RMA regime, particularly around its consistency and clarity.
42	We agree that any regime should allow for exemptions in certain cases. Business and market participants are by their nature changeable and the pace of change is only increasing. As a result, there must be some sort of safety valve for those who don't fit neatly into an existing authorisation.

	As with any exemption regime, some care will need to be taken to ensure that it is appropriately targeted so that it does not leave room for exploitation. It may be helpful to look at standard lease forms and the "land agreements" that often appear in those, together with the rationale behind them. However, it is accepted that it would be difficult to weigh up their impact upon competition because it will normally depend upon the particular circumstances.
43	We have not tried to evaluate existing examples of exemption to sections 27, 28 or 30 as a suitable benchmark. We are, however, aware (from the Commerce Commission market studies) of some examples of class exemptions granted by the ACCC in Australia. The Commerce Commission will likely have a view as to their transportability across the Tasman into a similar economy.
44	At this early stage we have no fixed view about whether criteria or a test would be most suited for this type of exemption.
45	Please see our response to question 43.

3 Conclusion

3.1 We would be happy to discuss this feedback further, if that would be helpful. Please feel free to contact me via the Law Society's Law Reform & Advocacy Advisor, Dan Moore (dan.moore@lawsociety.org.nz).

Nāku noa, nā

David Campbell
Vice-President