

## Restricting competition with restrictive covenants: an update

**The Commerce Act prohibits the use of restrictive land covenants which substantially lessen competition.**

**Restrictive land covenants can lessen competition in a market by preventing entry into, or expansion in a particular market.**

**Section 28 of the Commerce Act 1986 (the Act) prevents any person from requiring, giving, carrying out, or enforcing of a covenant that has the purpose, effect, or likely effect of substantially lessening competition in a market.**

**But how has this been enforced by the Commission?**

In December 2022, the Commission filed proceedings in the Wellington High Court, against NGB Properties Limited (**NGB**).

The Commission alleged that NGB had purchased a property in December 2019 and registered a land covenant over that property. The registered land covenant would prevent a hardware store being operated on the premises. Relevantly, NGB is a related entity to Juted Holdings Limited, which owns and operates the Tauranga Mitre 10.

Despite NGB having removed the covenant from the property in March 2021 in response to the Commission's concerns, the Commission claimed, in its High Court proceeding, that NGB's actions in registering the land covenant was in breach of section 28 of the Act because it substantially lessened competition in the hardware retailing market in central Tauranga.

Following proceedings being issued by the Commission, the Commission and NGB agreed a settlement, however the High Court went on to determine what penalty should be imposed.

In a land mark decision in July 2023, the High Court penalised NGB \$500,000 for its anti-competitive conduct. This is the first time a penalty has been imposed for breach of section 28 of the Act.

Justice Cooke determined that a significant penalty was appropriate given the seriousness of the conduct, and to act as a deterrent against this kind of conduct, as follows:

“The lodging of the encumbrance in the present case illustrates the types of concerns [the Commission] has identified. It was lodged as part of a deliberate strategy to prevent access to land by Bunnings and any other potential rivals to stop them competing with Mitre 10 MEGA Tauranga...”

“For these reasons it is important for the Court to impose a penalty that is significant, and which operates as an effective deterrent against this kind of conduct.”

Justice Cooke's decision, and the actions of the Commission in pursuing a penalty against

---

**Article title**  
(Continued)

NGB should be taken as a strong warning for any party who looks to impose anti-competitive land covenants, which have the effect of substantially lessening competition in a market.

**Other developments**

In 2022 the Commerce Act was amended to ban certain land covenants which restrict the development or operation of retail grocery stores. This amendment was made in response to concerns raised in the Commission's market study into the retail grocery sector.

Similar concerns were raised by the Commission in its retail fuel and residential building supplies market studies, and the Government is currently consulting on a wider ban of restrictive covenants.

**Want to know more?**

If you have any questions about restrictive land covenants or competition concerns, please contact our specialist Litigation Team.