



27 May 2022

Jamie Strange, MP
Chair
Economic Development Science and Innovation Committee
Parliament House
Wellington
NEW ZEALAND

Email: eds@parliament.govt.nz

Dear Chair

Attached are the comments that the New Zealand Food & Grocery Council wishes to present on the *Commerce (Grocery Sector Covenants) Amendment Bill*.

Yours sincerely

A handwritten signature in dark ink that reads "Katherine Rich". Below the signature is a simple horizontal line.

Katherine Rich
Chief Executive



Commerce (Grocery Sector Covenants) Amendment Bill

**Submission by the New Zealand Food & Grocery
Council**

27 May 2022

NEW ZEALAND FOOD & GROCERY COUNCIL

1. The New Zealand Food & Grocery Council (“**NZFGC**”) welcomes the opportunity to comment on the *Commerce (Grocery Sector Covenants) Amendment Bill*.
2. NZFGC represents the major manufacturers and suppliers of food, beverage and grocery products in New Zealand. This sector generates over \$40 billion in the New Zealand domestic retail food, beverage and grocery products market, and over \$34 billion in export revenue from exports to 195 countries – representing 65% of total good and services exports. Food and beverage manufacturing is the largest manufacturing sector in New Zealand, representing 45% of total manufacturing income. Our members directly or indirectly employ more than 493,000 people – one in five of the workforce.

OVERARCHING COMMENTS

3. We understand the *Commerce (Grocery Sector Covenants) Amendment Bill* (“**the Bill**”) aims to stop supermarkets (“**designated grocery retailers**”) from blocking actual or potential competitors from accessing land for new stores, whether that be new sites or existing ones such as within malls and shopping centres. This reflects the Commerce Commission’s (“**Commission’s**”) findings that “*suitable sites are a key requirement for successful entry and expansion of supermarkets*”¹ and “[t]he lodging of restrictive covenants and exclusivity covenants in leases on sites that might otherwise be suitable for retail grocery development (including expansion of existing stores) is likely to be a significant factor preventing or slowing entry and expansion”².
4. On that basis, we make the following comments to assist the Select Committee (“**Committee**”) in designing the legislation to achieve its intended purpose:
 - a) **Existing restrictions prohibit a range of retailing well beyond core retail grocery.** We recommend considering if the prohibition on anti-competitive covenants should be more broadly framed to reflect (and negate) the full scope of such current restrictions, which in effect can block not just other grocery retailers, but almost all forms of retailing around the supermarket. If grocery retailers see such operations as (potentially) competing, then it follows that those potential competitors should not be prohibited.³ The exhaustive range of retailing activities that leases can define as a “supermarket” is often a good indication of what activities the lessee seeks to constrain.
 - b) **Lease agreements may feature various types of rights of first refusal (“ROFR”),** whether to buy centres, take leases or approve any other tenants in or around the property that the supermarket deems relevant in the broadest definition. This includes ROFRs applying *after* the tenancy ends (e.g. up to 3 years later), which is unusual, and extending the ROFR to bind mortgagees (banks). Again, it is not clear the Bill captures such provisions which create entry / switching barriers. A ROFR lasting many years after the termination of a lease in effect makes it extremely difficult for a landlord to lease the site to another supermarket or food distributor without facing a significant financial penalty. We recommend this be addressed and / or clarified.

¹ Commission “*Market study into the retail grocery sector: Final report*” (8 March 2022) at [6.55].

² Commission “*Market study into the retail grocery sector: Final report*” (8 March 2022) at [6.82].

³ Notably, it is not clear The Chemist Warehouse would be a “**retail grocery store**” as it may not (yet) sell a “**grocery product**”, yet the supermarket chains argued it is a key competitor. It is well known - and again strongly submitted by the supermarket chains – that smaller niche retailers can expand (but they must first be able to enter). It is not clear why they should be allowed **any** such veto on retailing. As the Bill notes, this could be authorised. An alternative may be a rebuttable presumption, ie permitting clearance if the grocery retailer can demonstrate no anti-competitive harm.

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- c) **Lease agreements may require retail centre or facility owners to object to new developments or any changes to the district plan at the landlord's cost.** This may leverage supermarket market power and lead to behaviour which might (if conducted by the supermarket) be prohibited under the *Resource Management Act 1991* ("RMA") limits on trade objections. We recommend specifically prohibiting such terms in the Bill.
- d) **Lease agreements may (through linking rent to turnover) anti-competitively align the incentives of the retail centre/facility owner and the grocery retailer.** Sharing revenues⁴ may incentivise the retail centre/facility owner to protect the grocery retailer's monopoly rents (sharing monopoly rents). We recommend this be considered.
- e) **We recommend that the Committee reviews the individual and collective effect of the broader range of provisions, including those noted above.** Put another way, the scope of the Bill may not go far enough to remove all the land-related anti-competitive barriers⁵. We have other minor drafting suggestions that may improve clarity set out below.
5. We provide detailed comments and illustrate our comments with examples of clauses from a grocery retailer's standard lease template ("**Lease**") below. We recommend that the Committee seek details of template provisions and standard contracts used in New Zealand from the grocery retailers to assist with deliberations. Particularly given the terms may often be confidential.
6. Given the time frame, we have not developed a more extensive submission. Nor have we canvassed NZFGC members. Rather this submission seeks to identify matters for consideration / amendment, to reflect the Commission's recommendations and the Bill's intent. We are happy to discuss the submission and all relating issues with the Committee.

DETAILED COMMENTS

A. Existing restrictions prohibit a range of retailing well beyond core retail grocery

7. The proposed section 28A prohibition is currently limited to covenants that impede retail grocery stores. This scope is too narrow relative to currently existing contracts, which are go well beyond core retail grocery. The covenants we are aware of prevent an incredibly vast range of businesses from operating on the premises of which a supermarket is a part.
8. We refer to the definition of "Supermarket" in the Lease (see Attachment A) that states:

"Supermarket" means a store which:

- (a) Stocks, sells and supplies such general merchandise and services as provided for in Supermarkets anywhere in the world and includes, (but without limitation) general merchandise, products, goods and equipment and services under the following general headings: food and groceries such as meat, seafood, delicatessen, bakery, dairy, frozen, grocery, produce; alcoholic beverages; clothing, fashion, footwear and accessories for women, men, children and babies; bags and luggage; music, video, dvd and entertainment; toys and games; sports and fitness; electronics; computers and software; telecommunications; electrical appliances; small and large appliances;*

⁴ This reflects underlying market power - it seems the terms are (unusually) set by the *tenant*.

⁵ The Bill could perhaps provide that any such provisions (ie the examples noted above) individually or collectively are deemed anti-competitive.

kitchenware; homeware, furniture and furnishings; bedding and décor; lighting; carpets and rugs; books, office supplies, stationery, greeting cards, magazines and newspapers; confectionery; art and crafts; pet food and products; tools, hardware and diy; manchester and linens; toiletries, and cosmetic; pharmaceuticals; optical ware; household cleaning and chemicals; health and beauty care; giftware; gardening, plants and flowers; motoring automotive; jewellery; banking, financial, insurance and lending; and such other ancillary uses thereof and such new lines and products as may be introduced from time to time; and

- (b) Includes (but without limitation) a coffee shop, café, restaurant; takeaway/fast food outlet; pharmacy; lotto outlet; news agency; travel agency; optician; jewellers; photographic shop; pet shop; hairdresser; child care facility; shoe and key shop; post office; dry cleaners; car wash, automated teller machine; bank; internet/games café; home shopping and on-line facilities."*

9. We know of no fast-food outlets, travel agencies, opticians, shoe repairs, dry cleaners, jewellers, hairdressers (or other aspects above) within supermarkets, but within the lease contract, these are defined as being "supermarket" stores. While the list of retail activities appears exhaustive, there is additional scope to add any other activity deemed by the supermarket at any time through the phrase "but without limitation".
10. This definition of supermarket then carries through to another clause in the Lease which requires the retail centre/facility owner to obtain the designated grocery retailer's consent to permit any part of the retail centre/facility to be used by another supermarket, butchery, bakery, fruit and/or vegetable store, liquor store or pharmacy (noting the definition of supermarket already captures much more than this). Otherwise, the designated grocery retailer's base rent shall be reduced by 50% and the rent review date shall be postponed by three years until the breach has been remedied i.e. the competing retail store has been closed down (see the following and Attachment B):

"Other supermarkets: If at any time any premises (or part thereof) in the Centre or any adjoining Property are permitted by the Lessor without the Lessee's prior written consent to be used (either by the Lessor itself or any third party), whether pursuant to a lease, license or any other right of occupation, for any of the following purposes:

- a) a supermarket which stocks, sells and supplies food, merchandise and services as provided for in New Zealand and Australia from time to time);*
- b) a butchery;*
- c) a bakery;*
- d) a fruit and/or vegetable store;*
- e) a liquor store; or*
- f) a pharmacy.*

then the following provisions shall apply:

- i) for so long as those premises are so used the Lessee shall only be liable (notwithstanding any prior waiver or failure to take action by the Lessee) to pay to the Lessor the Base Rent at fifty per cent of the amounts ordinarily payable under the Lease and such reduction shall continue to apply from and including the date on which the Base Rent becomes payable until such time as the breach has been remedied to the satisfaction of the Lessee (acting reasonably). For the avoidance of doubt, such reduced Base Rent will be paid to the satisfaction of the Base Rent that would otherwise be payable under the terms of the Lease; and*
- ii) if the next Rent Review Date is due to occur on a date which is less than three years from the date that the breach first occurred, such Rent Review Date shall be postponed until the date which is three years from the date that the breach first occurred and the Lessor shall enter into a deed in such form as the Lessee reasonably requires to record such variation."*

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11. The designated grocery retailer can effectively 'block' a wide range of competitors, retail grocery store or not, from the retail centre/facility by withholding consent. Due to the wide definition of "supermarket", the landlord is required to seek permission of the supermarket tenant for any additional tenancy that could be in a mall, centre or facility. Anything remotely relevant to the supermarket is expected to be, or could be, vetoed in practice. Requirements like this are a clear barrier to entry, not just for additional grocery stores, but many Mum and Dad independent stores selling goods in the above expanded definition.
 12. In the grocery market study process, the designated grocery retailers were quick to emphasise they compete with a wide range of retailers. For example "*FSNI has always considered traditional Out-of-Home players (e.g. restaurants, fast-food places, cafes, bars, etc.) as competitors for the total "share of wallet" but even more so today, as delivery specialists such as Uber Eats are enabling a more convenient avenue to consume their offers.*"⁶ and the competitive landscape diagram Woolworths submitted includes fuel retailers, health & body/beauty retailers such as Chemist Warehouse and Unichem, the Warehouse, food and beverage retailers like McDonalds and Subway, and more⁷. These businesses would be captured by the extensive clause above, but would not be captured by section 28A's definition of "grocery product" and "retail grocery store".
 13. We are concerned the proposed prohibition fails to capture the reality of the covenants and leases in place, which have wider effects on other stores and malls/centres. We encourage the Committee to request examples from the designated grocery retailers of the types of covenants the Bill seeks to prohibit and test whether they are adequately captured by the prohibition described in the Bill.
 14. Another example where the Lease has a clause with wider effects than just retail grocery stores is a clause which requires the retail centre owner to take action reasonably necessary to protect and maintain the competitive position of the retail centre, including objecting to plan changes or resource consents, if requested by the designated grocery retailer. Developments that could threaten the competitive position of a retail centre is wider than just retail grocery stores. If the development is, for example, another retail centre it could be argued that there needs to be a sufficient nexus between impeding the new retail centre development and impeding a retail grocery store which may or may not be difficult to prove in the circumstances. The clause goes beyond effects on retail grocery stores and extends to retail centres and other stores which would have been in those centres.
 15. We recommend considering if the prohibition on anti-competitive covenants should be more broadly framed to reflect (and negate) the full scope of such current restrictions. If grocery retailers see such operations as (potentially) competing, then it follows that those potential competitors should not be prohibited.

⁶ Foodstuffs North Island "*Submission on retail grocery market study preliminary issues paper*" (4 February 2021) at p16: https://comcom.govt.nz/_data/assets/pdf_file/0027/236934/Foodstuffs-North-Island-Submission-on-retail-grocery-market-study-preliminary-issues-paper-4-February-2021.pdf

⁷ Woolworths New Zealand Limited "*Submission on retail grocery market study preliminary issues paper*" (4 February 2021) at p16, figure 2: https://comcom.govt.nz/_data/assets/pdf_file/0030/236946/Woolworths-New-Zealand-Submission-on-retail-grocery-market-study-preliminary-issues-paper-4-February-2021.pdf

B. Lease agreements may feature various types of ROFR

16. Lease agreements may feature various types of ROFR and options which require the landlord to offer premises first to the designated grocery retailer. For example, the Lease contains:

- a) **A ROFR to purchase the premises or the retail centre.** This gives the designated grocery retailer the first chance to offer on the premises or retail centre if the retail centre owner wishes to sell it. If the retail centre owner has an acceptable offer from a third party, then the major grocery retailer may purchase the premises or retail centre for the same amount (see [Attachment C](#)).
- b) **An option to purchase the premises or the retail centre if the retail centre owner is acquired by a competitor.** The apparent purpose of this seems to be to deny the competitor ownership of a desirable site, whatever the means by which the competitor tries to acquire it (see [Attachment D](#)).
- c) **A ROFR to take further lease.** For three years *after* expiry or termination of the lease, any time the retail centre owner wants to use the premises as a supermarket or let the premises to a third party, it must first offer to lease the premises to the designated grocery retailer that vacated (see [Attachment E](#)). A ROFR lasting many years after the termination of a lease in effect makes it extremely difficult for a landlord to lease the site to another supermarket or food distributor without facing a significant financial penalty.
- d) **A ROFR to lease other suitable premises at the retail centre.** The retail centre owner must first offer to lease other suitable premises at the retail centre to the designated grocery retailer first. If it fails to do so, the major grocery retailer's total occupancy cost becomes 1% of the major grocery retailer's turnover at the premises (see [Attachment F](#)).
- e) **Form of deed between the designated grocery retailer and the bank (mortgagee)** under which the bank agrees to observe the terms of the lease, including relating to ROFR to the designated grocery retailer (see [Attachment G](#)).

17. These are all just in one agreement. Each individually gives priority to the designated grocery retailer to lease or own the site and hinders competitors from obtaining the location, and collectively they ensure there are no means by which a competitor could acquire the site without the designated grocery retailer first having a right – for up to 3 years after the designated grocery retailer vacates the premises.

18. Clauses like these may create barriers to entry for new entrants and hinder new competition in an area. It is not clear the Bill captures such provisions which create entry / switching barriers. We recommend this be addressed and / or clarified.

C. Retail centre owner may be required to make submissions opposing new developments or plan changes

19. Lease agreements may require retail centre owners to object to new developments or plan changes. For example, a clause in the Lease requires the retail centre owner to take action reasonably necessary to protect and maintain the competitive position of the retail centre, for example by objecting to plan changes or resource consents, if requested by the designated grocery retailer (see [Attachment H](#)).

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20. As recognised in the grocery market study report, regulatory disputes of this type (which the Lease can require the retail centre owner to engage in) can create significant impediments or delays in the store development process⁸. This contributes to high barriers to entry in the retail grocery sector.
21. The use of such clauses may leverage supermarket market power and lead to behaviour which might (if conducted by the supermarket) be prohibited under RMA limits on trade objections. We recommend specifically prohibiting such terms in the Bill.

D. Lease agreements may anti-competitively align the incentives of retail centre owner and grocery retailer

22. Lease agreements may (through linking rent to turnover) anti-competitively, align the incentives of the retail centre owner and the designated grocery retailer. For example, the Lease provides that in addition to the base rent, the designated grocery retailer will pay the retail centre owner “turnover rent” based on the designated grocery retailer’s turnover at the premises (see Attachment I). The retail centre owner therefore benefits from the designated grocery retailer making more revenue.
23. Sharing revenues⁹ may incentivise retail centre owner to protect the grocery retailer’s monopoly rents and disincentivise it from permitting competitors setting up in the retail centre. We recommend this be considered.

E. Reviewing individual and collective effect of provisions and minor drafting suggestions

24. We recommend that the Committee reviews the individual and collective effect of the broader range of provisions, including those noted above. Put another way, the scope of the Bill may not go far enough to remove all the land-related, anti-competitive barriers. The Bill could perhaps provide that any such provisions (ie the examples noted above) individually or collectively are deemed anti-competitive.
25. Other potential mechanisms in the *Commerce Act 1986* (“**Commerce Act**”) to consider collective effects and other minor drafting suggestions that may improve clarity are below.

Aggregate effects

26. Sections 3(5) and 3(6) of the Commerce Act allow for the aggregation of effects of agreements or covenants, as applicable, in assessing whether there is an effect of substantially lessening competition in a market. The proposed section 28A prohibition could benefit from a similar provision. For example:

for the purposes of section 28A, a covenant (as defined in section 28A(4)) shall be deemed to have, or to be likely to have, the effect of impeding the development or use of land or a site as a retail grocery store or impeding another person at the same site (for example, a mall or a shopping centre) from operating a retail grocery store, if—

- (a) that covenant; and*
- (b) any other covenant to the benefit of which that person or an associated person (within the meaning of section 47(3)), is entitled or would be entitled if the covenant were enforceable—*

⁸ Commission “*Market study into the retail grocery sector: Final report*” (8 March 2022) at [6.66].

⁹ This reflects underlying market power - it seems the terms are (unusually) set by the *tenant*.

taken together, have or are likely to have the effect of impeding the development or use of land or a site as a retail grocery store or impeding another person at the same site from operating a retail grocery store.

Simplifying language

27. References in section 28A(2)(a) to “a restrictive covenant” and section 28A(2)(b) to “an exclusivity covenant” could be simplified just to “a covenant”.

Clarify definition of covenant

28. Covenant is defined in the Commerce Act as “a covenant (including a promise not under seal) annexed to or running with an estate or interest in land (whether at law or in equity and whether or not for the benefit of other land); and proposed covenant has a corresponding meaning”. We assume section 28A(4) which defines covenant as “any covenant or other provision referred to in **subsection (2)**” overrides that definition, otherwise the prohibition would fail to address concerns about restrictive provisions in leases which bind the parties but do not run with the land (which the legislation clearly is intended to also address).
29. For further clarity, we recommend the Bill amends the definition of “covenant” in section 2 of the Commerce Act to make clear the general definition of “covenant” does not apply to section 28A.

**Extract from existing supermarket standard lease agreement regarding
definition of supermarket**

"Supermarket" means a store which:

- (a) stocks, sells and supplies such general merchandise and services as provided for in Supermarkets anywhere in the world and includes, (but without limitation) general merchandise, products, goods and equipment and services under the following general headings: food and groceries such as meat, seafood, delicatessen, bakery, dairy, frozen, grocery, produce; alcoholic beverages; clothing, fashion, footwear and accessories for women, men, children and babies; bags and luggage; music, video, dvd and entertainment; toys and games; sports and fitness; electronics; computers and software; telecommunications; electrical appliances; small and large appliances; kitchenware; homeware, furniture and furnishings; bedding and decor; lighting; carpets and rugs; books, office supplies, stationery, greeting cards, magazines and newspapers; confectionery; art and crafts; pet food and products; tools, hardware and DIY; manchester and linens; toiletries, and cosmetics; pharmaceuticals; optical ware; household cleaning and chemicals; health and beauty care; giftware; gardening, plants and flowers; motoring/automotive; jewellery; banking, financial, insurance and lending; and such other ancillary uses thereof and such new lines and products as may be introduced from time to time; and
- (b) includes (but without limitation) a coffee shop, cafe, restaurant; takeaway/fast food outlet; pharmacy; lotto outlet; news agency; travel agency; optician; jewellers; photographic shop; pet shop; hairdresser; child care facility; shoe and key shop; post office; dry cleaners; car wash, automated teller machine; bank; internet/games cafe; home shopping and on-line facilities;

Extract from existing supermarket standard lease agreement regarding related ability to “block” competitor

15.12 **Other Supermarkets:** If at any time any premises (or part thereof) in the Centre or any Adjoining Property are permitted by the Lessor without the Lessee's prior written consent to be used (either by the Lessor itself or any third party), whether pursuant to a lease, licence or any other right of occupation, for any of the following purposes:

- (a) a supermarket (which stocks, sells and supplies food, merchandise and services as provided for in supermarkets in New Zealand and Australia from time to time);
- (b) a butchery;
- (c) a bakery;
- (d) a fruit and/or vegetable store;
- (e) a liquor store; or
- (f) a pharmacy.

1.6 then the following provisions shall apply:

- (i) for so long as those premises are so used the Lessee shall only be liable (notwithstanding any prior waiver or failure to take action by the Lessee) to pay to the Lessor the Base Rent at fifty per cent of the amounts ordinarily payable under the Lease and such reduction shall continue to apply from and including the date on which the Base Rent becomes payable until such time as the breach has been remedied to the satisfaction of the Lessee (acting reasonably). For the avoidance of doubt, such reduced Base Rent will be paid in satisfaction of the Base Rent that would otherwise be payable under the terms of the Lease; and
- (ii) if the next Rent Review Date is due to occur on a date which is less than three years from the date that the breach first occurred, such Rent Review Date shall be postponed until the date which is three years from the date that the breach first occurred and the Lessor shall enter into a deed in such form as the Lessee reasonably requires to record such variation.

**Extract from existing supermarket standard lease agreement regarding ROFR
to purchase property**

19. RIGHT OF FIRST REFUSAL TO PURCHASE PROPERTY

19.2 Offer: If the Lessor intends to sell the whole or any part of the Property or any interest, whether legal or beneficial, in the Property at any time during the Term, the Lessor shall first offer to sell the Property to the Lessee by delivering to the Lessee a duly completed written notice in the form specified in clause 19.4 ("**Notice of Offer**"). Where the Lessor has received an offer for the Property which it intends to accept, or has entered into a sale and purchase agreement which is conditional on the Lessee not exercising its right to purchase the Property under this clause 19, it shall provide the Lessee, with the Notice of Offer, a:

19.4 Form of notice of offer:

NOTICE OF OFFER

Date:

To:

**RIGHT OF FIRST REFUSAL CONTAINED IN LEASE DATED
("Lease")**

**MADE BETWEEN
("Lessor")**

**AND
("Lessee")**

**IN RESPECT OF THE PROPERTY AS DEFINED IN THE LEASE
("Property")**

The Lessor, pursuant to clause 19 of the Lease, gives you notice that the following are the terms upon which the Lessor offers to sell the Property to you.

(a) Price and payment:

- (i)** If an offer from a third party is acceptable to, or has been accepted by, the Lessor, then the purchase price shall be the same as the amount agreed between the Lessor and the third party; or
- (ii)** If no offer has been received from a third party or such offer has been received which is not acceptable to the Lessor but the Lessor wishes to sell the Property, then the purchase price shall be the Market Value determined in accordance with the provisions of Schedule 6.

**Extract from existing supermarket standard lease agreement regarding ROFR
to purchase property**

20. OPTION TO PURCHASE: CHANGE OF CONTROL IN LESSOR TO COMPETITOR

20.1 [REDACTED] if a Competitor acquires Control of the Lessor, or if the Lessor or a person which has Control of the Lessor becomes a Competitor, the following clauses apply.

20.2 The Lessor grants to the Lessee an option to purchase the Premises (and where the Premises do not comprise the entirety of the land on which they are situated, the land on which the Premises are situated, the Centre, or any part thereof together with the rights of access thereto (if any) granted by this Lease ("**Property**") to the Lessee at the Market Value of the Property.

Extract from existing supermarket standard lease agreement regarding re-leasing a facility vacated by a supermarket

22. LESSEE'S RIGHT OF FIRST REFUSAL TO TAKE FURTHER LEASE

22.1 Where the Lessee is [REDACTED] and:

- (a) all rights of renewal have been exercised and this Lease expires on the Final Expiry Date by the passage of time; or
- (b) the Lease has been terminated by the Lessor pursuant to clause 16.8,

1.16 then, in the event that, at any time during the period of three (3) years following the expiry or earlier termination of this Lease, the Lessor chooses to:

- (c) use the Premises (or any part thereof) as a supermarket or to permit a Related Company to use the Premises as a supermarket; or
- (d) let the Premises (or any part thereof) to a third party,

the Lessor shall submit to the Lessee an offer to lease the Premises on such terms and conditions as the Lessor shall in its absolute discretion determine, except that such offer shall be for the Permitted Use and shall specify a term (plus renewals) of such length as is typical of the lessee's other premises of a similar size, type and nature as the Premises and a market rent (such proposed market rent to be accompanied by a registered Valuer's report substantiating the proposed new market rent) and shall otherwise be on terms and conditions generally accepted in the market at the time of the offer ("**the Lease Offer**"). The Lessee shall then have sixty (60) Working Days from receipt of the Lease Offer in which to accept or reject the same, any such acceptance to be in writing in accordance with the provisions for service of notice under this Lease and to stipulate whether the consent of the Overseas Investment Office ("**OIO Consent**") is properly required to the lease of the Premises. If the Lessee accepts the Lease Offer, the parties shall be deemed to have entered into an agreement to lease the Premises on the terms set out in the Lease

Offer, but on the basis that if the Lessee has advised OIO Consent is required such agreement shall be conditional (for the benefit of both parties) on such consent being obtained within a reasonable timeframe, as stipulated by the Lessee having regard to the processing times of the Overseas Investment Office in respect of applications for consent under the Overseas Investment Act 2005 of a comparable nature to the consent required for the lease of the Premises. Each party shall provide to the Overseas Investment Office, as and when reasonably required to ensure the application for consent is progressed in a timely manner, such information as may reasonably be required to enable the application to be properly considered. If the Lessee fails to notify acceptance of the Lease Offer within such time and in accordance with the provisions for service of notice under this Lease then the Lessee shall be deemed to have rejected the Lease Offer, leaving the Lessor free (subject to the following restrictions) to make an offer of lease to another party or to use the Premises itself. The only restriction on the Lessor under this clause is that if the Lessee does not accept the Lease Offer then the Lessor will not lease the Premises to another party on terms and conditions more advantageous to that other party than the terms and conditions on which the Premises have first been offered to the Lessee without submitting a fresh offer to the Lessee and repeating the above process. Further notwithstanding that this Lease has been terminated due to expiry of the Term or any renewals thereof the provisions of this clause 22 shall survive and continue in full force and effect to the extent that such provisions remain unfulfilled or are not exhausted.

Extract from existing supermarket standard lease agreement regarding offer of available premises

26. OFFER OF AVAILABLE PREMISES

26.1 Offer by Lessee: The Lessor must not:

- (a) agree to grant or grant a lease; or
- (b) agree to grant or grant a licence to occupy

in relation to any Available Premises during the Term or any renewal, other than to a Related Company of the Lessee, unless the Lessor, in good faith, first offers to lease the

Available Premises to the Lessee by executing and delivering to the Lessee an offer to lease ("**Offer**") detailing:

26.6 Effect of breach by the Lessor: If the Lessor breaches clause 26.1 or clause 26.5, then during the continuance of any lease, licence or right of occupation of the Available Premises to a third party, the Total Occupancy Costs for each Lease Year or part thereof after commencement of such lease, licence or other right of occupation will be satisfied by the Lessee paying an amount equal to 1% of Turnover (payable at the same time that Turnover Rent may otherwise have been paid under this Lease).

Extract from existing supermarket standard lease agreement regarding future planning

23.3 Future Planning: The Lessor agrees to:

- (a) use its best endeavours to ensure that:
 - (i) the status of the Centre in the retail hierarchy under any relevant operative or proposed district plan; and
 - (ii) the external road infrastructure as shown on the Plan,at the date of the Agreement for Lease is maintained;
- (b) make submissions or object to (as appropriate) any changes to any relevant district plan (whether operative or proposed) which would alter the status of the Centre in the retail hierarchy at the date of the Agreement for Lease;
- (c) make submissions or object to (as appropriate) applications by others for approval for developments which would compete with the Centre on land within a radius of one (1) kilometre of the Centre; and

23.4 Maintain Competitiveness of Centre: If requested by the Lessee, the Lessor must take such action as is reasonably necessary to protect and maintain the competitive position of the Centre, including:

- (a) making submissions on plan changes or resource consent applications which the Lessee, acting reasonably, considers will, if implemented, be materially detrimental to the competitive position of the Centre; and
- (b) lodging an objection at the cost of the Lessor to any application for a plan change, or a resource consent application, which if granted the Lessee, acting reasonably, considers might be materially detrimental to the competitive position of the Centre.

Extract from existing supermarket standard lease agreement regarding turnover rent

4. TURNOVER RENT

- 4.1 **Amount:** In addition to Base Rent, the Lessee must pay to the Lessor the Turnover Rent in respect of each Lease Year or Broken Period (each, a "**Turnover Period**"). Turnover Rent is calculated in accordance with the following table in respect of each Turnover Period. If the amount calculated in accordance with the table exceeds zero, Turnover Rent is payable for that Turnover Period. If the amount calculated in accordance with the table is zero or a negative figure, then no Turnover Rent is payable for that Turnover Period:

Turnover Rent Percentage Amount for the relevant Turnover Period	\$
Deduct Base Rent payable for the relevant Turnover Period	\$
Deduct Additional Rent payable for the relevant Turnover Period	\$
Deduct the Increase in Outgoings payable for the relevant Outgoings Year (plus an amount equal to any set-off effected under clause 24.10)	\$
Deduct sums paid as Minimum Services for the relevant Turnover Period pursuant to clause 7.13	\$
Turnover Rent payable for the relevant Turnover Period	\$