

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2018-404-2843
[2019] NZHC 514**

UNDER Overseas Investment Act 2005

BETWEEN CHIEF EXECUTIVE OF LAND
INFORMATION NEW ZEALAND
Plaintiff

AND AGRIA (SINGAPORE) PTE LIMITED
First Defendant

LAI GUANGLIN (ALSO KNOWN AS
ALAN LAI)
Second Defendant

Hearing: 13 March 2019

Appearances: J Dixon QC and K Muirhead for the Plaintiff
M Chen and N Russell for the Defendants

Judgment: 21 March 2019

JUDGMENT OF GORDON J

This judgment was delivered by me
on 21 March 2019 at 11 am, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors: Crown Solicitor, Auckland
Chen Palmer Partners, Auckland
Counsel: J Dixon QC, Auckland

Introduction

[1] The first defendant, Agria (Singapore) PTE Ltd (Agria Singapore), and the second defendant, Lai Guanglin (Mr Lai), both admit a breach of the good character conditions in two consents granted under the Overseas Investment Act 2005 (the Act). The Chief Executive of Land Information New Zealand (the Regulator) has sought orders under s 48 of the Act imposing a civil penalty on both Agria Singapore and Mr Lai.

[2] The parties have agreed on and recommend penalties of \$100,000 for Agria Singapore and \$120,000 for Mr Lai together with a combined payment for both Agria Singapore and Mr Lai of \$30,000 to the Regulator towards monitoring and enforcement costs. Orders are sought in those terms.

[3] Because liability is admitted, the only issue for the Court to determine is the quantum of the penalties.

Agreed facts

[4] I first set out the details of the defendants and other entities, before turning to the relevant conduct.

Agria Singapore

[5] Agria Singapore was incorporated in 2009. It is majority owned by Agria Corporation and operates as a subsidiary of Agria Asia Investments Ltd, a joint venture between Agria Group Ltd (a subsidiary of Agria Corporation), New Hope International (Hong Kong) Ltd and Nai Tahu Capital Ltd.

Mr Lai

[6] Mr Lai is a business person who is a citizen of Singapore and a resident of Hong Kong. Mr Lai has been the Chairperson of the Agria Corporation Board of Directors since June 2007 and Executive Chairman of Agria Corporation since March 2013. He is also one of its principal shareholders, owning more than 40 per cent of shares in Agria Corporation.

Agria Corporation

[7] Agria Corporation is a Cayman Island-registered company engaged in the agricultural business. At all relevant times, Agria Singapore was either the wholly owned subsidiary of Agria Corporation or Agria Corporation was the majority shareholder of Agria Singapore via its interests in other companies.

[8] Agria Corporation's American Depositary Shares (ADS) were formerly registered with the United States Securities and Exchange Commission (SEC) and traded on the New York Stock Exchange (NYSE). On 3 November 2016, the NYSE suspended trading in Agria Corporation ADS. On 2 January 2017, the NYSE de-listed Agria Corporation.

PGG Wrightson Ltd

[9] PGG Wrightson Ltd (PGW) is a registered company incorporated in New Zealand. It is one of New Zealand's leading providers of agricultural products and services. It employs 2,100 people in New Zealand and key regions within Australia and South America. PGW announced an Operating EBITDA¹ for the year ended 30 June 2018 of \$70,200,000.

Conditional consents granted to make overseas investments in PGW

[10] On 16 November 2009, consent was granted to "Agria Corporation, or a 100% subsidiary of Agria Corporation (the applicant)" to make an overseas investment in PGW which owned "sensitive land" in terms of s 12 of the Act (first consent). Agria Singapore was designated as the applicant for the purpose of the first consent. Agria Singapore, as an "overseas person" under s 7(2)(b) of the Act (because it is incorporated outside New Zealand), was required to and did obtain consent under the Act when it sought to acquire shares in PGW.

[11] The first consent enabled Agria Singapore to acquire up to 19.99 per cent of PGW shares. A condition of that consent was that Agria Corporation, Agria Singapore

¹ Earnings before interest, tax, depreciation and amortisation.

or individuals with control of the applicant “continue to be of good character”. Mr Lai was subject to the good character condition of the first consent.²

[12] Once consent was granted, Agria Singapore obtained a 13 per cent shareholding in PGW. In December 2009, Mr Lai was appointed a director of PGW.

[13] On 15 April 2011, consent was granted to Agria Singapore for further investment in PGW (second consent) enabling Agria Singapore to acquire up to a further 41 per cent of the total issued ordinary shares in PGW. The second consent contained a condition that “the individuals with control of Agria Corporation [Agria Singapore], and New Hope Group Co. Limited must continue to be of good character”. Mr Lai was again subject to the good character condition in the second consent.

[14] In 2011, Agria Singapore became the majority shareholder in PGW with a shareholding of 50.22 per cent. As at 30 October 2018, Agria Singapore continued to own 50.22 per cent of PGW shares.

SEC investigation of Mr Lai and Agria Corporation

[15] The SEC investigated Mr Lai and Agria Corporation in relation to alleged breaches of the Securities Exchange Act 1934 (US) (the Exchange Act).³ The SEC allegations, in summary, were that:

- (a) Agria Corporation concealed losses from investors through fraudulent accounting in connection with its divestiture of a Chinese company, including by (for example) materially under-reporting losses relating to that divestiture; over-valuing shares it acquired through that transaction; and filing annual reports over a four year period that materially misstated Agria Corporation’s financial position; and, separately

² Overseas Investment Act 2005, s 15(2)(a) and (b).

³ Securities Exchange Act 15 USC § 78a.

- (b) Mr Lai engaged in a scheme to manipulate the price of Agria Corporation's ADS on the NYSE through trading, and Mr Lai made materially misleading statements in an Agria Corporation press release.

[16] In December 2018, Mr Lai and Agria Corporation entered into settlement agreements with the SEC without making any admissions of liability. Under the terms of the settlements, Agria Corporation agreed to pay a civil penalty of USD 3,000,000 to the SEC and Mr Lai agreed to pay a civil penalty of USD 400,000 to the SEC. Mr Lai agreed to cease acting as an officer or director of any United States listed entity (within an identified class) for a period of five years.

[17] Mr Lai and Agria Corporation also agreed to cease and desist from committing or causing any violations or future violations of certain provisions of the Exchange Act and rules under that Act.

Accepted breaches of the Act

[18] Agria Singapore and Mr Lai accept that:

- (a) The fact of the SEC investigation and the SEC settlements are matters that reflect adversely on the fitness of Mr Lai under s 19(1)(b) of the Act to hold the overseas investments in PGW that are the subject of the first and second consents (the two consents);
- (b) Accordingly, Mr Lai has failed to comply with the good character conditions of the two consents; and
- (c) The SEC investigation and SEC settlements have caused Agria Singapore to be in breach of the terms of the good character conditions of the two consents.

Statutory framework

[19] The Act regulates investments by overseas persons in New Zealand. The stated purpose, as set out in s 3 of the Act, is:

3 Purpose

The purpose of this Act is to acknowledge that it is a privilege for overseas persons to own or control sensitive New Zealand assets by—

- (a) requiring overseas investments in those assets, before being made, to meet criteria for consent; and
- (b) imposing conditions on those overseas investments.

[20] A transaction requires consent under the Act if it will result in an overseas investment in sensitive land or in significant business assets.⁴ Both are relevant in this case.

[21] In relation to sensitive land, s 16 provides that the criteria for consent to an overseas investment include that the investor test is met.⁵ The investor test is met if the relevant ministers are satisfied that, among other things, the relevant overseas person or (if that person is not an individual) all individuals with control of the relevant overseas person are of good character.⁶

[22] In relation to significant business assets, s 18 provides that the criteria for consent to an overseas investment include that the relevant overseas person is, or (if that person is not an individual) all the individuals with control of the relevant overseas person are of good character.⁷

[23] Section 19 then provides:

19 Applying good character and Immigration Act 2009 criteria

- (1) For the purposes of sections 16(2)(c) and 18(1)(c), the relevant Minister or Ministers must take the following factors into account (without limitation) in assessing whether or not a person (A) is of good character:
 - (a) offences or contraventions of the law by A, or by any person in which A has, or had at the time of the offence or contravention, a 25% or more ownership or control interest (whether convicted or not):

⁴ Overseas Investment Act, s 10(1).

⁵ Section 16(1)(a).

⁶ Section 16(2)(a).

⁷ Section 18(1)(c).

- (b) any other matter that reflects adversely on the person's fitness to have the particular overseas investment.
- (2) For the purposes of sections 16(2)(d) and 18(1)(d), an individual is not an individual of a kind referred to in section 15 or 16 of the Immigration Act 2009 if a special direction referred to in section 17(1)(a) of that Act has been made permitting a visa or entry permission to be granted to that individual.

[24] The Regulator relies on s 19(1)(b).

[25] When considering whether or not to grant consent to an overseas investment transaction, the minister(s) must grant the consent if satisfied that all of the criteria in ss 16 or 18 (as the case may be) are met.⁸ The imposition of conditions on consents held by overseas persons is one of the mechanisms by which the Act regulates the privilege referred to in s 3.

[26] Finally, s 48 provides the power to order a person in breach of a condition of consent to pay a civil penalty. That section provides in relevant part:

48 Court may order person in breach to pay civil penalty

- (1) On the application of the Regulator, the court may order a person (A) to pay a civil penalty to the Crown or any other person specified by the court if A has—

...

- (d) failed to comply with a condition of a consent or of an exemption.

- (2) The court may order A to pay a civil penalty not exceeding the higher of—

- (a) \$300,000; or
- (b) any quantifiable gain (for example, the increase in the value since acquisition) by A in relation to the property to which the consent or exemption relates or for which a consent should have been obtained; or
- (c) the cost of remedying the breach of condition; or
- (d) the loss suffered by a person in relation to a breach of condition.

...

⁸ Section 14(1)(c).

Good character

[27] While this is not the first proceeding under s 48 of the Act, it is the first proceeding involving a breach of good character conditions of consent under that section. The two earlier cases both concerned a failure to obtain the necessary consent.⁹

[28] Although Agria Singapore and Mr Lai admit they have breached the good character conditions of the consents, a consideration of the good character requirement provides a relevant backdrop for assessment of the nature and extent of the breaches and also deterrence, both of which are discussed later in this judgment.

[29] “Good character” is not defined in the Act. In that regard, s 19 is consistent with examples in other legislation where the term is used but is similarly not defined.¹⁰

[30] Mr Dixon QC, appearing for the Regulator, submits, and I accept, that there are four matters relevant to an assessment of good character under the Act. First, the requirement must be interpreted in light of the purpose of the Act as set out above. The purpose is to acknowledge that it is a privilege for overseas persons to own or control sensitive New Zealand assets such that only persons of good character will be entitled to that privilege.

[31] Second, the scheme of the Act suggests that ministers are entitled to adopt a high standard in terms of their level of satisfaction that the good character requirement is met. Offences and contraventions are mandatory considerations in assessing good character.¹¹ Any matter that reflects adversely upon a person’s fitness to have a particular overseas investment is also relevant.¹² As already noted, if all consent criteria are met, the minister must grant consent.¹³ There is no discretion to decline

⁹ *Chief Executive of Land Information New Zealand v Carbon Conscious New Zealand Ltd* [2016] NZHC 558; and *Chief Executive of Land Information New Zealand v Tang* [2018] NZHC 382.

¹⁰ Financial Markets Supervisors Act 2011, s 16(2)(b) (licencing of supervisors); Education Act 1989, ss 353(a) and 355 (registration as a teacher); Citizenship Act 1977, s 8(2)(c) (grant of citizenship); and Marriage Act 1955, s 10(3) (appointment of marriage celebrant).

¹¹ Overseas Investment Act, s 19(1)(a).

¹² Section 19(1)(b).

¹³ Section 14(1)(c).

consent. Additionally, once consent is granted, it cannot be revoked other than in limited circumstances.¹⁴

[32] Third, the report from the Finance and Expenditure Committee on the Overseas Investment Bill states that the majority agreed with the inclusion of a good character requirement, “as it is important to ensure that all persons investing in New Zealand are people unlikely to act inappropriately and bring this country into disrepute”. The report continues that the Bill did not at that time provide a test for determining whether a person is of good character which the majority believed to be essential if the requirement was to achieve its intent. The majority therefore recommended that the relevant clause, later enacted as s 19, be amended to detail (without limitation) matters that the minister needed to take into account in determining whether or not an overseas person is of good character.

[33] Fourth, case law from the immigration setting provides useful guidance. In *R v Secretary of State for the Home Department ex-parte al Fayed (No 2)*, Nourse LJ held that ministers were entitled to adopt a high standard of good character.¹⁵

Approach to fixing penalties

[34] This Court has considered the approach for determining the quantum of pecuniary penalties under s 48 of the Act in *Chief Executive of Land Information New Zealand v Carbon Conscious New Zealand Ltd* and *Chief Executive of Land Information New Zealand v Tang*.¹⁶ In both cases, the Court considered that the approach for determining the quantum of pecuniary penalties under the Commerce Act 1986 should apply equally to the fixing of penalties under the Act.

[35] Under that approach the Court has no objection to being presented with a joint recommendation as to penalty, nor to such a recommendation being reached as a result of a negotiated resolution. As stated by Venning J:¹⁷

¹⁴ Section 26 and sch 4(4).

¹⁵ *R v Secretary of State for the Home Department ex-parte al Fayed (No 2)* [2001] Imm AR 134 at [41].

¹⁶ See *Chief Executive of Land Information New Zealand v Carbon Conscious New Zealand Ltd*, above n 9; and *Chief Executive of Land Information New Zealand v Tang*, above n 9.

¹⁷ *Commerce Commission v Carter Holt Harvey Ltd* [2014] NZHC 531 at [30]. See also *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [18].

Such settlements are in the interests of the parties, the community and the judicial system, enabling as they do early disposal of the proceedings and encouraging a realistic view of culpability and penalty. They also avoid the need for a full hearing.

[36] Where the parties are agreed as to quantum, the role of the Court is to ensure that the recommended penalties are within the proper range rather than to substitute its own assessment of the particular penalty.¹⁸

[37] The approach under the Commerce Act is to adopt criminal sentencing principles to fix a pecuniary penalty. The Court assesses the seriousness of the offending, identifying relevant aggravating and mitigating factors to arrive at an appropriate starting point. The Court then considers any factors that are specific to the defendant which may warrant an uplift in, or reduction from, the starting point:¹⁹

[38] But as Lang J noted in *Tang*, it is necessary to bear in mind that the primary purpose of penalties under the Commerce Act is deterrence as opposed to criminal cases where the Sentencing Act 2002 prescribes a range of sentencing purposes and principles. Deterrence is just one of those purposes.²⁰

[39] The importance of deterrence under the Commerce Act approach is well stated by Miller J where the Judge said:²¹

... effective deterrence requires that the wrongdoer's unlawful gains or intended gains be eliminated but also that a rational wrongdoer takes into account *ex ante*, when contemplating the wrong, the probability that it will be detected and penalised. This rational approach is appropriate because general deterrence is concerned with violations that have yet to occur, viewed from the perspective of those who may be contemplating them.

[40] I agree with both Edwards J and Lang J that the primary purpose of penalties imposed under the Act is also deterrence.²²

¹⁸ *Commerce Commission v Alstom Holdings SA*, above n 17, at [18] as cited in *Chief Executive of Land Information New Zealand v Carbon Conscious New Zealand Ltd*, above n 9, at [24].

¹⁹ *Chief Executive of Land Information New Zealand v Tang*, above n 9, at [15].

²⁰ At [16].

²¹ *Commerce Commission v NZ Bus Ltd (No 2)* (2006) 3 NZCCLR 854 (HC) at [25].

²² *Chief Executive of Land Information New Zealand v Tang*, above n 9, at [16]; and *Chief Executive of Land Information New Zealand v Carbon Conscious New Zealand Ltd*, above n 9, at [30].

[41] In *Carbon Conscious*, Edwards J identified factors that are likely to provide guidance when fixing the quantum of pecuniary penalties.²³ They are:

- (a) The nature and extent of the breach;
- (b) The nature and extent of any loss or damage caused by the breach;
- (c) The nature and extent of any financial gain made from the breach;
- (d) Whether the breach was intentional, inadvertent or negligent;
- (e) The level of pecuniary penalties that have been imposed in previous similar situations; and
- (f) The circumstances in which the breach took place.

[42] Turning to features specific to the offender, Edwards J noted and adopted factors to be used in the Commerce Act context, namely:²⁴

- (a) Any previous misconduct of a similar nature by the offender;
- (b) The size of the offender;
- (c) Any cooperation with the authorities;
- (d) Any admission of liability; and
- (e) Any compliance programmes put in place by the offender.

[43] Both *Carbon Conscious* and *Tang* concern the failures of the defendants in those cases to obtain consents under s 10 of the Act, rather than a breach of conditions

²³ Law Commission *Pecuniary Penalties: Guidance for Legislative Design* (NZLC R113, 2014) at [16.47] as cited in *Chief Executive of Land Information New Zealand v Carbon Conscious New Zealand Ltd*, above n 9, at [31].

²⁴ *Chief Executive of Land Information New Zealand v Carbon Conscious New Zealand Ltd*, above n 9, at [47].

contained in consents. Both counsel submit, and I agree, that there is no reason for adopting a different approach for breach of a consent condition as occurred in this case.

Maximum penalty

[44] The maximum penalty that can be imposed may not exceed the higher of four alternatives set out in s 48(2)(a)–(d).

[45] The parties are agreed that no quantifiable gain is ascertainable; there are no identifiable costs of remedying the breach and there is no identifiable loss suffered by a person in relation to a breach of condition. The maximum penalty available for each of the defendants is therefore \$300,000.²⁵

Starting point

[46] I now turn to consider the appropriate starting point in light of each of the factors referred to in *Carbon Conscious* and *Tang*.

Nature and extent of the breaches

[47] Both Agria Singapore and Mr Lai accept that the allegations that gave rise to the breaches of the good character conditions are serious. The allegations by the SEC that Agria Corporation and Mr Lai misled investors and manipulated share prices represent a breach of their on-going obligations to remain of good character. Ms Chen, who appeared for both Agria Singapore and Mr Lai, acknowledges that allegations of misleading investors would be of significant concern to PGW and its minority shareholders even though those allegations were not admitted as part of the SEC settlements. Ms Chen says that both defendants also accept that because the allegations concern actions that took place over a period of several years, the breaches cannot be described as a one-off error.

[48] I consider that the seriousness of the allegations, and accordingly the breach, is underlined by the size of the civil penalty which was a combined amount of

²⁵ Overseas Investment Act, s 48(2)(a).

USD 3,400,000 paid by Mr Lai and Agria Corporation. The seriousness is further underlined by the actions taken by the NYSE to suspend trading in Agria Corporation ADS and to delist Agria Corporation.

[49] Against those factors, Ms Chen submits that the SEC investigation did not disclose any alleged activity that took place in or with respect to New Zealand or PGW. Nor did it allege any criminal offending. Furthermore, Ms Chen submits, the actions alleged by the SEC can be considered to be historic as no actions are alleged to have taken place after 2013.

[50] As to Ms Chen's submission that the alleged activity did not take place in or with respect to New Zealand or PGW, the alleged conduct on an objective basis is serious regardless of where it occurred. I also do not place any weight on the fact that there are no allegations after 2013. I do note, and take into account, the fact that the alleged fraudulent accounting began less than 12 months after the first consent was granted and before the second consent was granted.

[51] Having regard to the importance of good character as discussed in [27] to [33] above, I consider the nature and extent of the breaches to be serious.

Nature and extent of any loss or damage caused or financial gain from the breaches

[52] As already noted, the parties have not attempted to quantify any financial loss or damage caused by the breaches or any financial gain made by the defendants. Mr Dixon submits however that the defendants have received the benefit of both consents. They entitled Agria Singapore to own a significant stake in one of New Zealand's leading providers of agricultural services and products, while falling short of the high standards the Act expects of overseas investors.

[53] However, any consent holder who has breached a condition is likely to have received a benefit of the kind referred to by Mr Dixon. It is a state of affairs that will exist in those circumstances. I do not regard it as an aggravating factor that would merit an increase in penalty.

[54] On the other side of the ledger, I do not take into account the benefits that Agria Singapore and Mr Lai submit have accrued to the shareholders and employees of PGW and the community by its investment in PGW. There is no basis for assessing what would otherwise have happened but for the breaches.

Whether the breaches were intentional, inadvertent or negligent

[55] The settlement with the SEC was made without any admission of liability. In that sense, the breaches of the good character conditions in the two consents cannot be described as intentional or inadvertent or negligent.

Level of pecuniary penalties imposed in other cases

[56] Both *Carbon Conscious* and *Tang* turn on their own facts. I have found them of assistance in terms of the approach to setting a penalty but the conduct itself and factors which were relevant to penalty in those cases are quite different from this case.

[57] In the former, Edwards J ordered the first defendant to pay an end penalty of \$40,000 together with scale costs on a 2B basis, amounting to \$6,003.50. Significantly the defendants had completely relied on legal advice in structuring a transaction which involved the deliberate circumvention of the controls under the Act. This placed the defendants' culpability towards the lower end of the spectrum and there was an absence of any identifiable or quantifiable commercial gain or costs arising from the breach.

[58] The Judge gave a discount of 50 per cent from the starting point of \$80,000 for factors that were specific to the defendant. *Carbon Conscious* had sought retrospective consent for the transaction, there was an early admission of liability and cooperation with the Regulator and a history of compliance with the Act.

[59] In *Tang*, the first defendant, Mr Tang, entered into a sale and purchase agreement for a property. Mr Tang nominated the second, third and fourth defendants as purchasers. None of the defendants sought consent under the Act. In adopting a starting point of \$130,000 for Mr Tang, Lang J took into account the fact that the sale and purchase agreement referred to OIA consent and his experience as a business

person both of which ought to have alerted him to the consent required, the failure of the estate agent or his solicitors to advise him of the need for consent, and the absence of any identifiable gain from the breach.

[60] In relation to the remaining defendants, Lang J adopted a starting point of \$270,000 by reference to the gain they had made through the resale of the property and their acceptance that they should have been aware of the restrictions on overseas persons because of their prior business dealings in New Zealand.

[61] Lang J applied discounts of 15 per cent for all except the one defendant who did not instruct counsel requiring the Regulator to seek an order for substituted service (there was a 10 per cent discount for that defendant).²⁶

Overall assessment of starting point

[62] In common with Carbon Conscious and Mr Tang, Agria Singapore and Mr Lai are experienced commercial parties who breached the Act in a way that has not led to any readily quantifiable gains or losses.

[63] I accept the submission that Mr Dixon makes that the culpability of Mr Lai and Agria Singapore is greater than that of Mr Tang or Carbon Conscious because of the seriousness of Mr Lai's breaches of the good character conditions of the consents and the involvement of a publicly listed New Zealand company. This may be contrasted with the breaches by Carbon Conscious and Mr Tang which involved one-off property transactions.

[64] A further distinction is that the agreed statement of facts does not suggest that the misconduct alleged by the SEC against Mr Lai occurred in reliance on legal advice or was otherwise the result of any failings on the part of Mr Lai's advisors.

²⁶ It is important to note that at the time of the contraventions in *Tang* the maximum penalty available in respect of a quantifiable gain was the total amount of that gain. Accordingly, at that time there was little room for discounts taking into account the need for disgorgement of the defendants gains for deterrence purposes. See *Chief Executive of Land Information New Zealand v Tang*, above n 9, at [31].

[65] Additionally, I consider there is a strong need to deter breaches of the good character requirement having regard to its importance in the context of the scheme of the Act.

[66] As between the two defendants, I consider that the starting point for Mr Lai should be higher. The SEC alleges that Mr Lai himself engaged in misconduct and further, Mr Lai was the Chairperson of Agria Corporation during the period of the misconduct alleged against Agria Corporation.

[67] The liability for Agria Singapore arises indirectly through Mr Lai. Agria Singapore took no part in the acts alleged by the SEC and was not a party to the settlement agreements with the SEC. However, it is the party which has had the benefit of the two consents. In all the circumstances it is appropriate that there is a separate penalty imposed on each defendant.

[68] Ms Chen submits that the appropriate starting point for Mr Lai is “about \$180,000”. In support of her submission that a starting point of \$180,000 meets the necessary deterrence objective, Ms Chen refers to the penalty already paid by Mr Lai and Agria Corporation to the SEC.

[69] I do not take those payments into account. While the settlements with SEC give rise to the breaches, the breaches themselves arise under legislation and consents issued in this country. That said, I do not disagree with the sum proposed by the parties. Mr Dixon says, “In the range of \$180,000-\$190,000”. I consider the range is appropriate. It meets the deterrence objective and reflects the serious nature of the breaches of the consents.

[70] For Agria Singapore, Ms Chen submits that a starting point of “about \$150,000” is appropriate. Mr Dixon submits that “the range should be \$150,000-\$160,000”. I consider that the range proposed recognises Agria’s lesser culpability, but it also reflects the need to ensure that large corporations take their obligations under the Act seriously.

Adjustment for offender-specific factors

Any previous misconduct?

[71] Neither defendant has previously contravened the Act. The Regulator accepts there are no aggravating features personal to either Agria Singapore or Mr Lai.

Size of the offender

[72] The defendants acknowledge that Agria Singapore is a substantial company. Its shareholding in PGW (its main asset) has a market value in excess of \$370,000,000. The defendants therefore acknowledge that they will not encounter difficulty paying a higher penalty than in *Carbon Conscious* or *Tang* where the defendants were either individuals or a smaller company.

Cooperation with the authorities/admission of liability

[73] Ms Chen draws the Court's attention to the fact that the defendants approached the Regulator to self-report the SEC investigation. That, however, needs to be seen in light of the fact that the disclosure was made in the course of another application for consent.

[74] Nevertheless, the defendants did admit liability at the earliest available opportunity, filing the notice of admissions on the same day proceedings were commenced. They also instructed New Zealand solicitors to accept service on their behalf so there were no issues in relation to service.

Approach to compliance

[75] Agria Singapore and Mr Lai have now undertaken to, or have completed further compliance steps as follows:

- (a) Agria Singapore undertook to, and has now reduced its shareholding in PGW from 50.22 per cent to below 50 per cent;

- (b) Agria Singapore has undertaken to use its best endeavours to ensure that a majority of the PGW Audit Committee will be independent of Agria Singapore or any related companies; and
- (c) Mr Lai has agreed not to assume directorship of PGW or the role of Chairperson of PGW until at least December 2023.

Discount

[76] Counsel provided me with references to a number of cases under the Commerce Act where discounts have ranged from around 33 per cent to 50 per cent. The circumstances of any particular case will obviously dictate the size of the discount. Two important factors are the timeliness of any admissions and the extent of any cooperation. Where a defendant not only admits liability at an early stage but also cooperates with the Regulator by giving evidence against other defendants, discounts of up to 50 per cent have been given.²⁷

[77] Discounts in the range of 30 to 35 per cent have been given for an early admission of liability, cooperation with the Regulator (but where there has been no assistance in relation to another defendant) and no previous contraventions of the Act.²⁸

[78] In this case, the parties have agreed that a 35 per cent discount should be given. I accept that is an appropriate discount, taking into account the fact that the defendants have not previously contravened the Act; they admitted liability at the outset; they cooperated fully with the Regulator's investigation and they have taken steps to promote compliance.

[79] Applying a 35 per cent discount to the starting point (using the ranges referred to at [69] and [70] above) produces end penalty ranges of:

²⁷ *Commerce Commission v EGL Inc* HC Auckland CIV-2010-404-5474, 16 December 2010 at [19]–[26]; and *Commerce Commission v Lodge Real Estate Ltd* [2017] NZHC 1875 at [21].

²⁸ *Commerce Commission v Cargolux Airlines International SA* HC Auckland CIV-2008-404-8355, 5 April 2011 at [44]–[52]; and *Commerce Commission v Property Brokers Ltd* [2017] NZHC 681 at [14].

(a) \$97,500 to \$104,000 for Agria Singapore; and

(b) \$117,000 to \$123,500 for Mr Lai.

[80] I will adopt a midpoint for each, namely \$100,000 for Agria Singapore and \$120,000 for Mr Lai.

Ancillary order/costs

[81] Agria Singapore and Mr Lai have agreed to make an additional combined payment of \$30,000 to the Regulator towards the Regulator's monitoring and enforcement costs. This is comparable to the \$35,000 combined costs payment ordered in *Tang* and I consider it is appropriate.

[82] The parties are agreed that there should be no further award as to costs.

Result

[83] I order that:

(a) Agria Singapore is to pay a civil penalty of \$100,000;

(b) Mr Lai is to pay a civil penalty of \$120,000; and

(c) Agria Singapore and Mr Lai are to make a combined payment of \$30,000 to the Regulator towards monitoring and enforcement costs.

Gordon J