

Enforceable Undertaking to the Chief Executive of Land Information New Zealand

Pursuant to section 46A of the Overseas Investment Act 2005

Aviation School of New Zealand Limited
Eagle Flight Training Limited
BRJ Consulting (2015) Limited
Monash Investments Limited

A stylized illustration of a mountain range in shades of green and yellow, spanning the width of the page at the bottom.

Dated: 17 March 2021

1 Persons giving undertaking

- 1.1 Aviation School of New Zealand Limited is a company incorporated in New Zealand having its registered address at 119 Armstrong Road, Rd 4, Tauranga ("**Aviation**").
- 1.2 Eagle Flight Training Limited is a company incorporated in New Zealand having its registered address at 119 Armstrong Road, Rd 4, Tauranga ("**Eagle**").
- 1.3 BRJ Consulting (2015) Limited is a company incorporated in New Zealand having its registered address at Unit 9, 22a Kalmia Street, Ellerslie Auckland ("**BRJ Consulting**").
- 1.4 Monash Investments Limited is a company incorporated in New Zealand having its registered address at 2999 Long Bay Road, Wyuna Bay, Coromandel ("**Monash**").
- Collectively, these parties are referred to as the "**Investors**".
- 1.5 The Investors give this undertaking to the Chief Executive of Land Information New Zealand, being the chief executive of the department designated as the regulating department by the Minister of Finance ("**the Regulator**"), for the purposes of s 46A of the Overseas Investment Act 2005 ("**Act**") ("**Undertaking**").

2 Definitions

- 2.1 In this document:
- (a) **Act** has the meaning set out at clause 1.5 above.
 - (b) **Associate** has the meaning set out in section 8 of the Act.
 - (c) **Investors** has the meaning set out at clause 1.4 above.
 - (d) **Overseas person** has the meaning set out in section 7 of the Act.
 - (e) **Regulator** has the meaning set out at clause 1.5 above.
 - (f) **sensitive land** has the meaning set out in section 12 of the Act.
 - (g) **sensitive residential land** means residential (but not otherwise sensitive) land as defined in s 6(1) of the Act.
 - (h) **Undertaking** means this document.
 - (i) **Property** means the property at 219 Wainui Road, Gisborne, comprised in record of title GS6C/668 (Gisborne Registry), being sensitive residential land.

3 Introduction

- 3.1 The Regulator has investigated suspected breaches of the Act in relation to the Investors' acquisition of sensitive residential land without first obtaining consent under the Act.
- 3.2 The Investors wish to provide enforceable undertakings to resolve matters and this document records the Regulator's reasons for accepting those undertakings.
- 3.3 The Regulator will publish a copy of this Undertaking on the Land Information New Zealand website.

4 Background

The Investors

- 4.1 Aviation's subsidiary Eagle operates a flight training school in Gisborne.
- 4.2 At all relevant times:
- (a) Aviation has been an Overseas person, being wholly owned by a Vietnamese citizen, Mr Tran Dang; and
 - (b) Eagle has been an Overseas person because it is wholly owned by Aviation.
 - (c) At all relevant times, Mr Brian Johns has been:
 - (d) a director of Aviation and Eagle; and
 - (e) the sole director and shareholder of BRJ Consulting, a company used for separate business. BRJ Consulting is a non-Overseas person.
- 4.3 Mr Owen Williams is a business acquaintance of Mr Johns, and was at all relevant times the sole director and indirect owner of Monash. Monash is a non-Overseas person.

Acquisition of the Property

- 4.4 In November 2019, Mr Johns identified the Property as having potential for Eagle to develop into student accommodation and visited it with Mr Dang.
- 4.5 To secure the Property, on or about 22 November 2019, BRJ Consulting entered a sale and purchase agreement to acquire the Property, conditional upon due diligence but not conditional on consent being obtained under the Act. Mr Johns subsequently established the Property was suitable for Eagle's purposes and the agreement became unconditional.
- 4.6 Mr Johns organised for Mr Williams to pay the deposit, purchase price, and settle the transaction. Mr Williams agreed to hold the Property until at least late January 2020 while Eagle sought consent from the Regulator. Mr Johns agreed that Mr Williams may require a \$20,000 holding fee from Aviation.
- 4.7 On or about 29 November 2019, BRJ Consulting nominated Monash to settle the transaction. The deed of nomination was not conditional on consent under the Act being obtained.
- 4.8 In December 2019, Eagle applied to the Regulator for consent to acquire the Property. The application disclosed the circumstances for the acquisition, and the Regulator commenced an investigation.
- 4.9 In late January 2020, Monash and Eagle entered a heads of agreement recording that Monash would rent the Property on a monthly basis to Eagle upon settlement of the Property, which would continue if Eagle did not obtain consent under the Act within six months.
- 4.10 In early February 2020, Monash settled the transaction and continues to hold the Property until this investigation is resolved.

5 Obligations under the Act

- 5.1 Sections 10 to 12 of the Act require consent to be obtained for a transaction before an overseas investment in sensitive land is given effect under the transaction. This includes an Associate of an Overseas person.

- 5.2 Section 8 of the Act provides that a person (“**A**”) is an Associate of another person (“**B**”) in relation to an overseas investment or any other matter if (amongst other things):
- (a) A is B’s agent, trustee, or representative, or acts in any way on behalf of B, or is subject to B’s direction, control, or influence, in relation to the overseas investment or the other matter;
 - (b) A acts jointly or in concert with B in relation to the overseas investment or any other matter;
 - (c) A participates in the overseas investment or the other matter as a consequence of any arrangement or understanding with B;
 - (d) A would come within those descriptions if the reference to B were instead to another associate of B.

For these purposes, it does not matter whether the control, direction, power, influence, arrangement, or other relationship between A and B is direct or indirect, general or specific, or legally enforceable or not.

If A is an Associate of B, B is also an Associate of A.

- 5.3 Section 22 provides that each overseas person or associate making the investment must apply for consent to an overseas investment transaction.
- 5.4 Section 42 of the Act provides that a person who is required to apply for consent to an overseas investment transaction commits an offence if that person gives effect to the overseas investment without the consent required by this Act.

6 Why the conduct contravenes the Act

- 6.1 The Regulator has concluded, and the Investors acknowledge, that BRJ Consulting and Monash acted as Associates of Aviation and Eagle when purchasing and holding the Property. In particular:
- (a) Mr Johns acted on behalf of Eagle when entering the sale and purchase agreement in the name of BRJ Consulting, and acted on behalf of Eagle and Aviation when arranging for Mr Williams to participate in the investment as financier and nominee to settle the transaction.
 - (b) Mr Williams acted jointly with Mr Johns (in his capacities as director of Eagle and of BRJ Consulting) when agreeing to pay the deposit and purchase price, and to hold legal title to the Property while Eagle sought consent from the Regulator under the Act.
- 6.2 The Property is sensitive residential land because it has a property category of “residential”.
- 6.3 The Investors therefore breached the Act by acquiring equitable and legal interests in the sensitive residential land without first seeking consent under the Act.

7 Commencement of this Undertaking

- 7.1 This Undertaking comes into effect when:
- (a) the Undertaking is executed by the Investors; and
 - (b) this Undertaking so executed is accepted by the Regulator,
- in accordance with section 46B of the Act.

8 Undertakings

- 8.1 In connection with the contraventions outlined in this document, for the purposes of s 46A of the Act:
- (a) The Investors collectively and severally undertake to:
 - (i) terminate all arrangements or agreements (whether written or verbal) with each other that relate to, or give any kind of interest in, the Property by **Friday, 30 April 2021**, and
 - (ii) not enter any future arrangements or agreements (whether written or verbal) in relation to the Property.

To avoid doubt, this undertaking does not prevent Eagle's students independently renting accommodation at the Property, provided the above statements remain true.
 - (b) Aviation, Eagle, and BRJ Consulting collectively and severally undertake to cease to have any further involvement with the Property, including the Property's future development and any rental arrangements with Monash for the property.
 - (c) Aviation, Eagle, BRJ Consulting, and Monash severally undertake to provide written confirmation to the Regulator that the terms of this Undertaking have been and will continue to be complied with on or before **Friday, 30 April 2021**.

9 Reasons for acceptance

- 9.1 The Regulator accepts the Undertaking because it:
- (a) provides an appropriate way to end the Associate relationship in respect of the Property;
 - (b) ensures the Overseas persons (Aviation and Eagle) and their primary Associate (BRJ Consulting) have no further involvement with the Property acquired in breach of the Act;
 - (c) promotes compliance with the Act by the Investors; and
 - (d) serves a public deterrence purpose by being published on the Land Information New Zealand website and being the subject of public comment.
- 9.2 The Regulator will accept this Undertaking as an alternative to requiring Monash, as the registered owner of the Property, to dispose of its interests in the Property. In doing so, the Regulator notes:
- (a) Monash funded the acquisition and intends to develop the Property to provide additional housing at a time when Gisborne has a critical housing shortage.
 - (b) Monash is a New Zealand investor and is not an Overseas person, and entitled to purchase the Property in its own name and for its own purposes, independently of any Overseas person, without needing to seek consent under the Act.
- 9.3 In all of the circumstances, provided Monash complies with the Undertaking, the Regulator is prepared to allow Monash to retain the Property.

- 9.4 Each of the Investors will be separately issued a warning about taking responsibilities under the Act seriously which, together with this Undertaking, will be taken into account in relation to any compliance or enforcement matters concerning any of the Investors in future.

10 Acknowledgements

- 10.1 The Investors acknowledge that:
- (a) If any Investor contravenes this Undertaking:
 - (i) the Regulator may apply to the High Court for an order and, pursuant to section 46F of the Act, if the High Court is satisfied that any person who made the Undertaking has contravened the Undertaking, the High Court may make an order a civil pecuniary penalty not exceeding \$50,000 for an individual or \$300,000 in any other case, an order directing the person to comply with the Undertaking, and/or an order discharging the Undertaking.
 - (ii) The High Court may make further orders, including an order directing the person to pay to the Regulator the costs of the proceedings and the reasonable costs of the Regulator in monitoring compliance with the Undertaking in the future, and an order in respect of the contravention or alleged contravention of this Act or regulations made under the Act to which the Undertaking relates, as if this Undertaking had not been made.
 - (b) The Regulator will publish a copy of this Undertaking on the Land Information New Zealand website in accordance with section 46C of the Act.
 - (c) The Regulator may make public comment in relation to this Undertaking, including in a media release, other comment to the media, or in Regulator publications (including as a case study in public information). This is important for the public interest for transparency and to act as a deterrent to other prospective investors.
 - (d) This Undertaking in no way derogates from the rights and remedies available to any other person arising from the conduct described in this Undertaking.
- 10.2 The Regulator and Investors acknowledge that the Undertaking may be executed in two or more counterpart copies each of which will be deemed an original and all of which together will constitute one and the same instrument. Any party may execute the Undertaking by signing a counterpart copy and sending it to the other parties (including by email).

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