



## Memorandum

To: Simon Pope, Manager Enforcement

From: Andre Baldock, Senior Investigator, Enforcement

Date: 28 July 2022

File Ref: 202200033

Subject: **Germinal Holding New Zealand Ltd –  
Administrative penalty for retrospective consent**

For Your: **Approval**

### Summary

1. This memorandum seeks your decision on the appropriate administrative penalty for Germinal Holdings New Zealand Limited's (**Germinal**) retrospective consent application to acquire an interest in sensitive land in breach of the Overseas Investment Act 2005 (**Act**).
2. Germinal has applied for retrospective consent to acquire approximately 4.2032 hectares of freehold land located at the corner of Shands Road and Tancreds Road, Lincoln, Canterbury (the **Land**).<sup>1 2</sup>
3. On 28 September 2020, Germinal entered into a sale and purchase agreement (**SPA**) with the vendor, Broadfield Farm Limited (**Vendor**) to acquire the Land. The SPA was not conditional on Germinal obtaining consent under the Act. On 15 February 2021, title to the Land transferred to Germinal – without consent.
4. Consent was required as Germinal is an overseas person and the acquisition comprised the acquisition of residential (but not otherwise sensitive) land under the Act.
5. Germinal also intends to acquire the adjoining 4.1134 hectares of land and has also lodged an application under the benefit to New Zealand pathway<sup>3</sup> which is being concurrently assessed by the OIO (the **Proposed Lot 1 Acquisition**).
6. Germinal, and its legal advisors for the conveyancing, Argyle Welsh Finnigan (**AWF**), did not identify the need for consent prior to signing the ASP or obtaining title to the Land. Neither party identified that the Land was Residential Land under the Act – instead they believed that it was rural/non-urban land that did not exceed the area threshold in the Act and thus did not require consent.
7. On becoming aware that the transaction required consent, Germinal self-reported the conduct to the OIO and cooperated with our investigation.

<sup>1</sup> Title 928073 – Lot 2 DP 545549.

<sup>2</sup> Applications – Assessment Report – Germinal Holdings New Zealand Limited (202200276).  
<https://linzone/id:A4952200>

<sup>3</sup> Case 202200246

8. In our view, the breach was likely to have been inadvertent.
9. The regulator may require an administrative penalty be paid before deciding a retrospective consent application per s 53 of the Act, as further specified in the Overseas Investment Regulations 2005 (**Regulations**).
10. I recommend that, for the reasons set out in this memorandum, a \$20,000 administrative penalty be imposed given:
  - (a) the consideration paid is less than NZD 2 million
  - (b) the relevant tests for the application are the investor test; and the non-residential use test
  - (c) in the circumstances, that amount is not unduly harsh or oppressive given the nature of, and the reasons for, the retrospective consent.

## Facts – why retrospective consent required

11. The facts of the case are set out more fully in the Enforcement Assessment Report of 15 February 2022<sup>4</sup> and our letter to Germinal of 16 February 2022.<sup>5</sup>
12. By way of summary:
  - (a) In our view, Germinal breached section 10(1)(a) of the Act when it gave effect to an overseas investment in sensitive land without obtaining OIO consent
  - (b) Germinal was an overseas person, as defined in the Act, when it gave effect to the transaction
  - (c) Lot 2 is, and was at the time of the transaction, sensitive land under section 12 of the Act as it is Residential Land given it is categorised as “Lifestyle” under the Selwyn District Council District Valuation Roll
  - (d) Germinal required OIO consent to acquire Lot 2, but did not obtain OIO consent prior to giving effect to the transaction
  - (e) Bell Gully submitted that consent was not obtained as neither Germinal nor AWF identified that the land was Residential Land prior to signing the SPA and obtaining title – and instead believed that it was rural/non-urban land but was not large enough to trigger the need for consent
  - (f) Germinal submitted that there were factors that contributed to them believing the property was non-urban land instead of Residential Land, including that it is in a rural area, is part of the Broadfield Farm property, had no dwellings on it, and is surrounded by properties used for agricultural purposes
  - (g) Post acquisition of Lot 2, Germinal expressed an interest in acquiring the adjoining Lot 1 (which is very similar to Lot 2) and obtained advice from AWF which identified that the acquisition would need OIA consent (as together the associated land would exceed 5 hectares of non-urban land). A sensitive land certificate from Port Glen (October 2021) also identified that Lot 2 was sensitive land – at which point Germinal became aware it had breached the Act – and reported the conduct to us.
13. The Applications Team is of the view that the investment meets the Act is likely to be granted consent.
14. In our view, the application meets the OIO retrospective policy as:

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<sup>4</sup> <https://linzone/id:A4803001>

<sup>5</sup> <https://linzone/id:A4806853>

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- (a) it meets the threshold criteria set out in para 14 of the Retrospective Consent Policy<sup>6</sup>
- (b) the breach was likely to have been inadvertent
- (c) Germinal self-reported the issue to the OIO and has cooperated with our investigation.

## Assessment of appropriate penalty – for transactions on or post 22 October 2018

15. In accordance with regulation 36 of the Overseas Investment Regulations 2005, the amount of the retrospective penalty is \$20,000.<sup>7</sup> I do not consider that requiring the applicant to pay this amount would be unduly harsh or oppressive given the nature of, and the reason for, the retrospective application. I discuss those matters in further detail below.
- (a) Germinal is a plant breeding, seed production, marketing and distribution company, which develops products for the livestock industry
  - (b) Germinal is wholly owned by Germinal Holdings Limited (**Germinal Holdings**) which is beneficially owned by a number of individual shareholders in the United Kingdom. Germinal Holdings is a 6th generation family owned company founded in Belfast, Northern Ireland, and has operated in New Zealand since 2002 (when Germinal was incorporated).
  - (c) Germinal acquired the Land to provide part of its site for its plant breeding and seed production business. The Land was previously used for stock grazing and growing animal feed
  - (d) the breach was likely to have been inadvertent
  - (e) Germinal has not been subject to previous OIO enforcement action
  - (f) We have received a high degree of co-operation from Germinal during our investigation.

## Recommendation

16. I recommend that the Regulator impose an administrative penalty of \$20,000. I do not consider the amount to be unduly harsh or oppressive having regard to the value of the consideration paid for the Shares, or the nature of, and the reasons for, the retrospective consent.



Simon Pope  
Manager Enforcement

Agree:   
Disagree:

Date:

<sup>6</sup> <https://linzone/id:A3010743>, page 63

<sup>7</sup> The value of the consideration provided for the Land was less than \$2 million (being \$520,000) and consent for the transaction is not on the basis that only the commitment to reside test is met.