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MEMORANDUM

TO: Land Information New Zealand

DATE: 18 December 2023

RE: REVIEW OF CONSENT DECISION – HIKURANGI FOREST FARMS

Introduction – Terms of Reference

1. Land Information New Zealand (**LINZ**) has commissioned this report pursuant to a recommendation made by the Ministerial Inquiry into Land Use in Tairāwhiti/Gisborne and Wairoa. The Inquiry recommended that there be an independent review of the decision to grant consent to Eastland Estate Limited to acquire 100% of the shares in TreeOne (NZ) Limited and its subsidiary Hikorangi Forest Farms Limited, which had interests in approximately 35,071ha of forestry land on the east coast of the North Island under the Overseas Investment Act 2005. The substance of that decision is set out in detail below, but the particular focus of the Inquiry's recommendation concerns the decision not to include a requirement that the applicant build a new processing plant as a condition of the consent.
2. I have been provided with Terms of Reference dated 20 November 2023 (attached as Appendix A). Paragraph 3 provides that the report must consider the following matters:
 - (a) Ensure that the right decision was made in accordance with administrative law principles; and
 - (b) Identify possible improvements for future cases or decisions that LINZ can apply under the Overseas Investment Act 2005.
3. In this report I have used the following abbreviations:
 - (a) **Act** means the Overseas Investment Act 2005.
 - (b) **The Consent** means decision number 201900073 dated 31 May 2019 granted to Eastland Estate Limited to acquire a total of approximately 35,071ha of sensitive land in the east coast of the North Island.
 - (c) **Eastland** means Eastland Estate Limited, the Consent holder.

- (d) **HFF** means Hikurangi Forest Farms Limited, a wholly-owned subsidiary of TreeOne (NZ) Limited (itself a **wholly**-owned subsidiary of TreeOne (Malaysia) Sdn Bhd).
 - (e) **Land** means the sensitive land acquired by Eastland pursuant to the Consent, known as Hikurangi **Forest** Farms.
 - (f) **LINZ** means **Land** Information New Zealand.
 - (g) **Ministers** means the Associate Minister of Finance and the Minister of Land Information in their respective capacities as decision-makers under the Act.
 - (h) **Regulations means** the Overseas Investment Regulations 2005.
 - (i) **Special forestry test** means the statutory test applied for applications made under section 16A(4) of the Act for consent to acquire sensitive land that is used exclusively or nearly exclusively for forestry activities.
 - (j) **Vendors** means the shareholders of TreeOne (Malaysia) Sdn Bhd, a company incorporated in Malaysia and **the** ultimate owners of the Land.
4. In preparing this report I have reviewed the Consent decision using the same information that was available to LINZ and the Ministers at the time, including summaries of previous consent decisions affecting the Land, and a LINZ Site Inspection Report dated 26 May 2017. I have not found it necessary to conduct an independent inspection of the Land.
 5. I have been assisted in the preparation of this report by the following team at LINZ: Dan White, Leader – Strategy, Policy Design; Pedro Morgan, Overseas Investment Lead and Laretta Bensemann, Senior Advisor – Strategy, Policy and Design. I am grateful for their help in providing the relevant materials and other support.

Summary

6. The decision to grant the Consent was made lawfully in accordance with administrative law principles. Having regard to the information available at the time of the application and decisions previously made regarding compliance with conditions imposed on the Vendors, the application could not have been declined lawfully.
7. Nor was there any basis on which LINZ or the Ministers could lawfully have imposed additional conditions on the Consent which would have required Eastland to construct a plywood processing plant on the Land or deliver any other additional benefit to New Zealand. Any such condition would arguably be contrary to the objectives of the special forestry test, and therefore unlawful.
8. The Act has been substantially amended since the Consent was granted and would now be considered in light of a statutory national interest test. In light of those amendments, I have made no further recommendations.

Background

9. Although the Terms of Reference for this report are focused on the Consent, it is necessary to set out the background to Eastland's acquisition of the Land for the purposes of the analysis which follows.

10. Eastland acquired the Land from the Vendors by means of purchasing 100% of the shares in TreeOne (Malaysia) Sdn Bhd, a company incorporated in Malaysia. The Vendors or their predecessors had acquired the Land in a series of transactions between 1996 and 2006.¹ In each case, consent was required under the Act or its predecessor, the Overseas Investment Act 1973, because the Vendors are overseas persons and the Land is sensitive land for the purposes of the Act.
11. The Land is used for commercial forestry and related activities and is operated by HFF, a wholly-owned subsidiary of TreeOne (Malaysia) Sdn Bhd. It is mainly planted in radiata pine. It was a condition of each of the transactions that the consent holders would establish a plywood processing plant on the Land, and the Vendors acquired additional land located at Dunstan Road, Gisborne in 2006 and 2007 expressly for this purpose.
12. The Vendors originally budgeted ██████████ for the establishment of the proposed plywood processing plant. However, it became apparent that the plant as originally envisaged in the consent applications would be significantly more expensive. As a consequence, the Vendors changed their plans and built two smaller plants, a debarking facility established in 2009 at a cost of approximately ██████████ and a log optimizer facility established in 2017 at a cost of approximately ██████████. LINZ inspected these facilities in May 2017 and determined that they employed a total of 42 people.²
13. Although the processing facilities actually established on the land were substantially smaller in cost and scale than the plywood processing plant proposed as part of the consent applications in 2006 and 2007, LINZ determined that the Vendors had nevertheless delivered sufficient benefits in terms of investment and creation of new employment to satisfy the requirements of the Act. On this basis, LINZ decided that compliance with the original consent conditions requiring the construction of the plywood processing plant was reasonably excused under section 25B(b) of the Act.
14. As noted above, the decisions to grant consent for the acquisition of the Land by the Vendor and to excuse compliance with the condition to establish a plywood processing plant fall outside the scope of the Terms of Reference for this report. I have therefore proceeded on the basis that these decisions were made correctly in accordance with the statutory regimes in force at the relevant times. However, for the avoidance of doubt, there does not appear to be any evidence that any of those decisions was made wrongly.

Statutory context

15. This section of the report sets out key provisions of the Act at the time the Consent was granted. The Act has been subject to several amendments since that time, but I have not considered those amendments because they fall outside the Terms of Reference.
16. The Act regulates investments in sensitive land in New Zealand by overseas investors. The Land is sensitive land for the purposes of the Act because it is non-urban land over 5ha.³ Section 3 of the Act provides that its purpose is *“to acknowledge that it is a privilege for*

¹ Consent decisions 962173, 972076, 972166 and 200110132 under the Overseas Investment Act 1973 and 200520147 and 200620154 under the Overseas Investment act 2005.

² OIO Site Inspection Report, 26 May 2017.

³ Section 12 and Schedule 1 of the Act.

overseas persons to own or control sensitive New Zealand assets” by requiring investors to obtain consent before acquiring sensitive land and by imposing conditions on such consents. It is a criminal offence for an overseas person to acquire sensitive land in New Zealand without a consent or exemption under the Act.⁴

17. In practice, the Act functions by regulating transactions for the sale and purchase of land or interests in land.⁵ In particular, applicants for consent to acquire non-urban land over 5ha are required to satisfy an investor test⁶ which considers the personal circumstances of the applicant and a benefits to New Zealand test⁷ which considers the merits of the proposed transaction. The benefits to New Zealand test has a number of different pathways according to the nature of the land in question.⁸ These pathways include the special forestry test for land which is used exclusively or nearly exclusively for forestry activities.⁹ In addition, transactions which involve assets or consideration in excess of a statutory threshold amount are subject to a sensitive business assets test, but this does not impose additional requirements where the transaction involves sensitive land.¹⁰
18. At the time the Consent was granted the investor test required the Ministers to be satisfied that the applicant was of good character, had business experience and acumen relevant to the investment, and had demonstrated financial commitment to the investment.¹¹ The Act did not provide any further criteria to assist the Ministers in determining whether the applicant satisfied the investor test (this aspect of the Act has since been amended in some respects). That meant that the Ministers enjoyed a substantial degree of discretion making this determination.
19. The special forestry test was introduced as a discrete pathway within the benefits to New Zealand test under the Overseas Investment Amendment Act 2018. It did not apply to previous consent applications concerning the Land. It differed from the default test for non-residential sensitive land in that it did not require applicants to demonstrate that the transaction would generate new benefits to New Zealand. In effect, investments in sensitive land used for forestry activities were deemed to be beneficial in and of themselves. Under the special forestry test, applicants were required to satisfy the Ministers that the land would be used for forestry activities (and not for residential purposes) and that trees would be replanted after harvest.¹² In addition, applicants were required to satisfy the requirements of the Regulations. At the time, these required applicants to continue to abide by existing arrangements, consent conditions and log supply obligations that applied to the land.¹³ But beyond this, applicants are not required to demonstrate additional benefits of the sort otherwise required under the benefits to New Zealand test, such as creation of new employment or increased export receipts for New Zealand exporters.

⁴ Section 42 of the Act.

⁵ The Act also regulates the sale and purchase of sensitive business assets which do not include sensitive land, residential property and fishing quota but these aspects of the Act are not addressed in this report.

⁶ Section 16(1)(a) of the Act.

⁷ Section 16(1)(c) of the Act.

⁸ Section 16A of the Act.

⁹ Section 16A(4) of the Act. Forestry activities are defined in section 16A(9) as establishing, maintaining and harvesting a crop of trees.

¹⁰ Sections 13 and 18 of the Act. The threshold for sensitive business assets in most cases is \$100 million but the Regulations impose different thresholds for some categories of investors.

¹¹ Section 16(2) of the Act.

¹² Section 16A(4) of the Act.

¹³ Regulation 29(2) of the Regulations.

20. All consents under the Act are subject to conditions. Consents granted under the special forestry test are subject to compulsory conditions which require in effect that the land must continue to be used for forestry activities,¹⁴ that the information contained in the application is accurate and that the applicant must give effect to any investment plan or other representations made in support of the application.¹⁵ In addition to these compulsory conditions, the Ministers have a broad discretionary power to impose additional conditions under section 25A of the Act. I address this power in greater detail below.
21. Compliance with conditions is compulsory and failure to do so can result in civil or criminal liability under Subpart 5 of Part 2 of the Act. However, as noted above, compliance with a condition may be excused in some circumstances where the Ministers or LINZ consider the non-compliance to be reasonable in the circumstances.
22. Section 14(1)(a) of the Act provides that in determining applications for consent, the Ministers “*must have regard to only the criteria and factors that apply to the relevant category of overseas investment...*”. The Ministers are not permitted to take account of additional criteria that are not provided for in the Act and Regulations.¹⁶

The consent decision

23. The consent decision assessed the application against the requirements of the investor test and the special forestry test as set out above. The Ministers determined that¹⁷:
- (a) Eastland satisfied the requirements of the investor test. Eastland was an experienced forestry investor with an extensive track record which met both the business experience and financial commitment criteria. The individuals with control of Eastland also satisfied the good character test, having previously been granted consent under the Act. There was no evidence to suggest that the applicant did not meet any aspect of the investor test.
 - (b) Eastland satisfied the special forestry test. The Land was used for forestry activities and the application otherwise satisfied the requirement of section 16A(4) of the Act and regulation 29 of the Regulations.
 - (c) Eastland satisfied the sensitive business assets test. This applied because the value of the HFF estate exceeded the statutory threshold, but it did not require Eastland to satisfy any additional requirements over and above those imposed under the investor and special forestry tests.
24. The consent was subject to 6 special conditions and 6 standard conditions. These all reflected the compulsory requirements of section 16C and 25B of the Act. No additional discretionary conditions were imposed under section 25A of the Act. In particular, the Consent did not

¹⁴ Section 16C of the Act.

¹⁵ Section 25B of the Act. These conditions apply to all consents, not just those granted under the special forestry test.

¹⁶ In *Coromandel Watchdog of Hauraki (Inc) v Minister of Finance and others* [2020] NZHC 2345, the High Court expressly rejected the proposition that the Ministers could take account of considerations which fell beyond the criteria set out in the Act. The Court noted that “*The provisions enacting the factors and criteria that are relevant to a consideration of an overseas investment application are not only highly prescriptive, they are limiting. There is no ‘catch-all’ provision enabling Ministers to consider ‘any other matters’ the Ministers consider to be relevant*”: refer para [57] of the judgment.

¹⁷ The decision was actually made by LINZ acting under the delegated authority of the Ministers.

include any condition to establish a new plywood processing plant on the Land, or to upgrade the existing debarking and log optimizer facilities.

Analysis and recommendations

25. I have reviewed the Consent decision. In my view the decision was made correctly in accordance with administrative law principles. In reaching this view, I have taken account of the following factors:
- (a) Eastland clearly satisfied the investor and sensitive business assets test criteria under the Act. Eastland (and the individuals who controlled it) was experienced in managing large scale commercial forestry investments and had demonstrated the necessary financial commitment by being able to meet its obligations to the Vendors under the agreement for sale and purchase. There was and is no evidence that either Eastland or the individuals with control were not of good character or that they were otherwise unable to meet any other aspect of the investor test. It follows that there was no lawful basis on which the Ministers could or should have determined that Eastland failed the investor test.
 - (b) The Land clearly falls within the scope of the special forestry test. It is used nearly exclusively for forestry activities. Approximately 86% of the Land was used for maintaining, harvesting or establishing crops of trees. The remainder was land unsuitable for forestry activities. That land consisted of native bush, water bodies and other non-productive uses.
 - (c) There was no evidence that any of the Land was used for residential purposes and Eastland committed to not using any of the Land for such purposes in the future. That commitment was reflected in the Consent conditions.
 - (d) Eastland committed to honouring existing arrangements in respect of the Land. LINZ appears to have identified all the existing arrangements affecting the Land and there appears to be no evidence to suggest that Eastland was unwilling or unable to comply with them. Again, that commitment is reflected in the Consent conditions.
 - (e) The Ministers determined that the existing conditions factor under reg 29(2)(b) of the Regulations did not apply because there were no conditions of that sort. This determination appears to be correct having regard to LINZ's decision in 2017 that the Vendors were reasonably excused from complying with the previous condition requiring the establishment of a plywood processing plant. The effect of that decision was that the Vendors had fulfilled their obligation, and there was therefore no existing condition to carry forward. I address this in further detail below.
 - (f) Eastland committed to continuing existing log supply arrangements affecting the Land. LINZ appears to have identified all such obligations as part of its assessment of the application.
 - (g) Eastland committed to replanting the Land in trees within 2 years of harvesting existing crops.
26. Having regard to these factors, the Ministers determined that the application satisfied the statutory requirements under sections 16 and 16A(4) of the Act and reg 29 of the Regulations.

Having reviewed the file, that decision seems to be entirely correct. There appear to be no grounds on which the application could have been lawfully declined.

27. I have also considered whether the Ministers could have imposed an additional condition requiring Eastland to establish a new plywood processing facility on the Land as part of the Consent. In my view, that option was not available to the Ministers for the following reasons:
- (a) First, LINZ had already determined that the condition imposed on the Vendors had effectively been discharged (compliance had been excused). As noted above, that decision falls outside the scope of the Terms of Reference for this report, but in my view it was appropriate and lawful for LINZ to make that decision in the circumstances, bearing in mind the inflated cost of establishing the proposed plywood plant and the construction of the debarking and log optimization facilities on the land. A condition requiring the construction of a new plywood processing plant on the land would therefore have had to be imposed as an entirely new condition.
 - (b) While the Ministers **could** in principle have used, or at least purported to use, their discretionary power under section 25A of the Act to impose such a condition, they were under no obligation to do so. It follows that it was not wrong or unlawful for this to be omitted from the Consent conditions.
 - (c) If the Ministers had imposed such a condition against the objections of Eastland, there is a substantial risk that it would have been unlawful and vulnerable to challenge by way of judicial review. The main objective of the special forestry test is to exempt forestry investments from the requirement to deliver benefits to New Zealand. Having regard to that statutory objective, it would be strongly arguable that any condition which nevertheless required or purported to require a consent holder to deliver a benefit to New Zealand as part of a forestry investment would be unlawful. In administrative law terms, the condition would be reviewable on grounds that it was based on an irrelevant consideration or made for an improper purpose. As noted above, the High Court has confirmed that in determining applications for consent, Ministers are not permitted to take account of any considerations which fall outside the statutory criteria expressly prescribed in the Act. The desirability of establishing a new benefit to New Zealand, or avoiding an environmental risk, falls outside the criteria applicable to applications under the special forestry test.
28. The question of identifying potential for improvements for future cases or decisions under the Act is complicated by the fact that it has been substantially amended since the Consent was granted in 2019. In particular, the Overseas Investment (Urgent Measures) Amendment Act 2020 established a new category of transactions of national interest. Had this category existed at the time the Consent was granted, it is **possible** LINZ and/or the Ministers would have considered it due to the size and nature of Land and the potential for adverse environmental effects arising from forestry activities on the east coast of the North Island as demonstrated during Cyclone Gabrielle. If Eastland's application had been considered as a matter of national interest under section 20B of the Act as amended in 2020, the Ministers would in principle have had far greater discretionary power either to impose additional conditions on the Consent or possibly even to decline it altogether.

29. In light of these amendments to the Act, I make no further recommendations.



Nicholas Russell
Barrister

Proactive release