



**Land Information
New Zealand**
Toitū te whenua

Enforceable Undertakings to the Chief Executive of Land Information New Zealand

Pursuant to section 46A of the Overseas Investment Act 2005

Tresorelle (NZ) Limited

Dated: September 2023



1 Person giving undertaking

- 1.1 Tresorelle (NZ) Limited is a company incorporated in New Zealand having its registered address at 6 Blake Street, Rangiora, New Zealand ("**Tresorelle**").
- 1.2 Tresorelle gives this undertaking to the Chief Executive of Land Information New Zealand, being the chief executive of the department ("**the Regulator**") under s 46A of the Overseas Investment Act 2005 ("**Act**").

2 Definitions

- 2.1 In this document:
- (a) **1973 Act** means the Overseas Investment Act 1973.
 - (b) **1995 regulations** means the Overseas Investment Regulations 1995.
 - (c) **2005 Act** means the Overseas Investment Act 2005.
 - (d) **Associate** has the meaning set out in section 8 of the 2005 Act.
 - (e) **Associated person** has the meaning set out in s2A of the 1973 Act.
 - (f) **Overseas person** has the meaning set out in the 1973 Act or the 2005 Act as relevant.
 - (g) **Ordinarily resident in New Zealand** has the meaning set out in s2 of the 1973 Act and s7 of the 2005 Act as relevant.
 - (h) **Regulator** has the meaning set out at clause 1.2 above and includes where relevant the former Overseas Investment Commission constituted by the 1973 Act.
 - (i) **Sensitive land** has the meaning set out in section 12 of the 2005 Act and includes Land Requiring Consent to Acquisition by Overseas Persons listed in the First Schedule to the 1995 regulations.
 - (j) **Undertaking** means this document, and **undertakings** refer to the specific obligations listed in clause 8.
 - (k) **Land** means the land at 953 Loburn Whiterock Road, North Canterbury comprised in land titles CB46A/184 and CB46A/183.

3 Introduction

- 3.1 Following a voluntary disclosure by Tresorelle, the Regulator has investigated suspected breaches of:
- (a) the 1973 Act by Tresorelle acquiring Sensitive land as an Overseas person without first obtaining consent; and
 - (b) the 2005 Act by an overseas investment in sensitive land through an Associate of Tresorelle acquiring 25% or more of the securities in Tresorelle without consent.
- 3.2 Tresorelle wishes to provide enforceable undertakings to resolve the matters under the 2005 Act and this document records the Regulator's reasons for accepting those undertakings.
- 3.3 The Regulator notes that enforceable undertakings are not available to resolve breaches of the 1973 Act. However, events that occurred under that Act are referred

to in this Undertaking for context. No further action will be taken in respect of the 1973 matters which, in any event, are time-barred for enforcement proceedings.

- 3.4 The Regulator will publish a copy of this Undertaking on the Land Information New Zealand website.

4 Background

- 4.1 In early 2003, US citizen, **Mr L**, was seeking a forestry property in New Zealand. He sought the assistance of **Mr J** a business associate who was a New Zealand citizen but living in Australia.
- 4.2 They became interested in the Land which was sensitive land under the 1973 Act because it was non-urban land greater than 5 ha.
- 4.3 On or about 29 July 2003 Mr L signed two agreements for sale and purchase to acquire the Land. Mr L was an overseas person at the time of signing the agreements and has remained so. No consent was obtained prior to signing the agreements.
- 4.4 The total purchase price was \$221,000 + GST.
- 4.5 Mr L was not in New Zealand at the time and Mr J instructed and engaged legal representatives in New Zealand to act in the purchase of the properties. Mr L was party to some of the correspondence but Mr J was handling the day-to-day affairs.
- 4.6 On 8 August 2003 Tresorelle was incorporated to acquire the Land. At incorporation, **Tresorelle's 100 shares were divided equally between Mr J, Mr L, and Mr L's (then) wife and daughter (also US citizens), with each shareholder holding 25 shares.** Therefore 75% of the shares were held by overseas persons. The shareholders were also the directors of the company, so that 3 out of 4 directors were overseas persons.
- 4.7 Following the incorporation of the company, in a letter dated 20 August 2003, the lawyer acting on the land transaction wrote to Mr L advising him that **"there are requirements and consents to be obtained" for overseas investments of this nature in New Zealand.**
- 4.8 The lawyer noted that **"in order to avoid the necessity" to go through the consent process, Mr J had indicated the company would be restructured to ensure that less than 25% of the company would be owned by overseas persons.** The lawyer noted that to achieve this, Mr L and his family would need to transfer a proportion of its combined shareholding to Mr J who was a New Zealand citizen. The lawyer sought **Mr L's consent to effect the transfer so that Mr J would hold 76% of the shares, Mr L 12% and Mr L's (then) wife and daughter 6% each.**
- 4.9 On 28 August 2003, in a letter to Mr J, the lawyer acknowledged receipt of the share transfer forms and stated:
- I confirm that, on the basis that you are a New Zealand citizen and hold 76% of the shares in the company, an application for consent to the [Regulator] is now not necessary. I do remind you that you cannot hold these shares in trust for an overseas person and if indeed you transfer shares in the company to an overseas person which has the effect of reducing your shareholding to under 75%, then the consent of the [Regulator] will be necessary.
- 4.10 The share transfer described at paragraph 4.8 above was effected on or around 19 August 2003.
- 4.11 A statement signed by Mr J on 21 August 2003 recorded that Mr J was holding 76% of the shares in Tresorelle on behalf of Mr L. An Affidavit and Acknowledgement of

Beneficial Holding signed by Mr J in front of a notary in Japan on 8 June 2010 further acknowledged that he held the 76% shareholding in Tresorelle in trust solely for the benefit of Mr L.

- 4.12 The three L family members continued to be directors of Tresorelle along with Mr J.
- 4.13 On or around 3 September 2003 Mr L nominated Tresorelle to act as purchaser under the agreement for sale and purchase.
- 4.14 Tresorelle settled the transaction on the same day and became the registered owner of the Land.
- 4.15 On 24 September 2003, **Mr C**, a New Zealand citizen, was appointed to represent the company in matters relating to management of the Land.
- 4.16 In 2011, the business relationship between Mr L and Mr J ended. Mr L was advised that Mr J's shares could not be transferred to himself and his family members without the **Regulator's consent and that such consent may be difficult to obtain because he would need to demonstrate benefits under the 2005 Act.**
- 4.17 After considering various options, it was decided that Mr J would transfer his shares to Mr C.
- 4.18 On 19 September 2011 Mr C wrote to **Tresorelle's** lawyers asking whether the transfer **could be made "without any repercussions arising from the [Regulator] and of any other issues that myself and Mr [L] may need to be aware of".**
- 4.19 On 19 September 2011 the lawyer (who was with the same firm but not the same lawyer who had acted on the 2003 transaction) responded that **"there will be no problems in respect of [Overseas Investment Act] issues if a transfer of the shares is made to you as I understand you are a New Zealand citizen".**
- 4.20 A share transfer was signed on 11 October 2011. From this point Mr C held 76% of the shares.
- 4.21 On the same day Mr C signed an acknowledgement of bare trust drafted by **Tresorelle's lawyer** acknowledging that Mr C held the shares on trust for Mr L and **agreeing to be subject to Mr L's direction in all company matters.**
- 4.22 On or around 11 October 2011, Mr J resigned as director and on 8 November 2011 Mr C was appointed director.
- 4.23 **Between 2019 and 2021 Mr L's wife and daughter transferred their shares to Mr L as trustee of a separate family trust.**
- 4.24 On 1 March 2021 **Mr L's wife and daughter** resigned as directors. The current directors of Tresorelle are Mr L and Mr C.
- 4.25 In 2021, Tresorelle instructed new lawyers to action the share transfers and act on the sale of the Land, who identified that there had been a breach of the overseas investment regime. On 15 June 2022 Tresorelle, via its new solicitor, self-reported the breach, and has co-operated with the Regulator's inquiries.
- 4.26 Tresorelle gives this undertaking to address and remediate the breach. The undertaking constitutes a formal and binding promise to sell the Land and to discontinue any investment in the Land.

5 Obligations under the 1973 and 2005 Acts

- 5.1 When the Land was purchased in 2003, the 1973 Act was in force and the acquisition was governed by the 1995 regulations.

- 5.2 Regulation 8 required an overseas person to obtain consent before giving effect to the acquisition of any estate or interest in land (defined in Schedule 1 as any land exceeding 5 hectares in area).
- 5.3 An overseas person was defined in s2 of the Act as including:
- (a) An individual who is not a New Zealand citizen and who is not ordinarily resident in New Zealand; and
 - (b) a company in which:
 - (i) Twenty five percent or more of any class of shares is held by an overseas person or overseas persons; or
 - (ii) The right to exercise or control the exercise of 25 percent or more of the voting power at any meeting of the company or building society is held by any overseas person or overseas persons.
- 5.4 Section 2A defined an "associated person" as including a person acting in concert under any contract or arrangement or understanding in relation to the particular overseas investment.
- 5.5 Mr L was as an overseas person at the time he acquired the equitable interest in the Land in July 2003.
- 5.6 Tresorelle was an overseas person at the time it acquired legal interest in the Land in September 2003. While Mr J, a New Zealander, was a 76% shareholder of Tresorelle he was an Associated person because he held the shares on trust for Mr L and was subject to his direction, and as such more than 25% of the voting power was controlled by Mr L, an overseas person.
- 5.7 Regulation 18 of the 1995 regulations provided that no person shall enter into any transaction or execute an instrument for the purpose of or having the effect of, in any way, directly or indirectly, defeating, evading, or circumventing the regulations.
- 5.8 Section 17 of the 1973 Act provided that a person who failed to comply with the regulations committed an offence against the Act.
- 5.9 A further transaction took place on 11 October 2011 when Mr C acquired 76% of the shares in Tresorelle. At this time the 2005 Act applied.
- 5.10 Mr C was an Associate under s8 of the Act because he was subject to Mr L's direction and acted jointly or in concert with Mr L in relation to the investment. He also held Mr L's shares on a bare trust for him.
- 5.11 Mr C's acquisition of the shares was an investment in Sensitive land because:
- (a) he was an Associate of an Overseas person when he acquired the shares;
 - (b) he acquired more than 25% of the shareholding in Tresorelle; and
 - (c) Tresorelle had an interest or estate in Sensitive land.
- 5.12 Section 42 of the 2005 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 Acknowledgements

- 6.1 The Regulator has concluded, and Tresorelle acknowledges, that Tresorelle should have obtained consent for the acquisition of the Land in September 2003.

- 6.2 The Regulator has also concluded, and Tresorelle acknowledges, that the acquisition of shares by Mr C in October 2011 required consent.
- 6.3 Tresorelle acknowledges that Mr J and Mr C were its associates and that Mr L was the true beneficial owner.
- 6.4 The Regulator acknowledges that penalty proceedings against Tresorelle for the acquisition of the land in September 2003 are time barred. It also acknowledges that the provisions of the 2005 Act relating to enforceable undertakings do not apply to matters which predate the 2005 Act. Therefore, this Undertaking relates to the matters that occurred under the 2005 Act.

7 Commencement of this Undertaking

- 7.1 In accordance with s48B of the Act 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.

8 Undertakings

- 8.1 In connection with the contraventions outlined in this document, for the purposes of s 46A of the Act, Tresorelle undertakes:
- (a) To ensure that its interests in the Land (and that of any associates of Tresorelle) are fully disposed of within 12 months of this undertaking.
 - (b) That the sale of the Land will be to unrelated third party(ies) and will be on an **arm's length** basis with no ongoing involvement of any of the current shareholders or associates of Tresorelle.
 - (c) To provide written confirmation to the Regulator (In each case) within 5 working days of the Land transferring to new owner(s).
 - (d) To co-operate with any requests for information from the Regulator for the purpose of monitoring compliance with this Undertaking.

9 Reasons for acceptance

- 9.1 The Regulator accepts the Undertaking because it:
- (a) provides an appropriate way to end the overseas investment in the Land;
 - (b) ensures the Overseas person and its Associates have no further involvement with the Land acquired in breach;
 - (c) promotes compliance with the Act; and
 - (d) serves a public deterrence purpose by being published on the Toitū Te Whenua Land Information New Zealand website and being the subject of public comment.
- 9.2 The Regulator accepts this Undertaking as an alternative to issuing proceedings. In doing so, the Regulator notes:
- (a) The age of the breaches, including some which are now time barred for seeking penalties.

- (b) The fact that legal advice obtained prior to the share transfer in 2011 failed to identify that the use of Mr C as an Associate to hold the shares would be a breach of the Act.
- (c) That when Tresorelle consulted new solicitors in 2021 and became aware of the breaches, they were voluntarily disclosed to the Regulator.
- (d) That Tresorelle has co-operated with the Regulator's inquiries and has already taken significant steps towards selling the Land.

9.3 Tresorelle acknowledges that:

- (a) If it contravenes this Undertaking:
 - (i) The Regulator may apply to the High Court for an order under s46F of the Act for a civil pecuniary penalty not exceeding \$50,000 for an individual or \$300,000 in any other case, or an order to comply with or discharge 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 Toitū Te Whenua, Land Information New Zealand website in accordance with s46C 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 Miscellaneous

- 10.1 The Regulator and Tresorelle 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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