

Agreement on outcome of an investigation of contraventions of the Overseas Investment Act 2005

The Chief Executive of Land Information New Zealand

(Regulator)

Forest Growth Holdings Limited

(FGHL)

2 July 2018



1 Parties

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.

(Regulator)

Forest Growth Holdings Limited, a limited liability company incorporated in New Zealand, having its registered office at McIntyre Dick & Partners, 160 Spey Street, Invercargill, New Zealand

(FGHL)

2 Interpretation

2.1 In this Agreement:

- (a) **Act** means the Overseas Investment Act 2005.
- (b) **Investigation** means the Regulator's Investigation into the relationship of FGHL, the Manager and the Investor in terms of the acquisition of the Properties by FGHL and on-sale to the Investor.
- (c) **Investments** means the Investor's interest with and interest in, together with FGHL, thirteen forestry blocks in the Wairarapa region which involve the Properties from July 2013 onwards, including forestry rights and forestry land.
- (d) **Investor** means Wairarapa Estate Limited, a limited liability company incorporated in New Zealand, having its registered office at Level 13, 34 Shortland Street, Auckland, New Zealand.
- (e) **Manager** means New Forests Asset Management Pty Limited (ACN 114 545 283), a limited liability company incorporated in Australia, having its registered office at North Sydney, New South Wales, Australia.
- (f) **Properties** means:
 - (i) **Tranche 1:** the Lands End, Dunolly, Hawkins, Ruakokopatuna, Glenburn, Ngahape, Woodford and Kaiwhata Pines forests totalling 3,841.3146 ha; and
 - (ii) **Tranche 2:** the Beehive, Tinui, Flat Pt, Craigie Lea and Erindale forests totalling 3,063.0618 ha.
- (g) **Summary of the Parties' Positions** means the Summary of the Parties' Respective Positions in Schedule 1 of this Agreement.

3 Introduction

- 3.1 The Regulator has investigated suspected contraventions of the Act in relation to the relationship between the Investor and FGHL and FGHL's purchase of the Properties.
- 3.2 This Agreement records the background to the Investigation and the means by which the Investigation is to be resolved.
- 3.3 This Agreement may be made public by the Regulator (including on the Regulator's website).

4 Background

The investments

- 4.1 Since 2013, the Manager on behalf of the Investor has cooperated with FGHL to invest in the Properties, the details of which are set out in the Summary of the Parties' Positions annexed to this Agreement.

The investigation

- 4.2 The Regulator commenced the Investigation in April 2016. The Investigation focussed on the Tranche 1 Properties, but the Regulator considers that the circumstances surrounding the Investments in both Tranche 1 and Tranche 2 were similar in all material respects.

The parties' positions

- 4.3 The Regulator has completed its Investigation into the circumstances surrounding the Investments and concluded that it has sufficient evidence to prove on the balance of probabilities that FGHL has contravened the Act.
- 4.4 The Regulator considers that FGHL was an associate of the Investor and required consent under the Act to acquire 13 forestry blocks. The Regulator considers that FGHL contravened the Act by not obtaining consent.
- 4.5 The Regulator considers that the evidence is consistent with FGHL's alleged contraventions being inadvertent.
- 4.6 FGHL has cooperated with the Investigation, and in the interests of settling this matter and concluding the Investigation, agrees to the terms set out in this Agreement.
- 4.7 FGHL considers that it was not an associate of the Investor and did not require consent under the Act before it acquired the Properties.
- 4.8 FGHL has cooperated with the Investigation and has agreed to resolve the matter by acknowledging and accepting that the Regulator's view is a reasonable conclusion available to it on the evidence as set out in this Agreement.

Settlement

- 4.9 Following discussions between the Regulator and FGHL, the Regulator has concluded, based upon the Solicitor-General's Prosecution Guidelines and

Land Information New Zealand's Prosecution Policy, that it would be in the public interest to resolve the issues arising from the Investigation on the terms set out below.

- 4.10 In reaching the terms of this settlement, the Regulator has considered :
- (a) the nature of the factual issues involved in the case;
 - (b) the nature of FGHL's behaviour, including its co-operation with the Regulator;
 - (c) FGHL's cooperation with the Investigation; and
 - (d) the size of the Investment.

5 Terms of settlement

5.1 The Regulator and FGHL have agreed to resolve the issues between them arising from the Investigation on the following terms:

- (a) FGHL:
 - (i) acknowledges, subject to clause 4.7, the Regulator's conclusion that FGHL contravened section 42 of the Act (as set out in the Summary of the Parties' Positions);
 - (ii) must make a Donation on the terms set out in clause 6 below; and
 - (iii) not later than 31 July 2018, must pay to the Regulator \$20,000 plus GST towards the Regulator's actual and estimated further costs in relation to the Investigation.
- (b) The Regulator will:
 - (i) formally warn FGHL about the role it played in the Investments;
 - (ii) acknowledge that the alleged contravention of the Act by FGHL appears to have been inadvertent; and
 - (iii) close its investigation of FGHL on the basis set out in clause 7.

6 Donation

- 6.1 In this clause, **Donation** means a gift of an amount that gives rise to a post-tax detriment of not less than \$30,000 to the NZIF Foundation (a registered charity (CC47691) under the Charities Act 2005).
- 6.2 FGHL must, on or before 31 July 2018 make the Donation.
- 6.3 FGHL must obtain the approval of the Regulator as to the manner in which the Donation will be paid and the purposes to which the Donation will be applied, before making the Donation. The Regulator must not unreasonably withhold its approval.

- 6.4 FGHL must ensure the NZIF Foundation, within 14 days of the Donation being made, provides written confirmation to the Regulator:
- (a) of the amount of the Donation; and
 - (b) that the NZIF Foundation intends to apply the Donation for the purposes approved.

7 Closure of investigation

- 7.1 In this clause, **Closure Date** means the latest of the following dates:
- (a) The date on which the donation is made under clause 6; or
 - (b) The date on which the contribution to the Regulator's costs is paid under clause 5.
- 7.2 On the Closure Date, the Regulator will close the Investigation as it relates to FGHL's involvement in the Investment.

8 Public statements

- 8.1 Subject to clauses 8.3 and 8.4, the parties may make public statements in relation to the content of the settlement after both parties have signed this agreement. The parties agree that any public statements relating to the Investigation will be made in good faith and be consistent with the spirit and intent of this Agreement.
- 8.2 Nothing in this Agreement prevents the Regulator or FGHL from expressing their honest opinion as to their respective positions as set out in the Summary of the Parties' Positions annexed to this agreement and as these relate to the interpretation of the "associate" provisions in the Act.
- 8.3 Except as required by law, FGHL agrees that it will not make any public comment in relation to this Agreement or the Investigation until after the Regulator has issued a media release notifying the public of this settlement.
- 8.4 The Parties agree to provide an emailed copy of their initial written media statement to the other party at least 24 hours in advance of their release to allow the other party the opportunity to comment. No party will be obliged to accept the comments of another party, but will in good faith consider the comments.

9 Entire agreement

- 9.1 This Agreement constitutes the entire understanding and agreement between the parties in relation to the Investigation, and fully supersedes any and all prior agreements, arrangements, representations or understandings (whether orally or in writing) between the parties pertaining to the Investigation.
- 9.2 The parties agree that this Agreement is in full and final settlement of all claims and proceedings that the Regulator has, or may have, in respect of the Investigation.

- 9.3 The parties represent and agree that they are each voluntarily entering into this Agreement having had the opportunity to receive independent legal advice.

10 Miscellaneous matters

- 10.1 This Agreement will be governed by, and construed in accordance with, the laws of New Zealand.
- 10.2 No amendment to this Agreement will be effective unless it is in writing and signed by all of the parties.
- 10.3 Any delay by the Regulator in acting upon any breach of this Agreement will not operate by way of waiver.
- 10.4 The parties may enter this Agreement by signing any number of counterparts, each of which will be treated as an original. All of the counterparts taken together will constitute a single document. A party may execute this Agreement by one signatory executing one counterpart and another signatory executing a different counterpart. A party's delivery of a signed facsimile or pdf counterpart of this Agreement will have the same legal effect as that party's delivery of a single original counterpart.

Execution

Signed by Kirsty Catherine Millard
for and on behalf of **The Chief**
Executive of Land Information New
Zealand in the presence of:

Kirsty Catherine Millard

Witness to signature:

Signature of witness

Signed on counter-part document

Name of witness

Occupation

City/town of residence

Signed for and on behalf of **Forest Growth Holdings Limited** by:


If not signed by two directors then witnessed by:

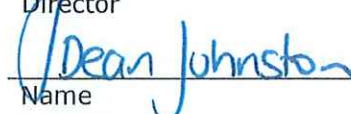
Signature of witness

Name of witness

Occupation


City/town of residence



Director


Name



Director/Company Secretary


Name

Summary of the Parties' Positions

1 Acquisition of Forestry Land

Background to the Investment

- 1.1 The Manager manages forest investments for institutional investors and at all material times (including prior to the incorporation of the Investor) acted on behalf of the Investor in respect of all material matters set out herein. The Investor is a holding company which owns forest assets on behalf of a fund managed by the Manager. The Manager and the Investor are overseas persons.
- 1.2 FGHL is a New Zealand company owned at all material times by two New Zealand based forestry businesses: IFS Forestry Group Limited and Invercargill City Forests Limited. FGHL is not an overseas person but the Regulator considers it to be an associate of the Manager and the Investor. FGHL does not consider itself to be an associate of the Manager or the Investor but acknowledges that the Regulator's position is one open to it under the Act and on the evidence as set out in this Agreement.
- 1.3 The Regulator considers that a number of forestry block investments made by FGHL and the Investor (in the case of the Investor, either itself or through the Manager) in Wairarapa contravened the Act.
- 1.4 The Regulator considers that:
 - (a) the forestry blocks were sensitive land;
 - (b) the Manager and the Investor were overseas persons;
 - (c) as an associate of an overseas person, FGHL required consent to acquire the forestry blocks, but did not obtain it; and
 - (d) the Manager and the Investor were parties to FGHL's contravention of the Act through their associate relationship.
- 1.5 FGHL accepts that the forestry blocks were sensitive land and that the Manager and the Investor were overseas persons but does not view itself as an associate of the Manager or the Investor and therefore party to the contravention. FGHL considers itself to be an independent company which purchased forests for its own business purposes and then on-sold forests to third parties, including the Manager and Investor. FGHL nonetheless acknowledges and accepts that the Regulator's view is a reasonable conclusion available to it on the evidence as set out in this Agreement.
- 1.6 The Investor applied for and obtained consent under the Act to acquire the forestry land (decision 201510017). As the vendor of the relevant land, FGHL provided information to the OIO in connection with that application. Complaints were subsequently received by the Regulator which led the Regulator to commence the Investigation.

Associate relationship

- 1.7 The Regulator considers that FGHL was an associate of the Manager and the Investor as:
- (a) FGHL acted jointly or in concert with the Manager and the Investor in relation to the purchase of forestry land; and
 - (b) FGHL participated in the purchase of forestry land as a consequence of any arrangement or understanding with the Manager and the Investor.
- 1.8 The Regulator considers that an associate relationship arose from an agreement (described as a 'term sheet') entered into by FGHL and the Manager on 22 August 2013 whereby FGHL would acquire and aggregate assets and which following their aggregation would be offered to the Investor.
- 1.9 The Term Sheet provided that:
- (a) The Manager would provide FGHL with information about its investment criteria;
 - (b) FGHL would acquire forest assets (land and trees) in the southern North Island;
 - (c) FGHL would bundle the trees and sell them to the Investor at a price determined by an agreed valuation model, using a specific discount rate;
 - (d) The Investor would pay rent to FGHL of a specific percentage of the value of land (as established by a land valuation) per annum; and
 - (e) The Investor would consider buying the land from FGHL for the amount set by the land valuation, subject to OIO consent being obtained.
- 1.10 FGHL made submissions to the Regulator regarding the way it says the term sheet ought to be interpreted, including:
- (a) The relevant aspects of the term sheet relied on by the Regulator relate to the sale of forest assets (i.e. trees) by FGHL to the Investor and not to land sales;
 - (b) The term sheet stated that FGHL was not required to sell any land to the Investor and the Investor was not required to purchase any land from FGHL;
 - (c) The term sheet stated that both FGHL and the Investor were free to deal with any other parties;
- 1.11 The Regulator considers that FGHL and the Manager gave effect to the Term Sheet according to its terms. The Regulator's position in this regard is summarised below.
- (a) FGHL was in contact with the Manager for a number of months in the lead up to its forest purchases. FGHL provided the Manager with detailed information about the properties, and FGHL and the Manager jointly modelled the value of the properties.

- (b) FGHL acquired 13 forestry blocks (totalling 6,904 hectares) and granted forestry rights over each to the Investor. The Manager and the Investor represent almost all of FGHL's business.
- (c) The agreed valuation model meant that FGHL could estimate, before acquiring a forestry block, the amount that the Investor might pay to acquire the forestry rights and forestry land at the agreed discount rate set out in the Terms Sheet.
- (d) The Investor paid rent to FGHL at the agreed percentage of the value of the land per annum.
- (e) FGHL agreed to sell the 13 forestry blocks to the Investor in two tranches.
 - (i) Tranche 1 was agreed to between FGHL and the Investor prior to the Regulator beginning its investigation. OIO consent was obtained for this transaction, but after FGHL had acquired the land as per the Terms Sheet.

The Regulator considers that the Term Sheet clearly provided for the Investor to acquire the land, and that the tender process was not at arm's length. The timing of the transaction was driven by the Investor's desire to acquire the land and the land was sold at a price determined in accordance with the Term Sheet.

- (ii) Tranche 2 was agreed after the Regulator began its investigation and raised issues in relation to Tranche 1. OIO consent has been sought, but no decision has yet been made. Accordingly, the land has not yet been sold to the Investor.

1.12 While FGHL entered into the term sheet, and the Investor acquired the forestry land, in good faith and in the belief their actions were not in breach of the Act, the Regulator considers FGHL and the Investor contravened the associate provisions under the Act. This is because FGHL acquired the forestry land as a consequence of an arrangement or understanding with the Investor (an overseas person) that it would acquire the land to on-sell it to the Investor. In carrying out this arrangement, the Regulator considers that FGHL and the Investor would act together to enable the Investor to ultimately acquire the forestry land and *before* seeking approval under the Act to acquire the land.

1.13 FGHL's position is that FGHL and the Manager engaged in a legal business activity of buying and selling trees. FGHL considers that the subsequent sale of land occurred via an arm's length public tender process. The Investor was the successful tenderer and sought and obtained OIO consent (for Tranche 1) and sought OIO consent for Tranche 2 (after the OIO began making inquiries). FGHL was of the view that, at all times, it was acting lawfully by selling forestry rights and that there was no prior binding agreement that the land would be sold to the Investor (though the transactions were contemplated by the term sheet).

1.14 The Regulator considers that FGHL only proceeded to buy the Properties as it had certainty that it could on-sell the Properties to the Investor.

- 1.15 FGHL's position is that it was not an associate of the Investor and did not require consent to acquire the forestry blocks. FGHL considers that there was never any arrangement that it would acquire the land to on-sell it to the Investor. FGHL considers its business of buying land and trees and then on-selling trees to the Investor and selling land via arm's length public tender to be compliant with the Act.

FGHL says that the Term Sheet was a non-binding document which recorded the criteria that the Investor applied in targeting forestry rights for acquisition in New Zealand. FGHL could then factor those criteria into its own independent activity of acquiring and amalgamating forests on the basis that, if FGHL acquires and amalgamates forests that meet the Investor's criteria, the parties could then enter into negotiations for the sale and purchase of the amalgamated forestry rights (i.e. trees not land).

- 1.14 FGHL's position is that it publicly marketed the forestry land (i.e. land separate from the trees) for sale by tender, the Investor was the successful bidder and there is sufficient evidence to show the tender processes were arms length. The Regulator considers that there is sufficient evidence to show the tender process was not arms-length.

Investments by FGHL and the Investor

- 1.16 FGHL and the Investor made the following investments in sensitive land in accordance with the term sheet.

Forest	Area (ha)	Purchase by FGHL	Sale of forestry right to the Investor	Sale of land to the Investor
Lands End	116.3168	04-Apr-14	15-Jul-14	23-Mar-16
Dunolly	601.3256	30-Apr-14		
Hawkins	177.9763	20-Jun-14		
Ruakokopatuna	259.8789	30-Jun-14		
Glenburn	2030.3997	15-Jul-14		
Ngahape	276.7936	29-Aug-14	12-Sep-14	
Woodford	162.7793			
Kaiwhata Pines	215.8444	10-Oct-14	22-Oct-14	
Beehive	168.3417	31-Mar-15	02-Jun-15	Land still owned by FGHL. The Regulator considers this to be covered by the Term Sheet.
Tinui	190.2000			
Flat Pt	154.7010	30-Jun-15	23-Mar-16	
Craigie Lea	1670.0542	31-May-16	31-May-16	
Erindale	879.7649		10-Jun-16	

