



Memorandum

To: Simon Pope, Manager Enforcement

From: Sarah Scott, Principal Advisor

Date: 2 December 2021

File Ref: 202000208

Subject: **Recommendation for retrospective penalty – Seed Force Ltd**

For Your: **Approval**

Summary

1. On 17 March 2020, Seed Force Limited (**Seed Force**) self-reported that they had entered into two lease agreements for property at 1210 Shands Road, Lincoln, Christchurch (non-urban land approx. 18.3 ha in size).
2. Both leases are for an initial term of 4 years from 1 April 2018 with two rights of renewal of two years each leading to a total potential term of 31 March 2026. There is a residential tenancy as well which is fixed for 4 years from 1 October 2017.
3. Seed Force reported that they are an overseas person (40% overseas ownership) and admitted that they required consent under the Act. Ed Smithies (lawyer for Seed Force) advised that this is an inadvertent breach by his client who immediately instructed him to engage with OIO to remedy the breach.
4. Initially the applicant queried whether the issue could be resolved by surrendering the leases and then entering a new lease for 2 years and 364 days without rights of renewal. However in our view this was an attempt at pro-forma rather than genuine compliance, particularly if, as seemed likely, there was an intent to stay on the land for a longer term ultimately.
5. Instead we indicated our preference that Seed Force proceed with an application for retrospective consent. After some initial reservations, Seed Force decided to take up this option.
6. The application is in its final stages and the proposed recommendation is that it meets the criteria for retrospective consent. Draft conditions are being forwarded along with the statutory declarations for signing.

Facts – why retrospective consent required

7. The leases were entered into without the benefit of legal advice. The breach was identified when Seed Force sought legal advice on another matter. The breach was immediately reported to the OIO, with Seed Force noting that it would like to take steps to remedy the breach.

8. Seed Force have been co-operative since the beginning of the investigation with all documentation having been provided voluntarily. It has indicated a willingness to apply for retrospective consent (as the Office's preferred means of dealing with this matter) and to pay the associated retrospective penalty.
9. Since the breach occurred the Act has been amended so that leases of up to 10 years on non-residential land can be entered into without consent. That does not reduce the scope of the breach in this case but indicates that there has been a change in government priorities towards leases that makes a retrospective consent an appropriate outcome in this case.
10. In all the circumstances therefore I consider that the obtaining of retrospective consent, and payment of the corresponding penalty (see below) would satisfactorily resolve the breach from an enforcement perspective.

Assessment of appropriate penalty – for transactions entered into prior to 22 October 2018

11. The transitional provisions of the regulations apply to the assessment of the appropriate penalty as the leases were entered into prior to 22 October 2018¹.
12. Under the transitional provisions, the assessment of the appropriate penalty is under regulation 32 of the regulations in force immediately prior to the 22 October 2018 amendments.
13. The maximum penalty the regulator may impose under regulation 32 is \$20,000.
14. When considering an appropriate penalty, it is important to recognise that the onus was on the applicant to obtain appropriate advice, and ensure compliance with all legal requirements, *prior* to entering into the leases.
15. In my view a mid-range penalty of \$10,000 would be appropriate and would not be unduly harsh or oppressive.
16. The consideration paid under the lease is moderate in value, but the original term of 8 years including rights of renewal was significantly longer than the three-year threshold that existed under the Act that time.
17. Ultimately, I consider an amount of \$10,000 by way of administrative penalty for needing to seek retrospective consent is consistent with similar recent cases and is not unduly harsh or oppressive, given the:
 - inadvertent nature of the breach
 - self-reporting as soon as the applicant became aware of the breach
 - co-operation of the applicantvalue of the leases.

Recommendation

18. I recommend that the Regulator impose an administrative penalty of \$10,000. I do not consider the amount to be unduly harsh or oppressive having regard to the nature of, and the reasons for, the retrospective consent.

¹ Schedule 1AA, Part 3, 3(2)(c).

s9(2)(a)
[Redacted]

Agree:	<input checked="" type="checkbox"/>
Disagree:	<input type="checkbox"/>

Simon Pope
Manager Enforcement

Date:

Released under the Official Information Act 1982