**OVERSEAS INVESTMENT ACT 2005:**

**REASONS FOR DECISION BY MINISTERS ON APPLICATION BY BATHURST COAL LIMITED IN RESPECT OF SULLIVAN MINE**

1. As relevant Ministers under the Overseas Investment Act 2005 (the Act), on 14 December 2017 we determined not to grant consent to the overseas investment application by Bathurst Coal Limited **(the Applicant)** to purchase Sullivan Mine located on the central Denniston Plauteau (consent application number 201710157). We set out below the reasons for our decisions.

**Description of application**

2. The Applicant has applied for consent to acquire Sullivan Mine, which is located on the central Denniston Plauteau.

3. Sullivan Mine is a small, non-operation site that includes approximately 18 hectares of sensitive land **(the Investment)** and has an estimated resource potential of at least 8 Mt (million tonnes) of coal.

4. The transaction requires consent as the Sullivan Mine is located on sensitive land under the Act.

**Purpose of the Overseas Investment Act 2005**

5. The application is required to be considered under the Act, and so our consideration of the application is framed generally within the purpose of the Act (s 3), which states:

> *The purpose of this Act is to acknowledge that it is a privilege for overseas persons to own or control sensitive New Zealand assets by –*
>
> *(a) requiring overseas investments in those assets, before being made, to meet criteria for consent: and*
>
> *(b) imposing conditions on those overseas investments.*

**Advice we have received**

6. The Overseas Investment Office (OIO) has assessed the application in accordance with its function as regulator, and has advised us on how the application complies with the Act's requirements. The Act requires that we, as relevant Ministers, must reach our own decision notwithstanding any particular advice from the OIO.

**The criteria we must consider on this application**

7. The OIO advises that the relevant land is sensitive land under the Act and in particular:

    a. is more than 5 hectares of non-urban land;

    b. includes riverbed;

c. includes land that is a historic place, historic area, wahi tapu, or wahi tapu area that is entered on the New Zealand Heritage List/Rarangi Korero or for which there is an application that is notified under section 67(4) or 68(4) of the Heritage New Zealand Pouhere Taonga Act 2014;

d. adjoins land that is over 0.4 hectares and is held for conservation purposes under the Conservation Act 1987.

8. As an application for consent to acquire sensitive land the relevant criteria are those in section 16.

9. Section 14 of the Act states that we must grant consent to an overseas investment in sensitive land if we are each satisfied that all of the criteria in section 16 are met; and conversely that we must decline to grant consent if we are not each satisfied that all of those criteria are met.

10. There are seven criteria in section 16 that must be met in relation to this application. We are satisfied that the first four criteria in section 16 are met. The criterion in section 16(1)(f) does not apply as the land is not and does not include any farm land.

11. In respect of the remaining criteria, which in this decision we call collectively "the benefit to New Zealand criterion", we must consider whether section 16(1)(e)(ii) and 16(1)(e)(iii) are met. Section 16(1)(e)(ii) requires that the overseas investment will, or is likely to, benefit New Zealand (or any part of it or group of New Zealanders), as determined by the relevant Ministers under section 17 (factors for assessing benefits of overseas investment in sensitive land).

12. If we determine under section 16(1)(e)(ii) that the overseas investment will, or is likely to, benefit New Zealand, because the land is more than 5 ha of non-urban land, we must also consider under section 16(1)(e)(iii), whether that benefit will be, or is likely to be, substantial and identifiable. We must be satisfied on this matter in order for section 16(1)(e)(iii) to be met.

**Applicant and section 16(1)(a)-(d) of the Act – Investor Test Criteria**

13. The first four criteria in section 16 relate to the overseas investor (or the individual controlling it) having relevant business experience and acumen, demonstrating financial commitment to the investment, being of good character and not being ineligible to enter New Zealand under the Immigration Act 2009.

14. The OIO has provided us with advice on who the relevant overseas person is and who the individuals with control of the relevant overseas person are. The OIO has also advised on whether they meet the requirements for consent in section 16 of the Act. We agree with OIO's advice on this aspect of the application. We agree that the relevant overseas person and the persons with control of the relevant overseas person meet the requirements of sub-sections 16(1)(a), (b), (c), and (d) of the Act.

**Benefit to New Zealand criterion**

15. Section 16 of the Act requires us to decide, whether we are satisfied in relation to the following "benefit to New Zealand" criteria:

    a. the overseas investment will, or is likely to, benefit New Zealand (or any part of it or group of New Zealanders), as determined under section 17 (s 16(1)(e)(ii)); and

    b. that benefit will be, or is likely to be, substantial and identifiable (s 16(1)(e)(iii)).

16. Under section 17(1) of the Act we, as relevant Ministers:

    a. must consider all of the factors in section 17(2) to determine which factor or factors (or parts of them) are relevant to the overseas investment;

    b. must determine whether the benefit to New Zealand criterion is met having regard to the relevant factors and whether that benefit will be or is likely to be substantial and identifiable;

    c. may, in doing so, determine the relative importance to be given to each relevant factor (or part).

**Counterfactual – What is likely to happen without the Investment?**

17. In our consideration of whether the Investment provides a benefit to New Zealand in respect of each factor, we need to consider what the counterfactual position would be in relation to the land at issue. The Court has described this as a "with and without" test, which requires a comparison of what is likely to happen with the investment, and what is likely to happen without the investment.

18. We agree with the OIO's analysis that without the Investment the land is likely to be sold to the Crown in light of the timeframes in the Deed of Company Arrangement.

19. We note that the Sullivan mine has not been operational since about 1997, it remains closed and the land has been rehabilitated. The Applicant has no clear plan to commence mining, and commencement of mining is dependent on future favourable market and economic conditions. Accordingly, there is uncertainty whether mining will eventuate in the factual.

20. We consider that under the counterfactual of Crown ownership, there is also uncertainty over the future use of the land, but we also consider that in the event that the Investment does not proceed mining in the future continues to remain possible.

**Applying the factors to the application**

21. There are 11 factors, or part factors, under section 17(2) and pursuant to section 17(2)(g)) a further 10 factors in regulation 28 of the Overseas Investment Regulations 2005 (the Regulations). The 21 factors are collectively referred to as "factors."

22. The OIO have concluded the following factors are not relevant to this application:

    a. Section 17(2)(a)(i) – Jobs

    b. Section 17(2)(a)(ii) – New technology or business skills

    c. Section 17(2)(a)(v) – Additional investment for development purposes

    d. Section 17(2)(c) – Trout, salmon, wildlife and game

    e. Section 17(2)(e) – Walking access

    f. Section 17(2)(f) – Special land

    g. Regulation 28(b) – Key person in a key industry

    h. Regulation 28(c)(i) – Affect image, trade or international relations

    i. Reguation 28(h) – Strategically important infrastructure

23. The OIO have concluded the following factors are not met by this application:

    a. Section 17(2)(a)(iii) – Increased export receipts

    b. Section 17(2)(a)(iv) – Added market competition, greater efficiency or productivity, enhanced domestic services

    c. Section 17(2)(a)(vi) – Increased processing of primary products

    d. Section 17(2)(b) – Indigenous vegetation/fauna

    e. Regulation 28(d) – Owner to undertake other significant investment

    f. Regulation 28(i) – Economic interests

24. We agree that these fifteen factors are not relevant to or have not been met by this application and that there are therefore no benefits to New Zealand for us to consider arising out of these factors.

**The remaining factors**

25. In respect of the six remaining factors we have considered and analysed the information provided to us by the OIO, including the application itself.

26. The remaining factors, our ranking of their relative importance and our assessment of each of them follows.

**Additional factor not met**

27. In addition to the factors identified by the OIO as not being relevant or met, and with which we agree, we have also identified Regulation 28(g) – Enhance the viability of other investments as not being met.

*Regulation 28(g) – Enhance the ongoing viability of other overseas investments*

28. The OIO has advised that this factor is met, although they note that viability of the Buller Coal Project has only increased a small extent.

29. We agree with the OIO's assessment that because future conditions in the global metallurgical coal market are uncertain and difficult to robustly forecast, the Applicant is unable to demonstrate that it will, or is likely to deliver economic benefits associated with the development of the Buller Project (such as jobs or export receipts) for New Zealand. The placement of Solid Energy into voluntary administration as a result of poor market conditions (including a significant decline in the price of hard coking coal), highlights the significant issues in the industry and uncertainty around the viability of other investments.

30. We note that the OIO's assessment considers that the Applicant can demonstrate that the Investment will increase to a small extent the viability of the Buller Coal project – increasing the likelihood of economic benefits, even if those benefits cannot currently be described as likely. The Applicant's intention to develop the Buller coalfield into an export operation however, has been suspended until the global metallurgical coal market experiences a sustained recovery.

31. In light of the significant uncertainty in the viability of both the Buller Coal Project and the Sullivan Mine, which are dependent on a sustained recovery of the metallurgical coal market, in our view, this factor has not been met.

**Low relative importance factors**

32. We have determined one factor, Regulation 28(a) – Consequential benefits, to be of low relative importance in relation to the Investment.

*Regulation 28(a) – Consequential benefits*

33. We consider that there will be minor consequential benefits from this overseas investment through the form of reduced liability to the Crown for excess rehabilitation costs and preserving the status quo at the Sullivan Mine as described by the OIO. We agree with the OIO assessment that this is a minor consequential benefit, given the relatively small excess of [redacted] and the uncertainty around the mine re-opening.

34. We have therefore given this factor a low weighting, as we do not consider the benefits to New Zealand will be or are likely to be substantial.

**Medium relative importance factors**

35. We have determined two factors to be of medium relative importance in relation to this overseas investment:

    a. Regulation 28(e) – Previous investments

    b. Regulation 28(j) – Oversight and participation by New Zealanders

*Regulation 28(e) – Previous investments*

*36.* The OIO has advised that this factor has been met, and we agree. Having regard to the Applicant's previous investments set out in paragraphs 83 to 89 of the OIO's analysis, we have given this factor a low weighting.

*Regulation 28(j) – Oversight and participation by New Zealanders*

37. The OIO has advised that this factor has been met, and we agree. We note that the OIO's analysis considered the six matters in regulation 28(j) and formed a view that on balance it considered that New Zealanders will be able to oversee the decision to a reasonable extent. We consider this was factor was finely balanced and accordingly give it a low weighting.

**High relative importance factors**

38. We have determined two factors to be of high relative importance in relation to this overseas investment:

    a. Section 17(2)(d) – Historic Heritage

    b. Regulation 28(f) – Advance Significant government policy or strategy

*Section 17(2)(d) – Historic Heritage*

39. The OIO has advised they do not consider that the historic heritage would be any less well protected under Crown responsibility, nor that the costs associated with the Sullivan CML obligations and historic heritage legislation are likely to be significant. We agree, and therefore, we are not satisfied that the benefit is substantial.

*Regulation 28(f) – Advance Significant government policy or strategy*

40. We accept that if the mine was to re-open, then the investment is likely to advance the Minerals Programme for Minerals (excluding Petroleum) 2013. We consider however, that there is considerable uncertainty whether the mine will re-open, given there is no current plan to commence mining and commencement is dependent on favourable market and economic conditions. We also consider that under the counterfactual, mining in the future may remain possible. However, we consider the uncertainty around the mine re-opening means we are not satisfied that the benefit is substantial.

**Decision on the substantial and identifiable benefit to New Zealand criterion**

41. We accept there may be some benefit to New Zealand for the reasons outlined above in terms of 16(1)(e)(ii).

42. The benefit to New Zealand of this Investment however, is premised on the re-opening of Sullivan Mine which has been closed for around 20 years. The Applicant has no firm plans to re-open the mine and any commencement of mining is dependent on favourable market and economic conditions.

43. Considering all the relevant factors, we are not satisfied that the proposed investment will be, or is likely to be, substantial and identifiable in terms of section 16(1)(e)(iii).

**No Conflict of Interest**

44. We record that as Ministers of the Crown, in determining whether sections 16(1)(e)(ii) and (iii) were met, we did not take into account the perceived benefit to the Crown, if any, if the land transferred to the Crown.

**Our decision**

45. We accordingly declined to grant consent to the application.

Hon David Clark

**Associate Minister of Finance**

Date: 18/12/17

E M Sage

Hon Eugenie Sage

**Minister for Land Information**

Date: 20/12/17