

Decision required under the Overseas
Investment Act 2005: Bathurst Coal Limited

Date	24 August 2017
Security Level	Commercial: In Confidence
Priority	High
Report/Case Number	1389 / 201710157
Consent Required By	As soon as possible

Instructions

	Action Sought	Suggested Deadline
Minister for Land Information	1. Sign the attached memorandum 2. Forward the memorandum and annexure to the Hon Dr David Clark	As soon as possible
Hon Dr David Clark	1. Sign the attached memorandum 2. Forward the memorandum and annexure to the Overseas Investment Office	As soon as possible

Contact for Telephone Discussion

Name	Position	Telephone (wk)	Cellphone	First Contact
Lizzie Barone	Manager Applications	██████████	██████████	✓
██████████	Solicitor	██████████		

Executive Summary:

1. Solid Energy New Zealand Limited (**Solid Energy**) is insolvent. As an alternative to liquidation, Solid Energy is required to sell all of its assets within a two and a half year period expiring in March 2018, pursuant to a Deed of Company Arrangement.
2. The applicant is Bathurst Coal Limited (**Applicant**), who seeks to acquire Solid Energy's Sullivan mine and related coal mining assets. The Applicant is ultimately a wholly owned subsidiary of Bathurst Resources Limited (**Bathurst**) and an overseas person under the Overseas Investment Act 2005.
3. **We recommend that consent is granted to the transaction.**
4. Bathurst is the second largest coal producer in New Zealand (Solid Energy is the largest), having produced approximately 431,000 tonnes of coal in the 2016 financial year. Bathurst operates exclusively in New Zealand and employs over 80 staff across its Wellington head office and South Island operations.
5. Bathurst entered the New Zealand market in 2010 through its acquisition of land in the Buller coalfield, where it intends to develop an export operation.

Investment

6. Sullivan mine is located on the central Denniston Plateau. It is a small, non-operational site that includes approximately 18 hectares of sensitive land (**Investment**) and has an estimated resource potential of at least 8 Mt (million tonnes) of coal.

Investment Plan

7. Prices for premium coking coal have historically been subject to significant volatility, with spot price increases coinciding particularly with supply disruptions (such as natural disasters). Within the previous year, we understand that the coal price has been particularly volatile.
8. The Applicant wishes to re-open Sullivan mine to operate it in conjunction with Bathurst's Buller coal project on the Denniston Plateau. However, Bathurst is waiting for a sustained recovery in coal prices before re-opening the mine.

Benefit to New Zealand

9. This Investment preserves the Sullivan mine's capacity to be re-opened at an appropriate time. We consider that preventing the closure of the mine before its future viability can be fully ascertained is of benefit to New Zealand.
10. It also facilitates the capacity to extract about 8 – 8.65 Mt of export-grade coal, which includes the coal seam located across the boundary of this mine, and the Escarpment and Whareatea West permit areas.¹ Therefore, there is increased likelihood that the Sullivan Mine and neighbouring coal resources are maximally depleted.
11. The Investment may also reduce by a small margin the Crown's potential liability for rehabilitation costs for the Sullivan Mine. It improves to a minor extent the potential viability of the Buller coal project.
12. The Applicant's ultimate parent company, Bathurst, has previously undertaken investments that have been or are of benefit to New Zealand. Bathurst currently employs over 80 staff across all of its New Zealand operations and has spent over \$250 million on operating and capital expenditure in New Zealand since 2010.
13. In addition, the Bathurst is approximately 22% owned by New Zealanders.

¹ For context, New Zealand exported 1.2 Mt of bituminous and sub-bituminous coal in 2016, according to the Ministry of Business, Innovation, and Employment's *Quarterly Coal, Supply, Transformation, and Consumption* data.

14. We are satisfied that the proposed investment is likely to benefit New Zealand and that the benefit is likely to be substantial and identifiable.

Instructions

15. Please see **Appendix 3** for instructions on how to make a decision and guidance on the relevant factors and criteria for consent.

Recommendations:

16. I recommend that you determine that:

- (a) the '**relevant overseas person**' is (collectively):

Entity	Relationship
Bathurst Coal Limited	Applicant
Bathurst Coal Holdings Limited	Direct parent company
Bathurst Resources Limited	Ultimate parent company

- (b) the '**individuals with control of the relevant overseas person**' are:

Individual	Relationship
Russell Lee Scott Middleton	Director of Bathurst
Tokorangi Thomas Kapea	Director of Bathurst
Pier Westerhuis	Director of Bathurst
Richard John Tacon	Director of Bathurst, Bathurst Coal Holdings Limited, and the Applicant

- (c) the individuals with control of the relevant overseas person collectively have business experience and acumen relevant to the overseas investment; and
- (d) the relevant overseas person has demonstrated financial commitment to the overseas investment; and
- (e) all the individuals with control of the relevant overseas person are of good character; and
- (f) each individual with control of the relevant overseas person is not an individual of the kind referred to in section 15 or 16 of the Immigration Act 2009; and
- (g) the overseas investment will, or is likely to, benefit New Zealand (or any part of it or group of New Zealanders); and
- (h) the benefit will be, or is likely to be, substantial and identifiable.
17. Accordingly, you are satisfied that:
- (a) the criteria for consent in section 16 have been met; and

Associate Minister of Finance:

Satisfied

Not Satisfied

Minister for Land Information:

Satisfied

Not Satisfied

✓

- (b) grant consent to the Investment as defined in Appendix 1 and subject to the conditions in Appendix 1 of the Report.

Associate Minister of Finance:

Minister for Land Information:

Consent Granted

☐

Consent Granted

☐

Consent Declined

☐

Consent Declined

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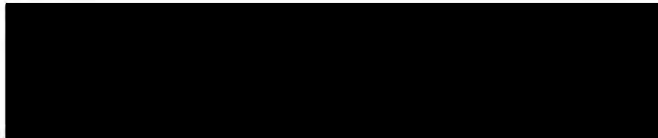
Hon. Dr David Clark:

Date

EM Sage

Minister for Land Information

Date



Lizzie Barone – Manager Applications
Overseas Investment Office

Released under the Official Information Act 1982

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Associate Minister of Finance:

Satisfied

Not Satisfied

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Minister for Land Information:

Satisfied

Not Satisfied

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Associate Minister of Finance:

Minister for Land Information:

Consent Granted

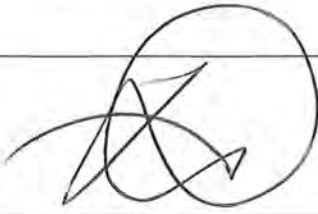
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Consent Granted

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Consent Declined

Consent Declined



Hon. Dr David Clark:

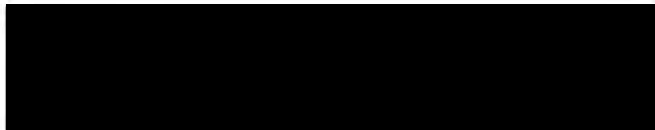
Date

14/12/17



Minister for Land Information

Date



Lizzie Barone – Manager Applications
Overseas Investment Office

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Report of the Overseas Investment Office
on the application for consent by
Bathurst Coal Limited
Case: 201710157

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What is the Investment?

Applicant	Bathurst Coal Limited (Singapore 57.89%, New Zealand 22.11%, Australia 19.0%, Various 1.0%)
Vendor	Solid Energy New Zealand Limited (New Zealand 100%)
Consideration	
Recommendation	Grant Consent

Description of the Investment

1. For consent for Bathurst Coal Limited (**Applicant**) to give effect to an overseas investment in sensitive land, being the acquisition of a freehold interest in approximately 18.9602 hectares of land of sensitive land (**Land**), associated with the Sullivan Mine located on the Denniston Plateau. The sensitive land is contained in the certificates of title: NL5C/6; NL10A/1303; and NL10A/333 (**Investment**).

Background to the Investment and Vendors

Solid Energy: voluntary administration and asset-sale procedure

2. In 2015, Solid Energy and its New Zealand subsidiaries were placed into voluntary administration as a result of poor market conditions (including a significant decline in the price of hard coking coal). Solid Energy and its New Zealand subsidiaries subsequently entered into a Deed of Company Arrangement (**DOCA**) as an alternative to liquidation.
3. Under the terms of the DOCA, Solid Energy is required to sell its assets within a two and a half year period expiring on 17 March 2018. After that date, it must repay 'participant creditors' using the proceeds of the asset sales to the extent possible.² The Crown is not a 'participant creditor'.
4. As part of the sales process under the DOCA, Goldman Sachs was appointed by Solid Energy to market its assets. Solid Energy's assets were marketed to a broad buyer set including international and domestic parties and across both trade and financial investors.

Bathurst's position on the Denniston Plateau

5. As outlined further under the rationale for the Investment, this Investment continues to advance Bathurst's consolidation of coal mining assets on the Denniston Plateau. Bathurst has acquired a significant portion of those coal mining assets. It is intended to enhance the overall viability of a future Buller coal project. In particular, in July 2017, Bathurst's joint venture BT Mining was granted consent under the Act to acquire the Stockton Mine, which neighbours the Sullivan Mine (consent number 201620085).

Sullivan Mine: future viability and international coal market

6. The Applicant was the successful bidder with respect to Sullivan Mine and associated land, and mining assets and interests. Several non-overseas persons were successful in bidding to purchase other Solid Energy assets, but no bid was made for Sullivan Mine on a standalone basis.

² Trade creditors and employees of Solid Energy continue to be paid in full.

7. Sullivan Mine is a small mine located on the Denniston Plateau, located next to several other mines in the area. Sullivan Mine was previously used for underground mining for a number of years, but it has not been operational since approximately 1995. The land has been rehabilitated.
8. Sullivan Mine is estimated to have between 6.3 and 6.9 Mt (million tonnes) of primarily hard/semi-hard metallurgical (coking) coal, which is export-grade. However, the mine remains under 'care and maintenance'.
9. Coking coal is a key ingredient used in iron and steel manufacturing. The viability of export coking coal operations depends on its international market price. Historically, coking coal prices have been subject to significant volatility, with spot price increases coinciding particularly with supply disruptions (such as natural disasters).
10. Within the previous year, we understand that the price of premium coking coal has been particularly volatile:

SPOT PREMIUM PLV FOB AUSTRALIA



11. We understand that the first price spikes in 2008 and 2010-11 resulted from Queensland floods, which disrupted transportation. The spike in late 2016 was prompted by the Chinese government restricting coal mine production to 260 days per year – this measure was subsequently reversed.
12. We understand that the price has continued to decrease since May to approximately USD \$146/tonne (as at 16 June 2017). Over the near term (2018-2021), a meta-analysis of 21 contributors forecast coking coal price holding steady with a median price approaching USD 130/t (in 2017 USD). That analysis was produced by KPMG (Australia) in March/April 2017. However, those forecasts rely on difficult to predict variables.

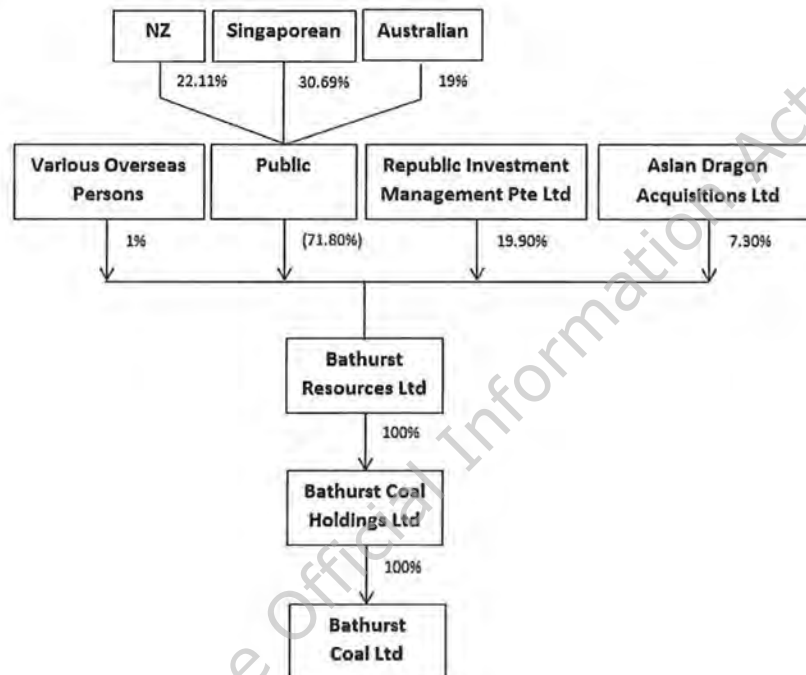
Sensitive assets

13. The Land is sensitive land for the reasons set out in **Appendix 2**.

Who is making the Investment?

The Applicant

14. The Applicant is a New Zealand limited liability company. The Applicant is held by Bathurst Coal Holdings Limited, which is a wholly owned subsidiary of Bathurst Resources Limited (**Bathurst**).
15. The Applicant is seeking to acquire certain assets of Solid Energy New Zealand Limited (**Solid Energy**). The Applicant's ownership structure is shown below. Bathurst, the Applicant's parent company, is an ASX listed company and its shareholding may fluctuate from that stated below.



Bathurst

16. The Applicant submits that Bathurst Coal Holdings Limited is only a holding company and that the relevant directors are also directors of Bathurst.
17. Bathurst is a New Zealand registered company which has been listed on the ASX since 2007. Between November 2010 and July 2015, Bathurst was also listed on the NZX.

Business activities - Bathurst

18. Bathurst is the second largest coal producer in New Zealand (Solid Energy is the largest), having produced approximately 431,000 tonnes of coal in the 2016 financial year. Bathurst directly employs more than 80 people across its headquarters in Wellington and its current mining operations, all of which are located in the South Island.
19. Bathurst entered the New Zealand market in 2010 through its acquisition of land and various permits in the Buller coalfield, primarily containing metallurgical coal (coking coal).
20. Bathurst has subsequently acquired the Takitimu mine in Southland, the Coalgate mine near Christchurch and a coal handling and distribution centre in Timaru. The Takitimu and Coalgate mines produce thermal coal, primarily sold for energy to local industrial customers.

Shareholders - Bathurst

21. Bathurst has two substantial shareholders – Republic Investment Management Pte Limited (19.90%) and Asian Dragon Acquisitions Limited (7.30%). Republic Investment Management Pte Limited is an institutional investor (it is a registered investment advisory firm located in Singapore).

Relevant overseas person

22. We have determined that the '**relevant overseas person**' is (collectively):

Entity	Relationship
Bathurst Coal Limited	Applicant
Bathurst Coal Holdings Limited	Direct parent company
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Individuals with control

23. We have determined that the '**individuals with control of the relevant overseas person**' are:

Individual	Relationship
Russell Lee Scott Middleton	Director of Bathurst
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Investment Plan

The Investment

24. The Investment is an overseas investment in sensitive land being approximately 18.9602 hectares located in the central Denniston Plateau. The acquisition also involves the purchase of Solid Energy's Sullivan Mine, including other certificates of title land and coal mining licences. These do not require consent under the Act and do not form part of the Investment.

Sale and purchase agreement

25. The Applicant and Solid Energy have entered into a sale and purchase agreement (**Agreement**), conditional on the Applicant receives consent under the Act to give effect to the Investment.
26. The total consideration for the Land is approximately [REDACTED]
27. As noted above, Solid Energy will use the proceeds from the sale to pay 'participant creditors' under the DOCA. As Solid Energy is insolvent, the Crown (which is not a 'participant creditor') is unlikely to receive any of the proceeds of the sale.

Land

28. Three of the six titles in land being acquired by the Applicant are sensitive land under the Act, collectively being about 20 hectares.³ The map on the following page shows these interests. Sensitive land is circled red (centre). The remaining land is circled in purple (top).

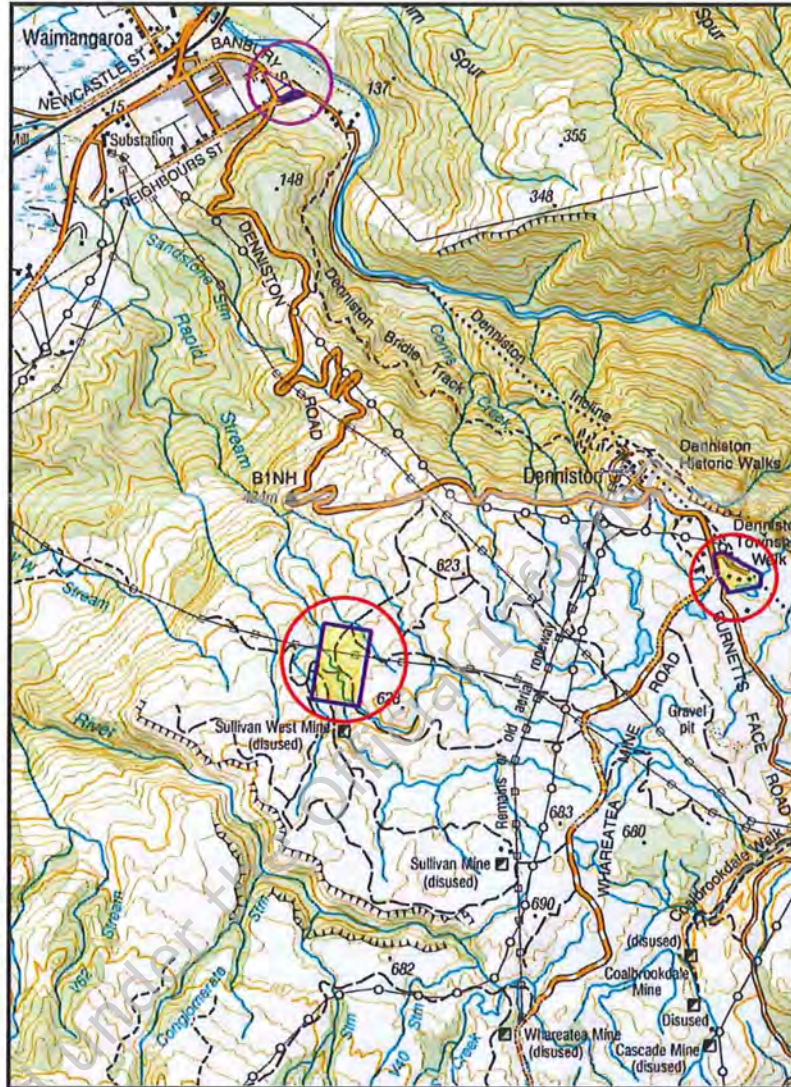
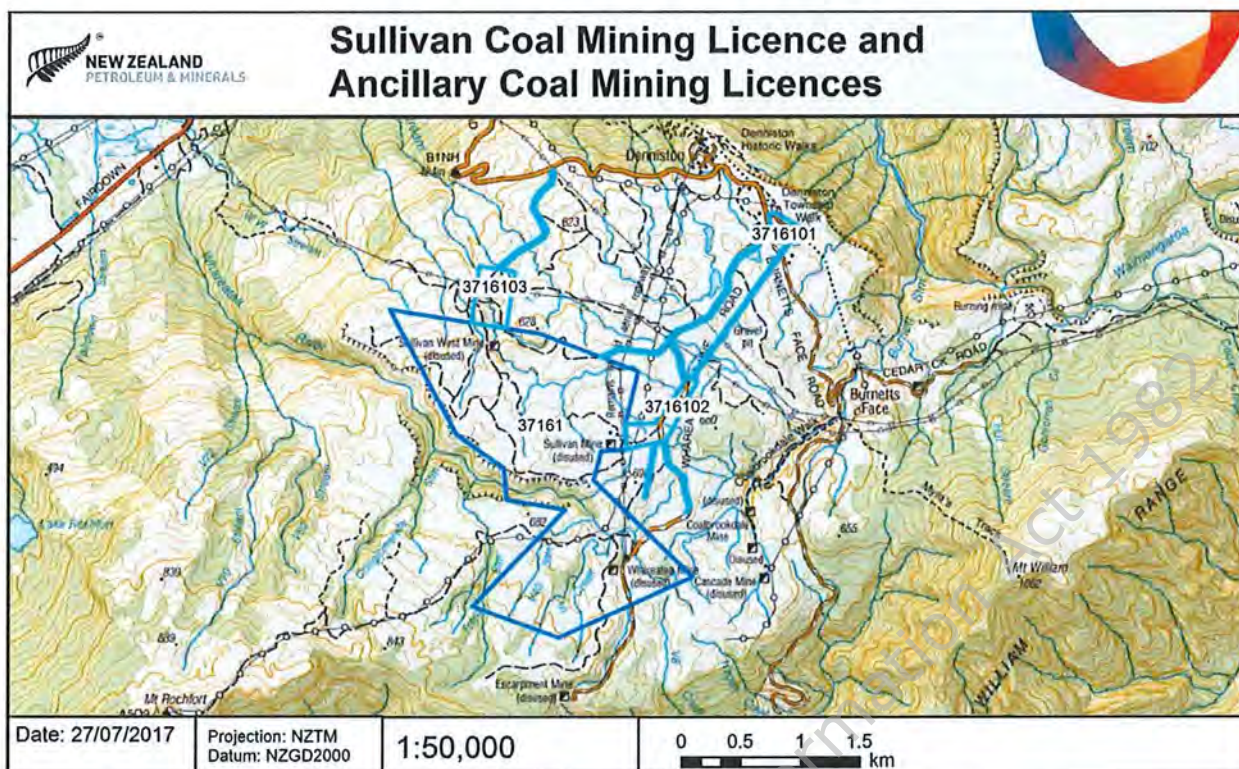


Figure 1: Sensitive Land

Source: Land Information New Zealand

29. The Applicant also proposes to acquire Solid Energy's Coal Mining Licence 37161 (**Sullivan CML**), and four Ancillary Coal Mining Licences (37161-01 to 37161-04 inclusive) (**ACML**). As above, for completeness, these do not require consent under the Act.
30. These licences are shown on the map over the page.

³NL70/196, NL9C/940, NL70/197, NL5C/6, NL10A/1303, and NL10A/333 (sensitive land).



Source: New Zealand Petroleum and Minerals

Rehabilitation and Crown indemnity

31. We understand the Crown has provided indemnities for the estimated cost to rehabilitate Solid Energy's mines. For mines that have been sold, the estimated rehabilitation has been transferred to escrow accounts.
32. For the Sullivan Mine, the CMLs and ACMLs carry with them certain obligations to rehabilitate the land to which those licences relate. Solid Energy has rehabilitated the underground mine site. Solid Energy has on-going obligations in respect of the mine weed control obligations. New Zealand Petroleum and Minerals also advises that the work remaining to be done is primarily re-profiling of the land and planting associated with acid mine drainage treatment.
33. The Crown has given an indemnity to the mine owner of the Sullivan Mine for cost of rehabilitation. The Treasury forecasts the value of the indemnity to be about [REDACTED]. The Agreement is also conditional on the Minister of Energy and Resources giving consent to the Applicant to be included in the terms of that indemnity.⁴

Rationale for the Investment

34. The Applicant submits that acquiring the Sullivan Mine will:
 - (a) enable the Applicant and Bathurst to effectively maximise the coal resource at the boundary of the Sullivan CML, and the Escarpment and Whareatea West permit areas; and
 - (b) advance Bathurst's Buller coal project.

Maximising local coal resource and infrastructure

35. Bathurst owns several other mines on the Denniston Plateau. The Sullivan CML and ACMLs are immediately adjacent to Bathurst's Whareatea West and Coalbrookdale mines, the subject of the Escarpment and Whareatea West permit and licence areas.

⁴ Sullivan (Denniston) – Deed of Indemnity relating to the Denniston Mine dated 17 September 2015 between Solid Energy, the West Coast Regional Council, Buller District Council, and the Crown.

36. Since 2010, Bathurst has been evaluating the potential of a single mine with multiple pits or entry points over Whareatea West, Coalbrookdale, and Sullivan mines. That work is currently at pre-feasibility stage.
37. The Applicant advises that there is a coal seam of approximately 1.75 Mt that lies near the common borders of the respective permits and/or licences. To extract it, the Applicant submits it will be necessary to remove the material that lies above the seam by benching back the terrain (an open-cast mining technique) to ensure it remains stable.
38. According to the Applicant, that operation would be effected by expanding the Whareatea West pit shell into the Sullivan CML co-ordinating the placement of utilities and supporting works, including access points, roading, and power lines.
39. Solid Energy and Buller Coal Limited (now a wholly owned subsidiary of Bathurst) had been unable to agree on the sharing of this resource and infrastructure for exporting coal from the Port of Lyttelton since 2011.
40. The Applicant submits that by owning land, permits and licences that relate to the Escarpment and Whareatea West mines, the Bathurst will be in a position to extract an additional 1.75 Mt of resource. The Applicant considers this would extend the amount of extractable resource at Escarpment and Whareatea West by approximately 1 Mt. The Applicant further submits that Bathurst's logistical trail, sales network, and capacity to blend with Bathurst coal to better meet customer requirements will also be available.
41. Without the acquisition, the Applicant submits that this resource would most likely be sterilised.

Buller coal project

42. In the wider context of the Denniston Plateau region, this Investment advances common ownership and control of coal interests on the Denniston Plateau and assists the integration of the Sullivan Mine into Bathurst's existing Denniston Plateau assets and infrastructure. Existing coal permits on the Denniston Plateau are shown on the diagram over the page.
43. The Sullivan Mine would form part of Bathurst's broader Buller coal project in order to advance the overall viability of the initiative. Bathurst currently has ownership or control interests, directly or indirectly, over a number of mines on the Denniston Plateau.
44. Bathurst intends to develop its interests in the Buller coalfield into an export operation, although it has suspended the project until the global metallurgical coal market experiences a sustained recovery.
45. When fully operational, the Buller coal project is expected to create over 200 direct jobs on the West Coast and a further 800 indirect jobs in New Zealand. Bathurst expects production to commence at round 500 thousand tonnes per annum, increasing to just under 1 million tonnes per annum at peak capacity. Bathurst considers that the total exploration potential from the project is in excess of 100 million tonnes.
46. A small portion of the direct and indirect jobs and production is expected to be directly attributable to the Sullivan Mine.
47. The acquisition of the Sullivan Mine allows it to be integrated into the Applicant's and Bathurst's existing Denniston Plateau assets and infrastructure.

Does the Applicant meet the Investor Test criteria?

Business experience and acumen - s16(1)(a)

The relevant overseas person, or the individuals with control of the relevant overseas person, must have business experience and acumen relevant to the overseas investment. There is considerable flexibility in determining what is relevant and more or less specific expertise may be required depending on the nature of the investment. Business experience and acumen that contributes to an investment's success may be treated as relevant even though the investor may have to supplement its experience and acumen by utilising the experience and acumen of others to ensure the investment succeeds.

48. We are **satisfied** that the individuals with control of the relevant overseas persons collectively have business experience and acumen relevant to the overseas investment, namely the acquisition of a coal mine which is in 'care and maintenance', with a view to ultimately extracting metallurgical (coking) coal.
49. We have reviewed the biographical information provided by the Applicant for each of the individuals with control and note that the directors of Bathurst have significant experience in the coal mining industry, including in New Zealand. Collectively, the directors have experience that spans operational through to senior management experience in accounting, and commercial management, project planning at major energy companies, and commercial, energy, and banking and finance legal experience as in-house counsel to energy and banking companies.

Financial commitment - s16(1)(b)

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50. We are satisfied that the relevant overseas person has demonstrated financial commitment to the Investment by:
 - (a) incurring due diligence costs in connection with the proposed transaction;
 - (b) entering into an agreement for sale and purchase to acquire the Land and coal mining permits and licences; and
 - (c) engaging professional advisers (including mining consultants and legal advisers).

Good character - s16(1)(c)

The decision maker must be satisfied that the individuals with control are of good character. Section 19 of the Act specifies that the decision maker must take the following factors into account (without limitation):

- (a) offences or contraventions of the law by A, or by any person in which A has, or had at the time of the offence or contravention, a 25% or more ownership or control interest (whether convicted or not);
- (b) any other matter that reflects adversely on the person's fitness to have the particular overseas investment.

51. We are **satisfied** that the individuals with control of the relevant overseas person are of good character.
52. We have also conducted open source background checks on the individuals with control and found nothing relevant to this criterion.
53. The Applicant has provided a statutory declaration stating that the individuals with control are of good character, have not committed an offence or contravened the law as described above and know of no other matter that reflects adversely on their fitness to have the Investment.
54. The statutory declaration complies with the requirements of the Oaths and Declarations Act 1957. We are satisfied that it can be relied on.

Immigration Act 2009 - s16(1)(d)

Section 15 of the Immigration Act specifies that certain convicted or deported persons are not eligible for a visa or permission to enter or be in New Zealand. Section 16 provides a power to deny a visa or permission to enter New Zealand for other specified reasons, such as if the individual is likely to be a threat or risk to security or public order.

55. We are **satisfied** that the individuals with control of the relevant overseas person are not individuals of the kind referred to in section 15 or 16 of the Immigration Act 2009 (which prevents certain people being granted visas or entry to New Zealand), based on representations by the Applicant and our open source background checks.
56. The Applicant has provided a statutory declaration stating that the individuals with control are of good character, have not committed an offence or contravened the law as described above and know of no other matter that reflects adversely on their fitness to have the Investment.
57. The statutory declaration complies with the requirements of the Oaths and Declarations Act 1957. We are satisfied that it can be relied on.

What is likely to happen without the Investment

Counterfactual

As a result of *Tiroa E and Te Hape B Trusts v Chief Executive of Land Information* [2012] NZHC 147 ("*Tiroa E*"), the OIO and relevant Ministers must apply a "counterfactual test" when assessing whether an overseas investment will, or is likely to benefit New Zealand. This test, which was described by the Court as a "with and without" test, requires a comparison of what is likely to happen with the investment, and what is likely to happen without the investment (the counterfactual).

58. To establish the appropriate counterfactual in this case, we have considered what the likely state of affairs would be without the Investment.

DOCA timeframe

59. The DOCA terms require the Vendor by 17 March 2018 to either sell its remaining assets or disclaim them to the Crown. The disclaimed asset procedure requires the Vendor to declare those assets unsaleable and take steps to complete their shutdown. All unsold mines must be properly de-commissioned and sealed. This particular mine has not been operational since about 1997 and remains closed.

Applicant's submissions

60. The Applicant's view is that, without the Investment, the Sullivan Mine would remain unsold by 17 March 2018 (the DOCA expiry date) and be disclaimed to the Crown, supported by the following considerations:
 - (a) the Vendor does not intend to re-run the asset-sale process for the Sullivan Mine. In the Vendor's view, the costs associated with a further sales process will likely outweigh the proceeds from the sale;
 - (b) the Applicant advises that there was no interest expressed in the Sullivan mine as a stand-alone asset; and
 - (c) the DOCA restricts the time within which a future asset-sale procedure could be completed. The Applicant estimates that it would be approximately a 10 month process for the Vendor to negotiate transaction terms, and to prepare, submit, and comply with required regulatory approvals before DOCA Expiry Date.

Our view of the likely counterfactual

61. Without the Investment, we consider that the land is unlikely to be sold by March 2018, and that the Sullivan Mine would be shutdown and disclaimed to the Crown.
62. The Vendor's perspective that a further asset-sale procedure for the Sullivan Mine would not be cost effective is a key factor which suggests the mine would not be sold.

63. No parties showed interest in the Sullivan Mine as a standalone asset during the initial sales process. The mine presents several challenges a standalone investment:
- (a) Sullivan Mine not presently being operational. As a single acquisition, the mine would represent an ongoing cost and liability an alternative purchaser to keep under 'care and maintenance' until the metallurgical (coking) coal price made a sustained recovery; and
 - (b) Bathurst also owning or controlling the surrounding coal interests and infrastructure on the Denniston Plateau. Extracting coal for export may require an agreement with Bathurst to access rail infrastructure to reach the Port of Lyttleton. In addition, the 1.75 Mt of coal contained in the seam under the boundary of the three permits would also require access/extraction negotiations.
64. There is no longer enough time to run a secondary asset-sale procedure.
65. For the reasons above, we consider that the likelihood of a standalone sale of the Sullivan Mine to an alternative New Zealand purchaser to be remote. Our view is therefore that, without the Investment, the Sullivan Mine is most likely to be shutdown and disclaimed to the Crown.

Benefits that are likely to occur with the Investment

66. We **are satisfied** that the Investment is likely to benefit New Zealand in regard to the following factors:

Historic heritage – s17(2)(d)

There are three key elements to this factor:

- **Historic heritage** must be identified **within the relevant land**.
- There must be **adequate mechanisms** in place or proposed to **protect or enhance** the historic heritage.
- The protection or enhancement of historic heritage that is **likely to result** from the overseas investment must be **additional** to that which is likely to occur **without the overseas investment**.

67. We consider that there will be adequate mechanisms in place to protect historic heritage but they are broadly comparable with the counterfactual. We therefore consider this factor is met but should be given low weighting.
68. Denniston is located on the sensitive land. Denniston is listed as a category 1 Historic Place on the New Zealand Heritage List/Rārangī Kōrero. Category 1 refers to a place that is of special or outstanding historical or cultural significance or value. Specific features on the sensitive land are a bath house, powerhouse chimney, swimming pool, powerhouse dam, and tennis court, and the main rope road. These date to the 1920s and 30s.
69. The Applicant submits that it will comply with the Sullivan CML obligations, which require the licensee to in consultation with the Department of Conservation:
- (a) undertake a survey and record all building structures and equipment at Sullivan and Whareatea mine sites that could be of historic or cultural interest;
 - (b) remove all rubbish, coal dumps, and buildings or other structures from the Sullivan and Whareatea mine sites not deemed to be of historic interest.
70. The Applicant also submits that it will comply with the Heritage New Zealand Pouhere Taonga Act 2014, and the Buller District Plan for the site. However, the Applicant has not identified any new mechanisms to protect or enhance this historic heritage but proposes to continue the status quo mechanisms. This is not a benefit for the purpose of this factor.
71. Under the counterfactual, the Applicant submits that the Crown will become responsible for the cost of on-going compliance with the Heritage New Zealand Pouhere Taonga Act 2014.

72. However, we 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.

Consequential benefits – r28(a)

There are three key elements to this factor:

- *There must be a **consequential benefit** to New Zealand.*
- *The benefit must not have been considered under another factor, it must be an **other** consequential benefit.*
- *The consequential benefit that is **likely to result** from the overseas investment must be additional to that which is likely to occur **without the overseas investment**.*

73. While the Applicant has not made submissions in respect of this factor, we consider the Investment is likely to result in several minor consequential benefits to New Zealand. We consider that this factor is **met**, but should be given **low weighting**.

Rehabilitation obligations

74. The Applicant estimates that the Sullivan mine has about [REDACTED] worth of outstanding rehabilitation obligations.
75. The Crown has given an indemnity to the mine owner, which the Crown currently forecasts to be [REDACTED]. The Denniston rehabilitation is scheduled to be completed by 2020. This would leave a shortfall of approximately [REDACTED].
76. The Crown has given indemnities for five other Solid Energy mines that are currently unsold. Rehabilitation of some of these mines may cost less than the forecasted escrow limit. Some may cost more.
77. We understand that, after all unsold mines have been rehabilitated, any surplus escrow amounts would be applied to cover any rehabilitation costs that the Crown was otherwise required to meet. However, rehabilitation is not anticipated to be complete for all mines until 2040.
78. If the Applicant acquires the Sullivan mine, we understand that the Applicant would be responsible for covering any amount in excess of the escrow. Therefore, without the Investment, the Crown is liable for, and may be required to meet, any excess rehabilitation cost. We note that the amount of liability (if any) will not be known under the counterfactual for some time.
79. We consider that this is a minor consequential benefit to New Zealand.

Future potential to operate

80. The Investment effectively preserves the status quo at the Sullivan Mine, by keeping it in 'care and maintenance' until it is known whether it will be economic to extract the remaining resource. Without the Investment, it is likely that the Mine will be disclaimed to the Crown. In the event that the Sullivan Mine is disclaimed to the Crown, we consider that the financial cost to re-establish operations would be prohibitive. We consider that preventing the closure of the mine before its future viability can be fully ascertained is of benefit to New Zealand.
81. We consider that this is also a minor consequential benefit to New Zealand.

Previous investments – r28(e)

There are two key elements to this factor:

- *The relevant overseas person must have previously undertaken investments;*
- *The previous investments must have been, or are, of benefit to New Zealand.*

82. We consider that this factor **is met**.

Bathurst

83. Bathurst entered the New Zealand market in late 2010 with the acquisition of some of the Denniston assets from L&M Coal Holdings Limited (case number 201020026). Bathurst subsequently acquired further land and mining permits on the Denniston Plateau and in Southland.
84. We note that Bathurst currently employs over 80 people in total in New Zealand, has its head office in Wellington and has spent in excess of \$250,000,000 on operating and capital expenditure in New Zealand since commencing operations here.

Buller Coal Project

85. Although Bathurst has not yet developed an export coal operation on the Denniston Plateau, we consider that their attempts to develop the Buller Coal Project have been of benefit to New Zealand. We consider that the Buller Coal Project has resulted in the creation of jobs (prior to suspending the development of Escarpment, we understand that the Applicant employed at least 110 people in New Zealand) and further investment for development purposes.

Takitimu mine

86. Bathurst initially acquired the 'Takitimu' mine through its investment in Eastern Resources Group (case number 201020131). The Takitimu mine was approaching depletion, prompting Bathurst to acquire a freehold interest in the nearby 'Coaldale' block (which had been partially developed pursuant to a profit-à-prendre) (case number 201210059). Bathurst then refocused mining activities on the Coaldale block.
87. We consider that Bathurst's investment in a freehold interest in the Coaldale block secured the viability of the Coaldale extension (and, subsequently, a further extension into the 'Black Diamond' block (case number 201520107), which is currently in progress). We also note that, following Bathurst's acquisition of the Coaldale block, the number of FTE positions at Takitimu increased from 40 positions in 2012 to 51 people in September 2014.

Coalgate mine

88. In 2013, Bathurst acquired Canterbury Coal – an open-cast mine near Coalgate. We understand that this transaction did not include sensitive land and that consent was not required under the Act. Bathurst has advised that it has invested in significant new plant and equipment to increase the processing capacity of the Coalgate mine. This investment included the following acquisitions:

- (a)
- (b)
- (c)
- (d)

89. Having regard to Bathurst's investments in the Buller coal project, the Takitimu mine and the Coalgate mine, we consider that Bathurst's previous investments have been, and continue to be, of benefit to New Zealand.

Advance significant government policy or strategy – r28(f)

There are three key elements to this factor:

- *The overseas investment **must give effect to or advance** a specific **Government policy or strategy**.*
- *The Government policy or strategy must be **significant**.*
- *The effect or advancement that is **likely to result** from the overseas investment must be **additional** to that which is likely to occur **without the overseas investment**.*

90. We consider that this factor is **met** but should be given **low weighting**.
91. The Investment is likely to advance the Minerals Programme for Minerals (excluding Petroleum) 2013 (**Minerals Programme**). The Crown's test to assess a mining permit application includes whether the permit applicant will "economically deplete the mineable mineral resource or deposit to the maximum extent practicable in accordance with good industry practice."
92. We consider that the Investment will increase the likelihood that the Sullivan and neighbouring coal resources are maximally depleted (a policy aim in the Minerals Programme).

Enhance the viability of other investments – r28(g)

There are three key elements to this factor:

- *The relevant overseas person must have undertaken **other overseas investments**.*
- *The overseas investment must **enhance the ongoing viability** of the other overseas investments.*
- *The enhancement in viability that is **likely to result** from the overseas investment must be **additional** to that which is likely to occur **without the overseas investment**.*

93. This factor is **met** and we consider that it should be given **medium weighting**.
94. Bathurst has undertaken other overseas investments – in particular, its acquisition of L&M Coal Limited and the Buller Coal Project in 2010. Bathurst's interests in the Buller coalfield now comprise permits over 10,000 hectares, which the company plans to develop into a full scale export operation in the event that the metallurgical coal market experiences a sustained recovery.
95. Because future conditions in the global metallurgical coal market are uncertain and difficult to robustly forecast, we consider that 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.
96. We do, however, consider 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.
97. As discussed in detail elsewhere, the Applicant submits that the Investment will enhance the future viability and longevity of Bathurst's Escarpment and Whareatea West mines by allowing coal at the boundary of the Sullivan CML to be mined efficiently. That area has an estimated total resource of 1.75 Mt. The Applicant estimates this resource will extend the life of Escarpment and Whareatea West mines by approximately 1 Mt.⁵

Oversight and participation by New Zealanders – r28(j)

There are three key elements to this factor:

- *There must be persons who are not overseas persons (**New Zealanders**);*
- *The New Zealanders must be **likely** to be able to **oversee or participate in** the overseas investment or any relevant overseas person;*
- *The overseeing or participation must be in the **overseas investment** or any **relevant overseas** person.*

This factor is relevant to all overseas investments in sensitive land.

98. We consider this factor is **met**.
99. The factor applies to oversight and participation in the overseas investment or relevant overseas person at an ownership or control level.

⁵ For context, New Zealand produced 2 Mt of bituminous coal and a total of 4 Mt of all (lignite, sub-bituminous, and bituminous) coal in 2014.

100. In assessing this factor, we have considered the six matters referred to in regulation 28(j).

- (i) *Whether there is or will be any requirement that 1 or more New Zealanders must be part of a relevant overseas person's governing body:*

The Applicant's constitution does not require that one or more New Zealanders must be part of the Applicant's governing body.

- (ii) *Whether a relevant overseas person is or will be incorporated in New Zealand:*

The Applicant and Bathurst are incorporated in New Zealand.

- (iii) *Whether a relevant overseas person has or will have its head office or principal place of business in New Zealand:*

Bathurst's head office is located in Wellington and all of its business activities take place in New Zealand.

- (iv) *Whether a relevant overseas person is or will be a party to a listing agreement with NZX Limited or any other licensed market in New Zealand:*

Bathurst delisted from the NZX in 2015, although it continues to be listed on the ASX.

- (v) *The extent to which New Zealanders have or will have any partial ownership or controlling stake in the overseas investment or relevant overseas person:*

New Zealanders currently hold approximately 22% of Bathurst's ordinary shares.

- (vi) *The extent to which ownership or control of the overseas investment or of a relevant overseas person is or will be dispersed amongst a number of non-associated overseas persons:*

Bathurst's shareholding is widely held among a number of non-associated overseas persons and New Zealand residents.

101. Having regard to the above matters, on balance, we consider that New Zealanders will be able to oversee the decision to a reasonable extent.

Benefit to New Zealand Test

102. The Investment is likely to result in a substantial and identifiable benefit to New Zealand.

103. The Investment preserves Sullivan Mine's capacity to re-open in the future and facilitates capacity to extract about 8 – 8.65 Mt of export-grade coal. That amount includes the coal seam located across the boundary of this mine, and the Escarpment and Whareatea West permit areas.⁶ Therefore, the Investment increases the likelihood that the Sullivan Mine and neighbouring coal resources are maximally depleted, a policy aim in the Minerals Programme.

104. The Investment improves to a minor extent the potential viability of the Buller coal project, increasing the likelihood of future economic benefits. It may also reduce by a small margin the Crown's potential liability for rehabilitation costs for the Sullivan Mine.

⁶ For context, New Zealand exported 1.2 Mt of bituminous and sub-bituminous coal in 2016, according to the Ministry of Business, Innovation, and Employment's *Quarterly Coal, Supply, Transformation, and Consumption* data.

105. The Applicant's ultimate parent company, Bathurst, has previously undertaken investments that have been and are of benefit to New Zealand. Bathurst currently employs over 80 staff across all of its New Zealand operations and has spent over \$250 million on operating and capital expenditure in New Zealand since 2010.

Benefits not likely to occur

106. We considered that the factors below were either not relevant to the Investment or a benefit to New Zealand was unlikely to arise with regard to those factors. The Applicant made submissions in relation to some of these factors. However, we were **not** satisfied that the evidence provided showed that these benefits were likely to result from the Investment.

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Factor	Not met / not relevant
Economic factors	
Jobs - s17(2)(a)(i)	This factor is not relevant . The mine is not operational. No new jobs are proposed.
New technology or business skills - s17(2)(a)(ii)	This factor is not relevant . No new technology or business skills are proposed.
Increased export receipts - s17(2)(a)(iii)	This factor is not met . The Applicant's business plan under current market conditions does not involve increased export receipts from the Sullivan Mine and that the mine is intended to remain under 'care and maintenance' until market conditions improve. Increased export receipts are therefore too uncertain to be considered a "likely" result of the Investment.
Added market competition, greater efficiency or productivity, enhanced domestic services - 17(2)(a)(iv)	This factor is not met . Claimed efficiency gains are predicated on the Sullivan, Whareatea West, and Escarpment mines returning to production. The likelihood of these mining assets returning to production is uncertain. Increased efficiency or productivity is therefore not a "likely" result of the Investment.
Additional investment for development purposes - s17(2)(a)(v)	This factor is not relevant . No additional investment is proposed.
Increased processing of primary products - s17(2)(a)(vi)	This factor is not met . Any increase in production is predicated on improved future conditions in the market for metallurgical (coking) coal. Those conditions are uncertain. We consider that increased processing in New Zealand of New Zealand's primary products is not a "likely" result of the Investment.
Environmental factors	
Indigenous vegetation/fauna – s17(2)(b)	This factor is not met . The Sullivan CML contains flora and fauna of high conservation value. The Applicant submits that it will comply with obligations on it relating to mining, rehabilitation, and

	<p>protection of the environment.</p> <p>We do not consider that merely complying with these obligations is sufficient to ensure there is or will be adequate mechanisms in place for protecting or enhancing existing areas of significant indigenous vegetation and significant habits of indigenous fauna.</p>
Trout, salmon, wildlife and game - s17(2)(c)	This factor is not relevant .
Walking access - s17(2)(e)	This factor is not relevant . The Applicant submits that the size and location of the sensitive land means it does not have usefulness for public walking access. The land is remote. We agree with the Applicant's assessment.
Special land - s(2)(f)	This factor is not relevant .
Other factors	
Key person in a key industry – r28(b)	This factor is not relevant .
Affect image, trade or international relations – r29(c)(i)	This factor is not relevant .
Owner to undertake other significant investment – r28(d)	This factor is not met . The terms of the DOCA require Solid Energy to use the investment proceeds to repay creditors. This is not an investment.
Strategically important infrastructure – r28(h)	This factor is not relevant .
<p>Economic interests – r28(h)</p> <p>(i) More reliable supplier of primary products</p> <p>(ii) Export earnings less controlled by single overseas persons</p>	<p>This factor is not met.</p> <p>Coal is a primary product of New Zealand. However, we consider that the Investment is unlikely to make New Zealand a more reliable supplier of coal.</p> <p>We consider that coal does not form an important part of New Zealand's export earnings.</p>

(iii) Enhanced strategic and security interests	The Investment is not relevant to New Zealand's strategic and security interests.
(iv) Improved key economic capacity	As the Investment is relatively small, we consider it is unlikely to have any effect on New Zealand's key economic capacity.

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Consent criteria

107. As detailed above, we are satisfied that the criteria in section 16 are met, and therefore consent should be granted to the Investment.

Appendices

1. Proposed Notice of Decision (including proposed conditions of consent)
2. Details of the sensitive land
3. General guidance how to decide an application and the criteria and factors

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Appendix 1 – Proposed Decision



Notice of Decision

Case: 201720036

Decision Date

November 2017

Decision

Consent is granted to **Bathurst Coal Limited** to acquire the Investment.

Only the named consents holder(s) may give effect to the Investment, not a subsidiary of the consent holder, a trust, or other entity.

Consent is granted subject to the following conditions:

Statutory Conditions of Consent

Section 28 of the Overseas Investment Act 2005 ("the Act") provides that it is a condition of every consent, whether or not it is stated in the consent, that:

- (a) the information provided by each applicant to the Overseas Investment Office or the relevant Ministers in connection with the application was correct at the time it was provided; and
- (b) each consent holder must comply with the representations and plans made or submitted in support of the application and notified by the Overseas Investment Office as having been taken into account when the consent was granted, unless compliance should reasonably be excused.

For the purposes of section 28(1)(b), the representations and plans made or submitted in support of the application and taken into account when consent was granted are those contained in the correspondence listed in the statutory declaration of Richard John Tacon dated 18 August 2017 and in all attachments annexed to that correspondence.

Conditions of Consent

Interpretation

Any term or expression that is defined in the Overseas Investment Act 2005 and used, but not defined, in this consent has the same meaning as in the Overseas Investment Act 2005.

Act means the Overseas Investment Act 2005.

Application Letter means the final version of the application letter dated 24 August 2017.

Business Plan means the final version of the investment plan set out in Appendix 11 – Part A of the Application Letter.

Consent Holder means Bathurst Coal Limited.

Denniston Historic Place means the Denniston historic place registered on the New Zealand Heritage List/Rārangī Kōrero, register number 7049.

Individuals with Control means:

- (a) the individuals who have, directly or indirectly, a 25% or more ownership or control interest in the Consent Holder or a Parent of the Consent Holder; and
- (b) the members of the governing body of the Consent Holder or a Parent of the Consent Holder; and
- (c) includes, for the avoidance of doubt, the members of the governing body of Bathurst Resources Limited, Bathurst Coal Limited and Bathurst Coal Holdings Limited.

Inspector means a person appointed by the Regulator to undertake an Inspection on the Regulator's behalf.

Inspection means a visit to a property by an Inspector for the purpose of monitoring these conditions.

Investment means the Land.

Land means a freehold interest (approximately 18.9602 hectares) at Sullivan Mine, Denniston Plateau, West Coast, being land comprised of the following computer freehold registers NL10A/1303, NL10A/333, NL5C/6 (Nelson Registry).

OIO means the Overseas Investment Office.

Parent of Consent Holder means a person that has, directly or indirectly, a 25% or more ownership or control interest in the Consent Holder, and includes a person that has, directly or indirectly, a 25% or more ownership or control interest in any Parent of the Consent Holder.

Regulations means the Overseas Investment Regulations 2005.

Settlement Date means the date the acquisition of the Investment took place.

Special Conditions

When the transaction must be given effect to

1. The consent will lapse if the Investment has not been acquired by and transferred to the Consent Holder within 12 months of the date of consent.

Good character

2. The Individuals with Control must:
 - (a) continue to be of good character; and
 - (b) not become an individual of the kind referred to in section 15 or 16 of the Immigration Act 2009.

Reporting to the OIO

3. The Consent Holder must notify the OIO in writing as soon as practicable, and no later than twelve months from the date of consent, whether settlement of the acquisition of the Investment took place. If settlement of the acquisition of the Investment did take place, the notice must include:
 - (a) the Settlement Date;
 - (b) final consideration paid (plus GST, if any);
 - (c) the structure by which the acquisition was made, and who acquired the Investment;
 - (d) where applicable, copies of transfer documents and settlement statements; and
 - (e) any other information that would aid the OIO in its function to monitor conditions of consent.

Annual reporting

4. The Consent Holder must report in writing annually to the OIO detailing progress of its Business Plan ("Annual Report"), including the following matters:
 - (a) any progress made towards developing the Sullivan mine;
 - (b) the amount of coal extracted during mining operations on the Land;
 - (c) the number of full-time equivalent positions employed in relation to the Sullivan mine; and
 - (d) any activities (and cost) undertaken in relation to that part of the Denniston Historic Place located on the Land.

The first Annual Report is due on 15 December 2018 and the final report is due on 15 December 2023 (or such other date as advised by the OIO in writing).

5. The Consent Holder must notify the OIO in writing within 20 working days if:

- (a) the Consent Holder, any Individual with Control, or any person in which the Consent Holder or any Individual with Control has, or had at the time of the offence or contravention, a 25% or more ownership or control interest, commits an offence or contravenes the law (whether convicted or not); or
 - (b) any Individual with Control:
 - (i) ceases to be of good character; or
 - (ii) commits an offence or contravenes the law (whether convicted or not); or
 - (iii) becomes aware of any other matter that reflects adversely on an Individual with Control's fitness to have the Investment; or
 - (iv) becomes an individual of the kind referred to in section 15 or 16 of the Immigration Act 2009;
 - (c) the Consent Holder:
 - (i) ceases to be an overseas person; or
 - (ii) disposes of the Investment.
6. If requested in writing by the OIO, the Consent Holder must provide a written report within 20 working days (or such other timeframe as specified) on any matter relating to its compliance with:
- (a) the representations and plans made or submitted in support of the application and notified by the regulator as having been taken into account when the consent was granted; or
 - (b) the conditions of this consent.
- Inspection for the purposes of monitoring these conditions*
7. The Consent Holder must allow an Inspector to conduct an Inspection, provided that the Consent Holder has been given at least two working days' notice of the Inspection.
8. For the purpose of conducting the Inspection, the Consent Holder must allow an Inspector to:
- (a) gather information and provide that information to the OIO;
 - (b) enter any building on the Land other than a dwelling;
 - (c) remain for as long as is reasonably required to conduct the Inspection;
 - (d) conduct surveys, inquiries, tests, and measurements;
 - (e) take photographs and video recordings; and
 - (f) do all other things that are reasonably necessary to enable an Inspector to carry out an Inspection.
9. The Consent Holder must take all reasonable steps to facilitate an Inspection, including:
- (a) directing its employees or agents to permit an Inspector to conduct an Inspection; and
 - (b) being available, or requiring its agents or employees to be available at all reasonable times during an Inspection to facilitate access by an Inspector onto and across the Land, including providing transport across the Land if reasonably required.
10. For the avoidance of doubt:
- (a) an Inspector will not inspect, copy or take documents during an Inspection, unless the Consent Holder or an employee or agent of the Consent Holder agrees to the document being inspected, copied or taken;
 - (b) the Consent Holder, its employees, and agents are not required to answer an Inspector's questions, but may do so if they wish.

Monitoring Conditions of Consent

For the purpose of monitoring conditions of consent, the Overseas Investment Office may, under section 38 of the Act, require the consent holder to provide information or documents, or both, that are specified in the notice. Under section 40 of the Act, the Overseas Investment Office may also require a consent holder to provide a statutory declaration verifying the extent to which the consent holder has complied with the conditions of consent, and, if the consent holder is in breach of a condition or conditions, the reasons for the breach and the steps the consent holder intends to take to remedy the breach.

Sanctions

The Act provides for civil and criminal sanctions for breaching the Act, failing to comply with the conditions of consent and failing to provide information required by the Overseas Investment Office. The Overseas Investment Office has an obligation to investigate and act upon alleged and suspected breaches of the Act.

General

A reference to the "Overseas Investment Office" in this Notice includes a reference to the regulator (as defined by the Act). A reference to the Applicant includes a reference to the consent holder.

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Appendix 2 – Sensitive Land

1. Sullivan Mine, Denniston Plateau, West Coast

Land Interest	Freehold Interest (18.9602 hectares)
CTs	NL10A/1303, NL10A/333, NL5C/6 (Nelson)
Sensitivity	Is more than 5 hectares of non-urban land
	Includes riverbed
	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
	Adjoins land that is over 0.4 hectares and is held for conservation purposes under the Conservation Act 1987

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Appendix 3 - Instructions

1. Ministers must grant consent to this overseas investment if they are satisfied that all of the criteria in section 16 of the Overseas Investment Act 2005 (**the Act**) are met. They must decline to grant consent if they are not satisfied that all of the criteria in section 16 are met. Ministers must not take into account any criteria or factors other than those identified in sections 16 and 17, and regulation 28 of the Overseas Investment Regulations 2005 (**the Regulations**).
2. In the attached Report the Overseas Investment Office identifies each of the criteria and factors under sections 16 and 17, and regulation 28 that Ministers are required to consider in this case.

"Benefit to New Zealand criteria"

3. In this case, section 16 requires Ministers to decide, among other things, whether they 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 (section 16(1)(e)(ii)); and
 - (b) that benefit will be, or is likely to be, substantial and identifiable (section 16(1)(e)(iii)).
4. The application of the benefit to New Zealand criteria involves the exercise of Ministerial judgement. The fact that responsibility for making this decision has been conferred on Ministers confirms that this is a high-level decision with significant policy content. That is also apparent from the language and content of the factors that must be considered, many of which require a high degree of evaluative judgement, and are not capable of quantification or calculation.
5. In applying the benefit to New Zealand criteria, Ministers are required to consider each of the factors in section 17(2), determine which of the factors are relevant to the investment, and have regard to the relevant section 17(2) factors. The relative importance to be given to each factor is a matter to be determined by Ministers. In particular, the Act does not require economic factors to be given more weight than non-economic factors, or vice versa. It is a matter for you, in carrying out your overall evaluation, to decide what weight to give to each factor.
6. The decision concerning whether the benefit to New Zealand, or any part of it or group of New Zealanders, is substantial and identifiable under section 16(1)(e)(iii), involves a collective assessment of the relevant factors.

Justice Miller's "with and without test"

Economic factors

7. The High Court in *Tiroa E and Te Hape B Trusts v Chief Executive of Land Information* [2012] NZHC 147 (**Tiroa E**) requires the "economic benefit" factors in section 17(2)(a) to be assessed on the basis of a "counterfactual test". That is, Ministers must consider with respect to each section 17(2)(a) factor whether the overseas investment is likely to result in a benefit to New Zealand over and above any benefit that will or is likely to result even if the investment does not proceed. It is only the additional benefit from the overseas investment that is relevant when applying the "benefit to New Zealand" criteria.

Non- economic factors

8. Although the position is not free from doubt, the better view is that the same question – will this benefit be achieved even if the overseas investment does not occur – should be asked in relation to the other “non-economic” factors listed in section 17(2)(b)-(e). The High Court judgment suggested⁷ that there could be a benefit in respect of the non-economic factors even if the same benefit would be achieved in the absence of the investment. But as the Court noted⁸, it is not easy to see how a benefit that will happen anyway could be regarded as substantial for the purposes of section 16(1)(e)(iii). We consider that Ministers should not treat benefits that are likely to be achieved in any event as contributing to the “substantial and identifiable benefit” criterion.

Regulation 28 factors

9. With regard to the factors in regulation 28 of the Overseas Investment Regulations 2005, Miller J noted that:

The criteria listed in reg 28 deal, for the most part, with benefits that only an overseas buyer could provide or what may be loosely described as strategic considerations, so they do not require a counterfactual analysis.⁹

10. Many of the factors in regulation 28 are incapable of having a counterfactual analysis applied to them. However, as recognised by Miller J, there are some factors that may require a counterfactual analysis. The Overseas Investment Office has applied a counterfactual analysis where appropriate.

Conditions

11. Conditions may be imposed on any consent that is granted, under section 25. The attached Report recommends some conditions that Ministers may wish to consider imposing in this case.
12. If you wish to make any changes to the conditions of consent, those changes should be discussed with the Overseas Investment Office, and the other Minister, before being finalised.

Decision

13. The decision that you are required to make should be based on information available to you that you consider is sufficiently reliable for that purpose. The information that the Overseas Investment Office has taken into account in making its recommendation is summarised in the attached Report.
14. If you propose to disagree with the decision of the other Minister, you should discuss your proposed decision with the Overseas Investment Office and the other Minister.
15. If required, staff from the Overseas Investment Office are available to brief you on the Office’s recommendations.

⁷ *Tiroa E* at [36].

⁸ *Tiroa E* at [38].

⁹ *Tiroa E* at [36].