IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2020-404-0138
[2020] NZHC 2345

UNDER	the Judicial Procedure Act 2016
IN THE MATTER	of the Overseas Investment Act 2005
BETWEEN	COROMANDEL WATCHDOG OF HAURAKI (INCORPORATED) Applicant
AND	MINISTER OF FINANCE AND ASSOCIATE MINISTER OF FINANCE First Respondents
	OCEANA GOLD (NEW ZEALAND) LIMITED Second Respondent

Hearing:	8 and 9 June 2020
Appearances:	B O'Callahan, R B Enright and H Z L Krebs for Applicant J B M Smith QC, K Anderson and K G Stephen for First Respondents J E Hodder QC, S V McKechnie and F J Thorp for Second Respondent
Judgment:	9 September 2020

JUDGMENT OF CLARK J

Introduction

[1] Overseas investment in sensitive New Zealand assets requires prior consent under the Overseas Investment Act 2005 (the Act).[1]

[2] One of the criteria to be met before consent for an overseas investment in sensitive land is given is that the overseas investment will, or is likely to, benefit New Zealand. In October 2019 the Minister of Finance and Associate Minister of Finance (the Ministers) each consented to Oceana Gold's application to acquire three parcels of rural land totalling approximately 178 hectares near Waihi.

[3] Coromandel Watchdog of Hauraki (Incorporated) (the Society) challenges the decision on the broad ground that Ministers assessed the "benefit to New Zealand" without having regard to the detrimental effects associated with Oceana Gold's acquisition of rural land for a tailings dam. The issue at the heart of the Society's challenge is whether, in assessing benefit to New Zealand, the relevant Ministers must have regard to detrimental effects as well as the benefits of the proposed investment.

Statutory framework

[4] I turn immediately to the legislative framework because the relevant facts are more readily understood against the legislative backdrop.

Purpose

[5] The purpose of the Act is set out at s 3:

> (1) 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—
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> (a) requiring overseas investments in those assets, before being made, to meet criteria for consent; and

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[1] The Act was amended in 2018 by the Overseas Investment Amendment Act 2018. In particular, the very provisions with which this proceeding is concerned, namely those governing the criteria for consent and the factors which Ministers must consider in assessing benefit, were amended. Pursuant to sch 1AA, however, the amendments made by the 2018 Amendment Act apply only to transactions entered into on or after its commencement. In this case the relevant transactions were entered into before the 2018 Amendment Act and therefore the pre-amended Act applies. There was no dispute about this point.

(b) imposing conditions on those overseas investments.

Consent regime

[6] A transaction requires consent under the Act if the transaction results in an overseas investment in sensitive land or in significant business assets.[2] An overseas investment in sensitive land is the acquisition by an overseas person, or an associate of an overseas person, of (relevantly) land that is sensitive under pt 1 of sch 1.[3] In this case, the land is sensitive because it is non-urban land exceeding the threshold of five hectares.[4]

Criteria for consent

[7] In considering whether or not to grant consent to an overseas investment transaction Ministers "must have regard to only the criteria and factors that apply to the relevant category of overseas investment".[5] Ministers must grant consent if satisfied that all of the criteria in ss 16 or 18 (as the case may be) are met and must decline to grant consent if not satisfied that all of the criteria are met.

[8] The criteria for consent are all of the criteria in s 16 which provides:

> **16 Criteria for consent for overseas investments in sensitive land**
>
> (1) The criteria for an overseas investment in sensitive land are all of the following:
>
> (a) the relevant overseas person has, or (if that person is not an individual) the individuals with control of the relevant overseas person collectively have, business experience and acumen relevant to that overseas investment:
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> (b) the relevant overseas person has demonstrated financial commitment to the overseas investment:
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> (c) the relevant overseas person is, or (if that person is not an individual) all the individuals with control of the relevant overseas person are, of good character:

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2 Section 10(1).
3 Section 12.
4 Schedule 1, pt 1.
5 Section 14(1)(a).

(d) the relevant overseas person is not, or (if that person is not an individual) each individual with control of the relevant overseas person is not, an individual of a kind referred to in section 15 or 16 of the Immigration Act 2009 (which sections list certain persons not eligible for visas or entry permission under that Act):

(e) either subparagraph (i) is met or subparagraph (ii) and (if applicable) subparagraph (iii) are met:

(i) the relevant overseas person is, or (if that person is not an individual) all the individuals with control of the relevant overseas person are, New Zealand citizens, ordinarily resident in New Zealand, or intending to reside in New Zealand indefinitely:

(ii) 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:

(iii) if the relevant land includes non-urban land that, in area (either alone or together with any associated land) exceeds 5 hectares, the relevant Ministers determine that that benefit will be, or is likely to be, substantial and identifiable:

…

[9] The criteria in subs (a)–(d) are colloquially referred to as the "investor test". The Society does not challenge the Ministers' decision that these criteria were met. In this proceeding, s 16(1)(e)(ii) applies. Where s 16(1)(e)(ii) applies Ministers must consider all the factors in s 17(2):

17 Factors for assessing benefit of overseas investments in sensitive land

(1) If section 16(1)(e)(ii) applies, the relevant Ministers—

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

(b) must determine whether the criteria in section 16(1)(e)(ii) and (iii) are met after having regard to those relevant factors; and

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

(2) The factors are the following:

(a) whether the overseas investment will, or is likely to, result in—

(i) the creation of new job opportunities in New Zealand or the retention of existing jobs in New Zealand that would or might otherwise be lost; or

(ii) the introduction into New Zealand of new technology or business skills; or

(iii) increased export receipts for New Zealand exporters; or

(iv) added market competition, greater efficiency or productivity, or enhanced domestic services, in New Zealand; or

(v) the introduction into New Zealand of additional investment for development purposes; or

(vi) increased processing in New Zealand of New Zealand's primary products:

(b) whether there are or will be adequate mechanisms in place for protecting or enhancing existing areas of significant indigenous vegetation and significant habitats of indigenous fauna, for example, any 1 or more of the following:

(i) conditions as to pest control, fencing, fire control, erosion control, or riparian planting:

(ii) covenants over the land:

(c) whether there are or will be adequate mechanisms in place for—

(i) protecting or enhancing existing areas of significant habitats or trout, salmon, wildlife protected under section 3 of the Wildlife Act 1953, and game as defined in sections 2(1) of that Act (for example, any 1 or more of the mechanisms referred to in paragraph (b)(i) and (ii)); and

(ii) providing, protecting, or improving walking access to those habitats by the public or any section of the public:

(d) whether there are or will be adequate mechanisms in place for protecting or enhancing historic heritage within the relevant land, for example, any 1 or more of the following:

(i) conditions for conservation (including maintenance and restoration) and access:

(ii) agreement to support the entry on the New Zealand Heritage List/ Rārangi Kōrero of any historic place, historic area, wahi tapu, or wahi tapu area under the Heritage New Zealand Pouhere Taonga Act 2014:

(iii) agreement to execute a heritage covenant:

(iv) compliance with existing covenants:

(e) whether there are or will be adequate mechanisms in place for providing, protecting, or improving walking access over the relevant land or a relevant part of that land by the public or any section of the public:

(f) if the relevant land is or includes foreshore, seabed, or a bed of a river or lake, whether that foreshore, seabed, riverbed, or lakebed has been offered to the Crown in accordance with regulations:

(g) any other factors set out in regulations.

[10] The "other factors" referred to in s 17(2)(g) (for assessing whether an overseas investment in sensitive land will, or is likely to, benefit New Zealand[6]) are set out in reg 28 of the Overseas Investment Regulations 2005 (the Regulations). Of particular relevance to the Society's case is reg 28(f):

> **28 Other factors for assessing benefit of overseas investment in sensitive land**
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> The other factors that are referred to in section 17(2)(g) of the Act for assessing whether an overseas investment in sensitive land will, or is likely to, benefit New Zealand are as follows:
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> …
>
> (f) whether the overseas investment will, or is likely to, give effect to or advance a significant Government policy or strategy.

[11] Section 24 specifies which Ministers must decide particular applications. Oceana Gold's application involved a land decision. Therefore, its application was to be decided by the Ministers of Finance and the Minister for Land Information.[7] In this case the Hon David Parker exercised the decision-making role of the Minister for Land

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6 Reflecting the test in s 16(1)(e)(ii).

7 See s 12 and definitions of "land decision" and "relevant Minister or Ministers" in s 6, the interpretation provision.

Information following a transfer of her responsibility under s 7 of the Constitution Act 1986.

[12] A consent under the Act may be refused or granted in whole or in part, retrospectively, unconditionally "or subject to the conditions that the relevant Minister or Ministers think appropriate".[8]

[13] Under s 34 the Minister of Finance may direct the regulator by a "Ministerial directive letter" about a number of matters including:[9]

> (a) the Government's general policy approach to overseas investment in sensitive New Zealand assets, including the relative importance of different criteria or factors in relation to particular assets.

Oceana Gold's applications for consent

[14] Oceana Gold's applications for consent total approximately 1000 pages. The following description of its purpose in making the applications is, necessarily, broad-brush and is taken from the assessment report prepared for the Ministers by the Overseas Investment Office (OIO).[10]

[15] Oceana Gold is a fully owned subsidiary of Oceana Gold Corporation, a Canadian gold mining company. Oceana Gold owns and operates mines in New Zealand. Its applications relate to its mining activities at its Waihi mine site. Specifically, the applications are for consent to acquire three areas of farm land totalling 178 ha outside Waihi. The areas would not be mined but are to enable the development of a new tailings pond.[11]

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8 Section 25(1).

9 Section 34(3)(a).

10 Oceana Gold's two applications, dated 13 and 14 August 2019, were assessed in a single assessment report prepared by the OIO for Ministers.

11 Tailings are the material remaining once gold has been extracted from ore. Tailings generated by mining activity may contain traces of chemicals and must therefore be kept in secure ponds in a geologically stable area to avoid contamination of ground water. The acquisition and placement of tailings storage ponds is an important consideration in any mining expansion because they must be safely disposed of to protect the surrounding environment. Safe disposal of tailings is a key issue in any mine expansion and must be addressed at the outset. Where there is no workable solution to the issue of safe disposal of tailings, the viability of all stages of the mining expansion is put in doubt.

[16] No suitable locations for additional tailing storage exist on the land Oceana Gold holds in and around the Waihi mines as part of its existing operations. Its proposed tailings storage facility necessitated the acquisition of more land.

[17] The land in respect of which Oceana Gold seeks consents is said to be essential for its plans to extend the commercial life of the mines for a further nine years during which time Oceana Gold expects to employ some 340 'full-time equivalent' staff and generate export receipts of approximately $2 billion.

Ministers' decisions

[18] Oceana Gold's application was actually declined in May 2019 by the Minister for Land Information, the Hon Eugenie Sage. The Minister of Finance approved the application but Ms Sage did not. Oceana Gold commenced judicial review proceedings. The proceedings were resolved and Oceana Gold submitted a second set of applications. Under the Act such applications must be decided by the Minister responsible for the administration of the Act.

[19] Both Ministers[12] decided to grant consent to the investment on the basis they were satisfied the criteria for consent in s 16 were met and the overseas investment would, or was likely to, benefit New Zealand (or any part of it or group of New Zealanders) and the benefit would be, or was likely to be, substantial and identifiable.

[20] The consent is in tabular form setting out first the total number of hectares and the timeframes within with the purchases of particular parcels of land are to be completed. In addition to standard conditions, special conditions were imposed with timeframes within which the condition is required to be met. For example, all applications for consent under the Resource Management Act 1991 affecting the construction of the tailings pond on the land are to be lodged with the appropriate consent authority by 31 December 2021.

[21] The following statement heads the table of conditions:

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12 See above at [11].

> **Special Conditions**
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> You must comply with the following **special conditions**. These apply specifically to this Consent and were considerations that particularly influenced us to give consent.

[22] The Ministers' decisions themselves did not contain any further reasoning beyond that they were each satisfied the necessary statutory conditions had been met. The Ministers were, however, provided with the substantial assessment report prepared by the OIO. In accordance with the test formulated by the High Court in *Tiroa E and Tehape B Trusts v Chief Executive of Land* (to which I return) the OIO's analysis considered a counterfactual in relation to each relevant statutory factor.[13] That is, the OIO considered what would be likely to happen without the investment. The important point that emerges from *Tiroa* is that when Ministers consider the factors in s 17(2)(a), the Act requires that they do so by assessing what would happen 'with and without' the overseas investment they are being asked to approve rather than applying a 'before and after' test.[14] In this case the OIO considered the most likely counterfactual was the status quo, that is, the land would continue to be owned by the current vendors.

[23] In its assessment overview the OIO assessed as either 'strong', 'moderate', or 'weak' the relative strengths of each of the s 17(2) and reg 28 factors against the counterfactual, that is, the position without the investment.

[24] The OIO concluded that Oceana Gold met the benefits test: when examined together the benefits of the investment were likely to be substantial and identifiable taking into account the size and nature of the land to be acquired.

[25] In reaching their decisions Ministers accepted the OIO's recommendation to grant consent subject to Oceana Gold complying with specified conditions.[15]

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13 *Tiroa E and Tehape B Trusts v Chief Executive of Land* [2012] NZHC 147, (2012) 10 NZBLC 99-703.

14 At [35] and [44].

15 One of the OIO's statutory functions is to consider applications and advise Ministers as to how the application should be determined: Overseas Investment Act, s 31(a).

The application for judicial review: parties' respective positions

Applicant's position

[26] The Society maintains that the Ministers assessed benefits without having regard to detrimental effects attaching to Oceana Gold's application and engaged in a limited evaluation of the economic benefits and disbenefits of the proposal. The Society believes environmental impacts are to be considered as part of a "holistic assessment" of the benefits and disbenefits of overseas investment in sensitive land. In the Society's view, given the current situation and policy direction of the present government, the considerations must include climate change.

[27] The Society has a 40 year history of advocacy towards protecting the environment in the Hauraki/Coromandel region. Catherine Delahunty, a member of the Society, filed affidavits in support of the application for judicial review. The Society is said to be concerned that Ministers:

> … did not consider relevant environment risks of soil contamination or tailings dump collapse, long term economic costs to the region and the way the proposal will contribute to increased greenhouse gas emissions during a critical time period for emission reduction if Government targets are to be met.

[28] Ms Delahunty deposed to the Society's belief that:

> (a) The creation of a new toxic waste dump to store waste from proposed new mining activity will inevitably result in increases in greenhouse gas emissions from those activities.
>
> (b) 178 hectares of productive land will be contaminated in perpetuity by waste from gold mining activities which includes large quantities of toxic heavy metals such as arsenic, mercury, zinc, cadmium, lead, copper and cobalt.

[29] Approximately 15 hectares of native vegetation on part of the land, being an unprotected terrestrial ecosystem with regional significance, forms part of a significant natural area under the Hauraki District Plan. Construction of the proposed tailings dam would result in removal of approximately 5 hectares of this land.

[30] The Society pleads that, in assessing the benefit to New Zealand by reference to the factors set out in s 17(2) of the Act and reg 28 of the Regulations, the Ministers took an approach that assessed actual or likely benefits to New Zealand without

weighing them against actual or likely detriments to New Zealand. For example, detrimental effects would be relevant to meeting the target for emissions reduction set out in s 5Q of the Climate Change Response Act 2002. The Society also pleads that detrimental effects would be relevant to a consideration of whether there are adequate mechanisms in place for protecting or enhancing significant areas of indigenous vegetation or protecting or enhancing the land.

[31] On the Society's case detrimental effects are also relevant to whether New Zealand's key economic capacity would be improved and whether the proposed acquisition concerned activities that are environmentally sustainable and are likely to create positive and long-lasting environmental benefits and provide economic, environmental, social and cultural benefits.

[32] The Society seeks orders setting aside the decisions and requiring reconsideration of the applications in light of the Court's findings.

First respondents' position

[33] The position of the first respondents, the Minister of Finance and Associate Minister of Finance, is that the Act does not permit a holistic assessment of the likely effects of an overseas investment. In deciding whether an overseas investment will likely be of "benefit to New Zealand", decision-makers can only consider the factors in s 17(2) of the Act and in reg 28. The Crown says the statutory factors are "positively focused on possible benefits of an overseas investment and not potential detrimental effects".

Second respondent's position

[34] Oceana Gold submits the applicant's case is profoundly flawed in that it misunderstands the purposes of the Act and the test to be applied. In determining whether an investment is both likely to benefit New Zealand and that the benefits are "substantial and identifiable" Ministers are not engaged in a weighing exercise but a threshold exercise. In particular, concerns beyond the focus of the Act are not relevant to a decision under the Act because whether the concerns are employment, or environmental, they will be addressed within the domestic legal framework.

Discussion

[35] The Society says the Ministers erred in law by either applying the wrong legal test or by failing to consider the adverse effects arising from Oceana Gold's proposed acquisition. Those detriments include the effects of climate change, the inherent unsustainability of extractive mining processes, and the permanent conversion of productive land to a toxic waste dump.

[36] In support of the Society's contention that the Ministers assessed benefit without having regard to "one mandatory half of the equation — namely the detrimental effects attaching to Oceana Gold's acquisition of rural land for a tailings dam (and related mining purposes)", Mr O'Callahan helpfully surveyed the legislative history and predecessor legislation.[16]

[37] In short, Mr O'Callahan sought to demonstrate that there has been no legislative intention to abandon what he described as a "previous overall judgment approach" whereby an overall net approach was taken to determining overseas investment applications.

[38] The Society's key point is that the assessment of whether an investment is of benefit to New Zealand, one that is substantial and identifiable, necessarily involves a broad judgment at a high policy level; an assessment of the pros and cons of an overseas investment in terms of the s 17 factors. A failure to assess the disbenefits, or to discount them as irrelevant "creates a false overall assessment of the benefit to New Zealand". Mr O'Callahan added it would be strange if a test that required an assessment of benefit to New Zealand was to be performed by omitting to balance benefits against detriments, particularly in the context of an Act designed to protect sensitive New Zealand assets from foreign investments that do not benefit New Zealand.

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[16] Land Settlement Promotion and Land Acquisition Act 1968 and the Overseas Investment Act 1973.

[39] The Society is essentially asking the Court to read into the Act a mandatory relevant consideration, namely the potential detriments of an overseas investment. I am unable to accept the Society's position because it is unsupported by the Act itself.

[40] The consent and conditions regime in Part 2 of the Act is not only clear but unusually prescriptive. The nature of the (mandatory) criteria in s 16, and the nature of the (mandatory) factors in s 17, require of the relevant Ministers an identification of benefits. The criteria and with one exception, the factors, are, as Mr Smith QC put it, exclusively focussed on the possible benefits of an overseas investment.[17] There is no reference to detriments or anything of that kind.

[41] In a sense the Society's case is redolent of the plaintiffs' claim in *CREEDNZ Inc v Governor-General*.[18] In *CREEDNZ* the plaintiffs alleged a wide range of factors were relevant to whether works proposed to be carried out in relation to an aluminium smelter were in the national interest.[19] The plaintiffs adduced a body of evidence drawing on the expertise of economists and academics involved in project evaluation studies, particularly those involving significant production or consumption of energy. The plaintiffs were aiming to prove certain pleaded contentions, for example, that the net economic effects of the proposed works was that the people of New Zealand would suffer a "minimum absolute loss of $43 million per annum"; that the cost of creating permanent jobs in the economy was so great it was economically unjustifiable and a misuse of resources; and that the effect of the works on the New Zealand economy would be to accelerate inflation contrary to the national interest — to describe but three of the plaintiffs' seven asserted relevant considerations. The plaintiffs then asked the Court to infer that these considerations could not have been taken into account because if they had been Ministers could not have concluded the proposed works were in the national interest.

[42] Cooke J addressed the plaintiffs' claim that relevant matters were not considered:[20]

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17 The factor in reg 28(c) of the Regulations focuses on whether refusing consent will, or is likely to "adversely affect New Zealand's image overseas …" or result in New Zealand breaching any of its international obligations.

18 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA).

19 At 180.

20 At 183.

> What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the Court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the Court itself, would have taken into account if they had to make the decision.

[43] Similarly, the Society in this case must demonstrate that the matters which it says Ministers failed to consider, were mandatory relevant considerations. The Society has identified no basis for engrafting on to the Act a requirement that Ministers must consider any factor or criterion beyond those that Parliament has strictly prescribed. The point is put beyond doubt by s 14(1)(a) which directs that the specified statutory criteria and factors (applicable to the relevant category of overseas investment) are the *only* matters able to be considered.

[44] As was the case with Oceana Gold's applications, not all of the statutory criteria or factors will be relevant. Those that are not will be disregarded. An observer may think that a proposed overseas investment might bring benefits that the legislature has not thought to include in s 17(2). But neither the OIO, nor relevant Ministers, may consider any such benefit — just as it is impermissible to consider detriments (unless they are included in the s 17(2) factors). To do so would render the decision legally vulnerable on the basis irrelevant considerations were taken into account.

[45] Mr O'Callahan argued that the counterfactual test involves assessing the position with the investment, and without the investment, and that the concept of the counterfactual would make little sense if it were to be applied without considering the downside of an investment. Mr O'Callahan further argued that a properly constructed cost-benefit appraisal would involve "forward-looking estimated streams of quantifiable costs and benefits for the proposed project and the counterfactual would then discount these streams to a present-value, and would then compare the two present values to determine which project is to be preferred in the absence of unquantifiable effects."

[46] In relation to assessments, and decisions, to be made under the Act I think the position is straightforward. Unlike other statutory contexts on which the applicant relies, the Act is highly prescriptive as to the criteria and factors not simply able to be

taken into account but which the relevant Ministers "must consider". Contrary to the applicant's argument that the purpose of the Act is to protect sensitive New Zealand assets from foreign investment that do not benefit New Zealand, the Act both facilitates and regulates overseas investment in New Zealand assets. The most that might be said is that there is "something of a tension between … Parliament's description of overseas investment in New Zealand as a privilege and giving overseas investors an entitlement to consent where they meet the relevant criteria".[21] Under s 14(1)(c) an applicant must be granted consent if relevant Ministers are satisfied that all of the relevant criteria are met.

[47] In applying the benefit test in s 16(1)(e)(ii) — that is, in assessing the likely benefit to New Zealand from the overseas investment — the counterfactual assessment required since the High Court decision in *Tiroa E and Tehape B Trusts* engages, in relation to each claimed benefit, a consideration of the likely consequences of the investment not proceeding. In Miller J's opinion:[22]

> … the statute contemplates for several reasons that the economic factors in s 17(2)(a) may be accounted benefits only if they will not or might not happen absent the overseas investment.

[48] Thus, any negative, or detrimental, aspects to the investment will be considered as part of the assessment of the particular benefit. Mr Smith gave as an example of the counterfactual assessment, an overseas investment proposal resulting in 50 people being employed as against a counterfactual of 30 people continuing to be employed. The result of the counterfactual assessment is that only 20 new job opportunities flow from the investment.[23] In the same way, negative consequences of the investment are considered as part of this "intra-factor" assessment. What are not permissible considerations are "inter-factors"; factors unrelated to s 17(2) or reg 28.[24]

[49] The statement of purpose in s 3 does not simply acknowledge that it is a privilege for an overseas person to own or control sensitive New Zealand assets but

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21 *Tiroa E and Tehape B Trusts v CE Land Information New Zealand* [2012] NZCA 355, [2012] 3 NZLR 808 at [41].

22 *Tiroa E and Tehape B Trusts v Chief Executive of Land Information*, above n 13, at [35].

23 One of the mandatory factors for consideration under s 17(2) is whether the overseas investment is likely to result in the creation of new job opportunities or the retention of existing jobs in New Zealand that might otherwise be lost.

24 The "inter"/"intra" nomenclature is attributed to the submissions on behalf of the first respondents.

does so by incorporating into the statutory purpose a methodology. Significantly, the requirement that an overseas investor must meet the statutory criteria for consent is incorporated into the statutory purpose as is the other limb of the methodology — the imposition of conditions on those overseas investments.

[50] Meeting the criteria and meeting the conditions are in a sense the 'price' for the privilege, as Mr Smith characterised these limbs of the statutory purpose. The key point is that meeting the criteria and imposing conditions go hand in hand. When one has regard to the four criteria comprising the "investor test" it is apparent there is a search for benefits. The same may be said of the criteria in subs 16(1)(e). That successive governments have actively sought foreign investment is borne out somewhat by the observations of the Hon Dr Michael Cullen who, as Minister of Finance at the time, moved the first reading of the Overseas Investment Bill. The review of the 30 year-old Overseas Investment Act had two purposes:

(a) to ensure New Zealand's approach to the regulation of foreign investment focused on assets that really mattered to New Zealand such as sensitive land, fisheries and assets with historical or cultural significance; and

(b) to ensure potential overseas investors did not face unnecessary compliance costs and that foreign investment that could make a positive contribution to the economy was to be encouraged.

[51] The stated intention of the Bill was to ensure overseas investors who sought to acquire sensitive New Zealand assets complied with purchase conditions that advanced New Zealand's interest. In this way, the Bill aimed at balancing the need to protect sensitive New Zealand assets while recognising the positive contribution to the economy made by overseas investment.

[52] How then, are Ministers to give effect to reg 28(f) which is made relevant by the s 17(2)(g) obligation on Ministers to consider "any other factors set out in regulations". And the factor in the regulations said to be relevant to this proceeding is reg 28(f): "whether the overseas investment will, or is likely to, give effect to or

advance a significant Government policy or strategy". The applicant's case is that the correct approach to determining benefits was stated in the Ministerial directive letter, which required the relevant Ministers to have regard to whether the proposed acquisition was environmentally sustainable and minimise adverse impacts on the natural environments and would provide economic, environmental, social and cultural benefits to regional communities.

[53] The relevant Ministerial directive letter was issued on 28 November 2017 by the Minister for Finance, the Hon Grant Robertson. The purpose of the letter is to direct Land Information New Zealand, as the regulator, on the Government's general policy approach to overseas investment; the relative importance of different factors in s 17(2) and factors in reg 28; and other matters not relevant to this proceeding. In his letter the Minister stated that:

(a) the Government welcomed high quality overseas investment that (amongst other things) is environmentally sustainable, minimising adverse impacts on the natural environment, and is likely to create positive and long lasting environmental benefits;

(b) the Government also recognise that while economic goals are important, so too are environmental, social and cultural goals.

[54] The Minister also:

(c) provided direction in relation to the relative importance of the various statutory criteria and factors regarding particular assets; and

(d) directed the regulator that certain factors would be of "high relative importance" in relation to particular acquisitions.

[55] The applicant says these statements support its argument that, in effect, environmental sustainability is a relevant factor under s 17(2) or reg 28. But it is simply not the case that any Ministerial directive letter supplants the legislative criteria in ss 16 and 17(2) and reg 28. As the Court of Appeal commented in *Tīroa E and*

Tehape B Trusts "the Act is drafted so as to accommodate different governmental policies in relation to foreign investment in New Zealand" but:[25]

> … while the responsible Minister has the power to give directions to the OIO about (among other things) 'the relative importance of different criteria or factors in relation to particular [sensitive New Zealand] assets' he or she has no power to dispense with the requirement that the statutory criteria be met.

[56] The applicant's reliance on the Ministerial directive as introducing "environmental" factors as mandatory relevant considerations under s 17(2) or reg 28 is misconceived. The directive does not introduce a new factor but signals the importance to Government of an overseas investment that meets the environmental goals contained in the directive.

[57] The provisions enacting the factors and criteria that are relevant to a consideration of an overseas investment application are not only highly prescriptive, they are limiting. There is no 'catch-all' provision enabling Ministers to consider "any other matters" the Ministers consider to be relevant. The legislature has left no such discretion to the relevant Ministers. Unlike, for example, the "benefit to the public" test in s 67(3)(b) of the Commerce Act 1986, which is framed more generally and allows decision-makers considerably more scope to take into account a greater array of factors,[26] the Act's "benefit to New Zealand" test is heavily circumscribed. It constrains decision-makers to a greater extent than similar tests in other statutory contexts.

[58] There is, however, scope for conditions to be imposed under s 25(1)(c) of the Act. The Act's structured approach enables concerns that lie beyond the statutory criteria — such as environmental concerns — to be accommodated, in the usual way, under other domestic legislation such as the Resource Management Act. That is precisely what took place in relation to Oceana Gold's two applications. For example, one of the seven special conditions imposed requires Oceana Gold to lodge all applications for consents under the RMA by 31 December 2021. If the necessary

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25 *Tiroa E and Tehape B Trusts*, above n 13 at [41] and [48].

26 See for example the Court of Appeal's discussion in *NZME Limited v Commerce Commission* [2018] NZCA 389 at [81].

consents are not acquired by 31 December 2026, Ministers may require Oceana Gold to dispose of the land.

[59] A further special condition was imposed to offset damage to a "significant natural area". Oceana Gold is required to "offer to accept resource consent conditions which mitigate the environmental effects of the removal of any part of the significant natural area …". Mr O'Connor submits that the condition assists the Society's approach to the benefit test. I do not agree. By the time conditions are imposed, the substantial and identifiable likely benefit has already been assessed by reference to the permissible criteria and factors. The threshold determination having been reached, it was then available to Ministers to impose, as they did, conditions of consent under s 28. One cannot work backwards from a condition to argue that the nature of the condition shows a prior step — the "benefit to New Zealand" assessment — was in error.

Result

[60] The applicant has not established that Ministers failed to take relevant considerations into account when granting Oceana Gold's applications for consent. Nor did Ministers apply a wrong legal test. It follows that the application for judicial review must be dismissed.

[61] As costs follow the event, the applicant is liable to pay the respondents' costs. I would expect costs to be able to be agreed but failing agreement, the parties may file brief memoranda in accordance with the following directions. Memoranda should not exceed five pages. Any memoranda from the respondents is to be filed and served within 15 working days of this judgment. The applicant's memorandum is to be filed and served 10 working days afterwards and the respondents may file reply memoranda five working days following.

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Karen Clark J

Solicitors:
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