
Disagreeing Minister Leads to a Decline of OceanaGold OIO Application

OceanaGold (New Zealand) Ltd (*OceanaGold*) has recently had declined an application under the Overseas Investment Act 2005 (OIA) to acquire 178 hectares of rural land for the purposes of use as storage of mine tailings (*the Application*). The establishment of the additional mine tailings capacity was to extend the life of the Waihi mine from 2028 until 2036 by allowing OceanaGold to proceed with its new mining project “Project Quattro”. The decline came as a surprise to the applicant and the industry and does raise some question marks.

As the application was in respect of the purchase of land, section 24(1)(a) of the OIA required a decision to be made by the two Ministers. Minister Clark granted the Application but Minister Sage declined it, meaning that of necessity the Application was declined. The Overseas Investment Office itself had recommended the Application be granted.

Under section 16A of the OIA, the Ministers must consider whether the Application meets the Benefit to New Zealand test. As the Application involved rural land, it was subject to the higher standard of a ‘substantial and identifiable’ benefit having to be shown, as against other counterfactual uses.

When making their respective decisions, both Ministers considered a number of factors identified to be of high relative importance, including jobs; new technology or business skills; increased exports receipts; increased processing of primary products; and the oversight and participation of New Zealanders’. Minister Sage, in declining the Application, determined that converting the land into a waste-storage area for the by-product of a non-renewable extractive industry reduces any economic benefit from the Application. This determination led the Minister to conclude that the overall short term financial benefits are inconsistent with sustainable economic interests.

The assessment of a net negative benefit to New Zealand is novel in the sense that here, the Minister has effectively deducted points for a use of the land that is contrary to government policy.

Two different decisions by Ministers of the same coalition government will always raise questions of impartiality in decision making, but in this instance in particular questions have been raised by the mining industry body Straterra and the Hauraki District Council about the Minister's history of activism against mining and have questioned whether she should have recused herself and delegated the decision making power, an option available under section 32 of the OIA. She has previously done so, on other grounds.

Perhaps with little surprise, OceanaGold have filed proceedings in the High Court for a judicial review of the decision, with the proceedings alleging that "Minister Sage's decision was flawed as a result of a number of errors of law and irrelevant considerations, because the benefits to New Zealand of the land purchase would be likely to be substantial and identifiable on any analysis undertaken in accordance with the relevant public law principles". Whichever way the Court decides there is no doubt that the outcome of these proceedings will impact future ministerial decisions of OIA applications under the Benefit to New Zealand Test and potentially change the nature of the applications that the OIA receives.
