Campaign Against Foreign Control of Aotearoa

Submission to the Finance and Expenditure Committee on the Overseas Investment Bill 2004

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1. CAFCA

1.1. The Campaign Against Foreign Control of Aotearoa (CAFCA) has been in existence for thirty years. It is concerned with all aspects of New Zealand's sovereignty, whether political, economic, military or cultural. It opposes foreign control of New Zealand by other States or by corporations, but welcomes interaction with people of other countries on the basis of equality. It is anti-racist and internationalist in outlook and has wide networks with other groups and individuals in New Zealand and overseas.

1.2. Its members include a number of institutions and libraries, journalists, politicians from most political parties, public figures, trade unionists, environmentalists, other researchers in the area, and people from all parts of New Zealand. Members receive a magazine, *Foreign Control Watchdog*, on an approximately quarterly basis. It is acknowledged as a unique and well-researched source in this area, where hard information is difficult to come by. CAFCA also researches, publishes, and organises public meetings and other events.

1.3. Since December 1989, CAFCA has been receiving monthly information from the Overseas Investment Commission (OIC) on its decisions. We analyse this information, supply our analysis on subscription and on request to mainstream news media and other interested parties, publish it on our web site www.cafca.org.nz, and in each issue of *Watchdog*. We are therefore aware of most significant direct overseas investments into the country.

1.4. We request that we be heard by the Committee in support of this submission, and therefore request that the Committee hear submissions in Christchurch where CAFCA is based. Please contact [ ]

2. Background

2.1. The rationale for overseas direct investment[1] is that it brings access to new markets and to new technology and ideas, including better management.

2.2. Rather than being a statement of religious faith, this should be determined on the evidence for each investor, and monitored. Some overseas investors quite clearly bring neither new markets nor innovation and do more damage than good.

2.3. For example:

2.3.1. When New Zealand Rail was privatised in 1993, overseas investors supported by Fay Richwhite interests bought its assets and operation for $328 million, including a 99 year lease of the track for $1 a year. They proceeded to run down the company, neglecting maintenance while extracting hundreds of millions of dollars in capital re-payments and dividends which the company could ill afford. In plain words, they as-set stripped New Zealand's rail system. Results included an appalling safety record, killing and maiming staff and customers; track so bad that trains must crawl rather than run; unreliable services that lost the confidence of its corporate customers; run down passenger services; and a near bankrupt company. The government had to hold an inquiry into its appalling safety record, and bail out rail by taking back the track. It will be paying at least $200 million to restore it to a usable state. Solid Energy alone estimates that TranzRail's rundown of the rail track cost it $200 million in earnings from exports (*Press*, "$200m coal exports 'lost'", by Marta Steeman, 11/02/2005, p.B10, quoting chief executive Don Elder speaking to the Commerce select committee). The original investors sold their shares years ago leaving us to suffer the consequences and pay to put things right.

2.3.2. Juken Nissho, which operates wood processing plants in Kaitaia, Masterton and Gisborne. It has a horrifying health and safety record. It had 269 serious harm notifications from 1995 to 2003, and 11 convictions under the Health and Safety Act, with fines ranging from $6,000 to $10,000. In 1997 Juken Nissho was prosecuted for exceeding permitted emissions at its Kaitaia plant. There are numerous complaints from neighbours about the effect on their health. An analysis of Juken Nissho's New Zealand accounts from 1999 to 2003 showed that it reported losses and paid no tax. It was totally debt-financed and under normal circumstances would be insolvent. Many of the company's transactions appear to occur through related parties and may provide a way to shift profits offshore and avoid tax.

[1] That is, investment bringing a degree of control of assets. Such investment is the subject of this bill.

2.3.3. Telecom's overseas owners have failed to live up to the promise of making new technology available to New Zealanders. The company closed off options rather than developed new ones. Its overseas owners have sacked thousands of employees and have extracted billions from New Zealand in profits and capital, while over-charging for services (such as broadband networking to the home) which will be the backbone of the economy in the future, virtually killing others (such as ISDN) in the past, failing to develop services which are commonplace overseas until forced to, and using every possible means to keep out the competitors who would not have been necessary had it been providing a decent service. From 1995 to 2004 it paid out more than its net earnings in dividends (reported earnings of NZ$6,464 million and dividends paid out of NZ$6,698 million), for most of that time, its capital expenditure barely covering reported depreciation. It was running down its assets. More recently it has used its cash to invest (rather unsuccessfully) in Australia rather than develop the extensive new services needed in New Zealand. Investment analyst Brian Gaynor described the effect of the privatisation as follows ("Testing years ahead for Telecom", by Brian Gaynor, *New Zealand Herald*, 26/5/01):

> The Ameritech/Bell Atlantic/Fay, Richwhite, Gibbs, Farmer syndicate walked away from Telecom with a realised capital profit of $7.2 billion. In addition, the telecommunications group paid over $4.2 billion in dividends in the 1991 to 1998 period, more than half to the consortium members.
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> … These are extraordinary figures for a company that is supposed to be at the cutting edge of new technological developments.
>
> In other words, a huge amount of money had been extracted from Telecom …

2.4. This may be continuing, and has wider implications. University of Canterbury lecturers in accountancy, Sue Newberry and Alan Robb, having analysed Telecom's public accounts, finding for example that "Telecom's 2004 annual report issued in New Zealand reports a profit of NZ$754 million, but the figure reported in the United States is reduced by NZ$604 million, the amount of Telecom's share of Southern Cross Cables' losses since the suspension of equity accounting", conclude that

> Closer scrutiny of Telecom's success narrative and of some of the accounting mechanisms it uses … raise questions about the extent to which its reported operating results and debt ratios bear any connection to an underlying reality…
>
> In the case of companies with significant off-shore investors, there is a risk that pursuit of shareholder value currently conceptualised as maximising cash payouts and share price runs the company down in the longer term. Any short term gain to shareholders goes outside the country while the longer term losses, especially if the company collapses, are likely to be borne by stakeholders in the country.

> Where the company runs an essential part of the infrastructure of the economy, its collapse is politically unacceptable and almost inevitably will force a bailout by taxpayers. This has already happened in New Zealand in the case of Air New Zealand Ltd and Tranzrail Ltd, both formerly publicly-owned operations, corporatised and then privatised during New Zealand's earlier economic restructuring…
>
> With the recent selling down of Telecom shares by major offshore investors accompanied by the talking up of Telecom's shares in New Zealand, the significant changes in the pattern of Telecom's shareholders, suggests that those outside the country who have benefited from the high dividends already paid out may have removed themselves from any risk of loss should Telecom's finances become precarious. The losses to current shareholders as well as other stakeholders seem likely to fall heavily on New Zealanders and Australians. Lazonik and O'Sullivan had pointed out that the pursuit of shareholder value may function as an "appropriate strategy for running down a company – and an economy". This examination of the financialised system as it affects a small country with its largest listed company listed on other exchanges besides that in New Zealand suggests that it could very well run down both the company and the economy. ("Financialisation: creating shareholder value by disconnecting from reality?", by Susan Newberry and Alan Robb, Department of Accountancy, Finance and Information Systems, University of Canterbury, paper accepted for presentation at the CPA conference, New York, April 2005, quoted with permission.)

2.5. The concern of Newberry and Robb with the "financialisation" of company management (a single-minded focus on limited financial indicators to the exclusion of other evidence of success) should be seen in the context of both heightened competition in an economy open to virtually unlimited imports and foreign investment, and extremely high foreign debt levels in the economy. Both result in enormous pressure to perform in the short run, which can often be achieved only (or most easily) by running down the assets of an enterprise. In other words short run results are bought at the expense of long run vitality or even viability. When investors have only a short term view, or can opt out of a company or the economy with relative ease, as with many overseas investors, the risks of this behaviour are even higher.

2.6. There are many more examples of mismanagement, asset stripping and failure to invest in value added production or new technology in New Zealand: Air New Zealand under its previous ownership; Huaguang, Citic, Carter Holt Harvey and other forestry companies; the corporations whose feeding frenzy helped create the ongoing mess that is now our electricity system; the promising local manufacturers and technology companies which have been bought up and closed down by foreign buyers; and so on.

2.7. New Zealand is one of the most dependent countries on foreign investment, certainly in the developed world, and rivalling even highly dependent developing countries. In 2003 according to the UN, the only comparable developed countries which had more of their economy owned by foreign investors (as a percentage of GDP) were Ireland and Malta. The Netherlands, Sweden and Switzerland also had more, but they have huge overseas investment of their own, far more than the foreign investment present in their home economies[2]. So one would have thought that if the advocates of floods of foreign investment were right, we would have a brilliant export record by now in high technology exports, and superb management (however that is defined).

2.8. We don't. Most of the thriving areas of technology development have been driven by New Zealand companies – only to be bought out too frequently by foreign investors wanting an easy way to corner new technology. Even the Prime Minister has expressed concern about this pattern. The record on productivity increases is mediocre by world standards.

2.9. And good management? The recent report by the government-backed Workplace Productivity Working Group made an admission which was surprising given the heavy involvement of business in the report:

> There is a widespread perception, although little hard evidence, that weaknesses exist in the quality and quantity of New Zealand's stock of leadership and management capability. Concerns centre on the ability of New Zealand managers to take advantage of changing business environments, through such measures as marketing, innovation management, and building networks and relationships.[3]

2.10. Our last few years of relatively high growth in GDP and low unemployment have been at time when foreign direct investment has levelled out and is largely sales from one overseas owner to another (though overseas debt and portfolio investment have continued to rise and it is now widely acknowledged that New Zealand is over reliant on foreign capital).

2.11. There is much more that could be said on these matters, but two decades of the most rapid increase in foreign investment New Zealand has seen, probably since the 19th century, certainly challenges any assumption that overseas investors bring good management, technology, ideas and new markets. The best that can be said is that some overseas investors may bring these benefits. Many we know from our experience do exactly the opposite.

2.12. For this reason, if we are going to accept overseas investment we must pick and choose. We must have the power to decide which investors should be let in, and which should be rejected.

2.13. Indeed even consultants employed by the government at the early stages of its "growth and innovation strategy" conceded that some overseas investment was poor and we needed to be selective. The Boston Consulting Group's 2001 report on how to target foreign direct investment (FDI) conceded that

> Although the nation has at times attracted significant quantities of FDI, the quality has been poor. Almost all FDI in New Zealand has

[2] "World Investment Report 2004: The Shift Towards Services", UNCTAD, Annex table B.6. Inward and outward FDI stocks as a percentage of gross domestic product, by region and economy, 1980, 1985, 1990, 1995, 2000, 2002, 2003, p.399ff.

[3] "The Workplace Productivity Challenge", report of the Workplace Productivity Working Group, p.48.

> involved privatisation or merger and acquisition activity with little flow-on benefit. Export-oriented greenfield investment has been sparse, and is generally concentrated in low-growth, low-return sectors.[4]

2.14. It proposed that New Zealand should be selective about which foreign investment it chose.

2.15. We note that the Finance and Expenditure Committee, in its 1999/2000 Financial review of the Reserve Bank of New Zealand, focussing on the Overseas Investment Commission, recommended as follows (reporting in 2001):

- Government and Green members recommend that the Government examine whether to extend the application of the national interest criteria to proposals which do not involve the purchase of land or fishing quota.
- We recommend that the Government re-examine the investment threshold that triggers scrutiny by the commission. The Greens and New Zealand First believe the threshold should be dropped to $10 million.
- Government and Green members recommend that the Government consider requiring the Commission to consider the impact on social well being, environmental sustainability and economic sovereignty (for example balance of payments implications, impact on productive capacity) when assessing whether an overseas investment will accrue the fullest possible benefit to New Zealand.
- Government and Green members recommend that the Government examine the feasibility of introducing a code of corporate responsibility which investors would need to agree to and against which the Commission would monitor compliance. The content of that code to be developed from sources including the so-called “bad boy” legislation which has been adopted by several States in the USA and the OECD guidelines for multinational enterprises.
- Government and Green members recommend that the Government consider expanding the ‘national interest’ test to include three additional criteria: environmental impact of an investment, the impact on the social fabric of the local community and compatibility with Treaty of Waitangi obligations.

2.16. Selection is hardly a radical idea. It is precisely what we do to select people who want to come to live in New Zealand permanently. Though immigrants are welcomed by most – they genuinely do bring in new ideas, skills, and diversity – we take great care to choose whom we let into New Zealand permanently. We select on the basis of their skills, their character, their numbers, and other criteria.

2.17. And yet the damage potentially done by one badly behaved immigrant pales beside a huge transnational corporation misbehaving in New Zealand. The loose, almost non-existent rules on foreign investment privileges corporations over ordinary people.

[4] “Building the Future: Using Foreign Direct Investment to Help Fuel New Zealand’s Economic Prosperity”, The Boston Consulting Group, 2001.

2.18. The usual defence is that overseas investors are subject to New Zealand laws, implying this is sufficient control. It quite clearly is not. If immigrants behaved like the companies whose records are outlined in this submission, they would probably be deported. Further, it is not a crime to asset-strip, massively avoid tax, or run down strategic infrastructure, but it is hugely damaging to New Zealand.

2.19. We should reassert the right to control entry of corporations likely to damage the country, monitor their behaviour, and revoke their right to stay, or require appropriate behaviour, if they cause damage.

2.20. Quality of overseas investment matters. Investment income sent overseas is a drain on the resources available to New Zealanders. Interest and dividends remitted overseas cost us $8.9 billion in the year to March 2004, of which $4.9 billion resulted from overseas direct investment. That's as much as our total milk powder, butter and cheese exports, and many times more than any new trade agreement promises, let alone delivers.

2.21. Reinvestment is low. While in the last year it has been unusually high, the ten year average shows less than a quarter of profits being reinvested in New Zealand. In the ten years ended March 2004, 22.7% was reinvested. In some years more profits were extracted than earned.

2.22. For these reasons, our approach in this submission is that the legislative framework should enable intelligent selection of foreign investment, and the application of conditions on investors once accepted. It currently does not. The new bill is somewhat better for investment in land, which we applaud, but much more could be done. But in the end, land is a tiny part of the economic picture where overseas investment is concerned. Its value is tens or hundreds of millions of dollars per year compared to billions of dollars in core areas of economic and social life.

2.23. We do not consider the current bill provides a satisfactory framework. We are deeply concerned that an opportunity is being missed to put in place a solid framework for selection. We would prefer that the bill be withdrawn and redrafted with this in mind. However the submission, without prejudice to this view, points out where improvements could be made to the bill before the House.

Land

2.24. Land, though in itself a small part of the value of overseas investment in New Zealand, has special significance to most New Zealanders, and to our economy. We believe there is wide agreement that controls on overseas ownership of land should be tightly controlled. Reasons for this follow.

Speculation

2.25. Overseas ownership encourages speculation on rising land prices as the land becomes available to a wealthy international market beyond the reach of most New Zealanders. Corporate farming, land bought solely for investment, increased prices of dairy-capable land resulting from the 1994 GATT settlement, and the temporary boom in timber prices in the mid-1990s, all made speculation highly likely. Tourist and "life-style" properties in locales such as coastal areas and the high country are obvious targets.

2.26. Speculation raises the price of land above its earning capacity. Land becomes unaffordable to new farmers or those wishing to expand their farms. Rates become unaffordable to existing landowners. Speculation also encourages neglect as only the resale value of the land matters, not its productive capacity, cultural or natural values.

Absentee ownership

2.27. Approval by the OIC of absentee ownership of land by overseas interests is commonplace. The dangers include the owners' inability or unwillingness to properly control the use of the land leading to run down or inappropriate use of the land. Speculation and investment solely for capital appreciation are temptations. Profits go overseas.

Vertical integration

2.28. Some companies attempt to control the marketing of a product from soil to overseas market. This can reduce market opportunities for New Zealand farmers, and/or reduce prices paid to them. It makes possible transfer pricing (where a transnational company artificially prices goods to make profits in the country where taxes are lowest). It reduces the foreign exchange earnings of the country. Only two generations ago, farmers found themselves at the mercy of vertically integrated British-owned meat companies. The pitfalls became clear when U.K. entered the European Community. Recent examples include timber, wines, wool, meat, barley and horticultural produce.

Preservation of land of special importance

2.29. It has become more and more difficult to maintain public access to high country, coastal land, and other land of special importance as it becomes owned by overseas residents and companies for private purposes or tourism. Consider the number of South Island high country stations that have passed into overseas hands. Some examples: Cecil Peak (13,686 ha.), Kinloch (885 ha.), Woodbine (2,501 ha.), Lilybank (2,136 ha. pastoral lease), Otamatapaio (9,110 ha.), Rugged Ridges (12,684 ha.) Glenroy (5,003 ha.), Erewhon (13,573 hectares pastoral lease, jointly Australian and New Zealand owned), Cone Peak (3,486 hectares pastoral lease), Mount Aitken (2,391 ha.), Makarora (2,185 ha.), Coleridge Downs (1,899 ha.), and Walter Peak (375 ha. freehold, 25,758 ha perpetually renewable Crown Lease).

2.30. Other recent significant South Island sales include Glenhope Station on the Lewis Pass Road (9,265 ha. pastoral lease), and Glazebrook Station, Waihopai Valley (9,094 ha.).

2.31. Recent North Island sales include the historic 661 ha. Nicks Head Station and the 5,899 ha. Glenburn Station (both coastal); Poronui Station (6,334 ha.); and Puketiti Station (3,616 ha.), which controls access to one of the country's longest caves.

2.32. The creeping overseas takeover of TrustPower includes 3,919 hectares of land, and the sale of Contact Energy included 8,631 hectares, much of it in scenic or sensitive areas.

Providing benefits

2.33. Until the 1980s, overseas ownership of a property happened only if the new owner brought new techniques, skills or expertise to New Zealand that could not be easily acquired in other ways. Many recent overseas purchasers have made such claims, but these are rarely tested.

How much land is overseas owned?

2.34. One disturbing aspect of land ownership is that there is no publicly available reliable information or even reliable statistics on overseas ownership of land in New Zealand. CAFCA maintains a record of all decisions made by the OIC (that it has not suppressed details of) on our web site www.cafca.org.nz, including land sales. These go back to 1994, but we have earlier information that has not been published on the web site. The OIC publishes statistics but they are only for approvals given by it, and then only since the early 1990s. There is no complete information on overseas ownership of land that was acquired prior to that time. There is no information on sales by overseas owners back to New Zealanders. The OIC does not collect or provide information on the value of land sales it approves. In addition, the OIC's method of collating its statistics confuses rather than clarifies. In particular, its definition of "net sales" is not the common sense meaning of "net" (sales to overseas owners less sales by overseas owners to New Zealanders) but instead a contrived measure that counts only (for example) 25% of the land area if it is only 25% overseas owned, despite the fact that that 25% ownership may well bring control of the land. There is a similar problem with its treatment of "net" investment dollar value.

2.35. Within these limits of reliability we estimate using OIC data that just over 1 million hectares of New Zealand land is overseas owned. This is 7% of New Zealand's commercially productive land (pasture, arable land and production forest). We believe this is an underestimate. It additionally does not include the large area of land controlled by overseas owners of forestry and other rights over land, as distinct from the land itself. Land owned or managed by overseas forestry companies totals over 1 million hectares on its own. See Appendix 3 for details.

3. Analysis of the Bill – General matters

Government intentions

3.1. In a Media Statement announcing the tabling of this bill in the House (10/11/04, "Toward a more effective overseas investment regime"), the Finance Minister, Dr Cullen, announced not only some of the terms of the bill but also the following points:

- Overseas applicants wanting to buy land but not intending to reside in New Zealand will have to include in the asset management plan attached to their application how they will manage any historic, heritage, conservation or public access factors relevant to the property as well as any economic development planned.
- Plans submitted by an overseas investor in support of his/her purchase will be made conditions of consent.
- To keep costs to the taxpayer down, the onus of compliance will be on the overseas investor. Investors will be required to report regularly on how they

are complying with the terms of their consent and outline any reasons for non-compliance. Monitoring will continue until all obligations have been met.

- The threshold for screening non-land business assets where the proposed acquisition entails a 25 per cent or more shareholding will be raised from $50 million to $100 million. It was last adjusted in 1999 when it was increased from $10 million to $50 million. [The last time a business application not involving land was turned down was by Sir Robert Muldoon in 1984.]

3.2. None of these aspects are part of the bill. They are apparently intended to be implemented by regulation. We make further comment below on the wide use of regulation proposed in this bill. We strongly object to the last two points, and, while supporting the first two points, submit that they should be embedded in the legislation with only details to be determined by regulation.

3.3. Regarding the third point, putting the onus of compliance on the overseas investor is an invitation to disregard the law. We detail below the long standing practice of the OIC allowing retrospective approvals, and the large number of such approvals. This indicates that there are many overseas investments in New Zealand that are operating illegally (that is, without approval). Clearly many investors do not comply with the law already. We see no reason why a "self-reporting" regime will do anything but encourage that attitude. We therefore submit that there should be active monitoring and investigation of compliance with conditions by the Regulator (though see our submission on the Regulator below), rather than self-reporting. The Regulator should have sufficient resources to do a credible job of this.

3.4. Regarding the fourth point, we strongly oppose a further rise in the threshold, which was raised five-fold without public consultation only five years ago. It is a very significant weakening of the regime. Indeed, it should be returned to $10 million as it was in 1999.

3.5. It will become very difficult to change, as it is embedded in trade and investment agreements which the government is negotiating. For example, the free trade treaty recently agreed with Thailand, includes the statement that "The NZ$50 million threshold will increase to NZ$100 million on coming into force of proposed New Zealand legislation to amend the overseas investment regime" (in Annex 4.2 New Zealand's Schedule on Investment). We note that this was agreed before the bill had even been opened for public submission, let alone full debate in the House.

3.6. We consider quite irrelevant the parenthesised statement in Dr Cullen's release: "[The last time a business application not involving land was turned down was by Sir Robert Muldoon in 1984.]" This is a reflection not of the lack of need for a strong regime, but of the weakness of a regime which allows anything to proceed. Throughout most of the 1990s for example, it operated under instructions from the then government to the Overseas Investment Commission to grant consents unless there was good reason to refuse them – described by Dr Cullen himself as a presumption in favour of approving applications. (e.g. 8/5/00 press release by Dr Cullen, "Foreign bids for BIL's Sealords stake declined"; and Hansard, 9/5/00.) It indicates the need to strengthen the regime, not weaken it.

3.7. The following are examples of investments which fall between the current $50 million threshold and the $100 million threshold proposed, from 2003 and 2004.

Many of them are highly significant for economic, environmental or social reasons.

3.7.1. Pacific Equity Partners Pty Limited of the U.S.A. paid $91 million to acquire the Australian, New Zealand and Hong Kong businesses of WH Smith. In New Zealand the businesses include the major book chains Whitcoulls and Bennetts.

3.7.2. Sime Darby Motor Group (NZ) Limited, of Malaysia paid $61,830,000 plus a potential additional consideration of up to $5 million to acquire Truck Investments Limited. Its businesses include truck sales companies that sell Hino, Mack and Renault brands and Truck Stops which operate that national chain spare parts and service outlets for trucks.

3.7.3. Sky City Entertainment Group Limited paid $93,750,000 for Aspinall (NZ) Limited. Aspinall (NZ) owns 40.5% of the Christchurch Casino.

3.7.4. AMP NZ Office Trust, owned 43% in Australia paid $71 million for Mobil on the Park, 35 Waring Taylor Street, Wellington and $75 million for the BNZ Centre, 1 Willis Street, Wellington.

3.7.5. Telecom New Zealand Limited, owned 72% overseas, paid $62,346,000 for the information technology services company Gen-i Limited.

3.7.6. Macquarie Goodman Nominee (NZ) Limited, owned 60% in Australia paid $72,000,000 for the Fletcher Challenge complex at 810 Great South Road, Penrose, Auckland.

3.7.7. Macquarie Goodman (Highbrook) Limited and Macquarie Goodman Funds Management Limited (as manager of the Macquarie Goodman Industrial Trust), owned 90% in Australia, paid $68,389,158 for Highbrook Development Limited which owns 153 hectares at Highbrook Drive, East Tamaki, Auckland.

3.7.8. Vero Insurance New Zealand Limited of Australia (the former Royal and SunAlliance) paid $68,000,000 for the motor vehicle and consumer goods warranty and credit insurance business of Autosure Group Holdings Limited and Crown Insurance Corporation Limited of Aotearoa (including those brand names).

3.7.9. Macquarie Goodman Industrial Trust of Australia paid $63,450,000 for the Trinity Park industrial development at 600 Great South Road, Auckland".

3.7.10. Fletcher Residential Limited (owned 52% overseas) paid $80,411,250 for a residential subdivision of 17.5 hectares at Schnapper Rock Road, Albany, Auckland, comprising 350 residential lots.

3.7.11. Alesco Corporation Limited of Australia paid $53,000,000 for Biolab Limited and TechDev company, which is the largest supplier and distributor of scientific consumables and instruments to the biotechnology and scientific industries in both Australia and New Zealand.

3.7.12. UBS Timber Investors of the U.S.A. paid $81,227,436 for trees in and a forestry right over 6,400 hectares of mature age trees of Tahorakuri forest in the Central North Island, Bay of Plenty. (Note that only forestry rights and trees were sold; there was no land involved so this would not be caught as a land transaction unless forestry rights are included as an interest in land.)

3.7.13. Australian Radio Network Pty Limited, owned 50% by Clear Channel Communications Inc of the U.S.A., 20% by Independent News and Media PLC of Ireland, and 30% in Australia paid $56,719,448 for the remaining shares in the New Zealand Radio Network Limited.

3.7.14. TrustPower Limited paid $92,500,000 for Cobb Power Ltd which owns the Cobb Hydro Station on 16.7 hectares of land in Cobb Dam Road, Upper Takaka, Nelson.

3.7.15. ING Retail Property Fund Australia, owned in the Netherlands, the U.K., and Singapore, paid $52,650,000 for the Meridian Centre, at 267-285 George Street and 49 Filluel Street, Dunedin, Otago.

3.7.16. Brunswick Corporation of the U.S.A. paid $54,500,000 for 70% of Navman NZ Limited (with an option to buy the remaining 30% by 2005). Navman is a New Zealand based electronic manufacturer of marine electronics and general navigation products.

3.7.17. Tech Pacific Holdings (NZ) Limited, owned in the Netherlands, Hong Kong and the U.K., paid $96,284,549 for Tech Pacific (N.Z.) Limited. Tech Pacific is a leading software vendor.

3.7.18. iiNet New Zealand Limited of Australia paid $57,152,188 for the iHug Group of companies. The iHug Group is New Zealand’s third largest, and one of its most innovative, internet services provider providing services such as dialup and ADSL services, telephony services, wholesale broadband and web services in New Zealand and Australia.

3.7.19. B Digital Limited of Australia paid $80,400,000 for Digiplus Investments Limited. Digiplus operates in New Zealand and primarily in Australia, where it offers local, national and international and mobile telephone calls and internet services.

Recommendation 1 **While proposals for implementing the new regime with regard to the requirement for asset management plans and the undertakings in these being made conditions of consent have merit (and should be used for all, not only land, investments), the regime should not be a self-reporting one. There should be active monitoring and investigation of compliance with conditions by the Regulator. These matters should be embedded in the legislation, not left to regulation. The Regulator should have sufficient resources to do a credible job of ensuring compliance.**

Recommendation 2 **There should be no further rise in the dollar threshold for transactions. It should be lowered to $10 million.**

Definition of overseas ownership

3.8. The bill continues the 25% overseas ownership threshold throughout for an investment to be classed as an “overseas investment”. Yet control can be achieved at a much lower level. Statistics New Zealand use 10%, the common standard internationally. It states in its publication "Balance of Payments – Sources and Methods 2004" (p. 77):

> A direct investment enterprise is an incorporated or unincorporated enterprise in which a direct investor owns 10 percent or more of the ordinary shares or voting power (for an incorporated enterprise) or the equivalent (for an unincorporated enterprise). Direct investment enterprises comprise branches (unincorporated enterprises), subsidiaries (incorporated enterprises that are more than 50 percent owned by the direct investor), and associates (incorporated enterprises that are between 10 and 50 percent owned by the direct investor).
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> A *direct investor* may be an individual; an incorporated or unincorporated private or public enterprise; an associated group of individuals or enterprises; a government or a government agency; an estate or trust; or an international organisation which has an investment of 10 percent or more in a direct investment enterprise in an economy other than the one in which the direct investor resides.
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> An enterprise that has significant long-term operations in more than one economy is divided into separate entities in each economy. These entities are always in a direct investment relationship: the head office constitutes the direct investor and its branches constitute the direct investment enterprises.

3.9. The publication references this definition to the IMF's Balance of Payments Manual most recent (fifth) edition and to the second edition of the OECD Detailed Benchmark Definition of Foreign Direct Investment. So both the IMF and the OECD use a 10% threshold. So does UNCTAD, which publishes the authoritative annual World Investment Report (see for example its latest report, "World Investment Report 2004: The Shift Towards Services", p.345).

3.10. Even in this bill, in Schedule 2, a threshold of 20% is proposed for amendments to the Credit Contracts and Consumer Finance Act 2003.

Recommendation 3 **Consistent with international standards, the threshold for defining overseas ownership should be lowered from 25% to 10%.**

Power to set thresholds

3.11. The bill proposes that the thresholds at which approval is required for overseas investment, including

- minimum land areas for the various types of sensitive land,
- minimum value of investment,
- the definition of "associated land"

may be set by regulation. This allows changes to be made by the Executive without public consultation. One particularly important instance of this is changes made as a consequence of international treaty commitments, especially given that such international commitments can be made without parliamentary approval. The thresholds are in practice crucial as to the effectiveness of the legislation. High thresholds would make it almost completely ineffective.

Recommendation 4 **The definitions of all thresholds, including that of "associated land" should be within the bill, rather than by regulation.**

Definition of "good character"

3.12. The test of "good character" is used in a number of places, but not defined in the bill (cl. 17, 19, new 73 (new s.57G)). Given that according to the OIC there is little case law to define it, it should be defined within the bill.

3.13. We note that the OIC commonly assures itself of "good character" of individuals by asking for a statement to that effect either from their solicitors or the individuals themselves. This is a completely ineffectual process, obviously open to abuse. The onus should be on the Ministers through the Regulator to properly investigate good character and independently satisfy themselves that it holds.

3.14. To give one example, in May 1997, CAFCA provided evidence to the OIC that two people controlling Wharekauhau Holdings Ltd, which owns the Wharekauhau Lodge and Farm, appeared not to be of good character. One was on the basis of a *New York Times* report that one of the directors had provided substantial financial support to a terrorist organisation, namely Renamo in Mozambique. It quoted the U.S. State Department asserting that "100,000 civilians may have been murdered as a result of widespread violence and brutality by the rebel group. Victims were beaten, mutilated, starved, shot, stabbed or burned to death". The second was from *Time* magazine and which alleged ethically highly questionable, though not illegal, business practices by another director. This article was the subject of legal action and the *Time* statement on the outcome of the action as far as the director was concerned did not withdraw the allegations. (One of these directors is now dead; the other remains as a director.)

3.15. The OIC responded saying "our enquiries have not revealed any information to refute that [either of the two directors] are of 'good character' as that term is used in the Overseas Investment Act 1973. Accordingly we will not be taking the matter any further." We asked for the reasons for its decision, and a copy of documents relevant to the decision. It supplied them with numerous deletions. While it had "made enquiries" through "other agencies" following our May 1997 letter, it apparently primarily relied on "certificates" by the two directors that were of "good character". Its report on our "allegations" (4 February 1998) stated that "the Commission interprets [the good character condition in the Overseas Investment Act] as requiring a certificate on the eligibility of the applicant company directors who are overseas persons". These certificates were simply a signed statement as follows:

> I confirm that I, ______________ continue to meet the eligibility criteria specified in section 14A(1)(a)-(c) of the Overseas Investment Act 1973.

3.16. The OIC appeared to be taking these statements as the baseline for the truth about these matters, and requiring evidence to "refute" these certificates. It is not clear what investigations it made of the evidence we provided.

3.17. Regarding the definition of "good character", the OIC's 4 February 1998 report stated that the term "is used numerous times in New Zealand legislation and is not once defined". It listed three contexts for the term:

(a) in relation to the registration of persons to membership of various professions;
(b) in determining whether to grant New Zealand citizenship under section 8 of the Citizenship Act 1977; and
(c) in screening overseas investors to New Zealand.

It reviewed a court decision regarding the term, and concluded:

> It is clear that when determining "good character" convictions are not the only factor to have regard to. However the term "good character" must be considered in relation to the context in which it is used."

3.18. The law is therefore very unclear on this matter, and this leads to exceedingly weak enforcement in the present context. This is added to by the OIC's sloppy methods of satisfying itself that the criterion is met. The regime simply invites abuse.

Recommendation 5 **The term "good character" should be defined in the Bill. Its definition should reflect court interpretations, but should be wider than criminal convictions, including adherence to common ethical standards, and absence of acts that would be illegal in New Zealand or which have given rise to adverse civil court findings.**

Recommendation 6 **The practice of relying on certificates of adherence to criteria provided by applicants, persons controlling investments, their legal representatives, or other associated persons, should be prevented by the legislation. The Ministers and Regulator should be required to be satisfied on the basis of evidence before granting approval.**

3.19. In addition, the "good character" criterion, and indeed the other three "core" criteria common to all investment (that relevant individuals have business experience and acumen; financial commitment; not individuals of the kind referred to in section 7(1) of the Immigration Act 1987) apply only at the time the decision on an application is made. Unless an explicit condition is attached to a consent, an individual investor could subsequently exhibit bad character, poor business practice, lack of sufficient financial backing, and so on, without any review of the approval being possible.

Recommendation 7 **At least the four criteria common to all investments subject to the bill be required to continue to hold after consent has been given. An appropriate amendment to cl.29 would accomplish this.**

3.20. However even with the above amendments, there is a major failing in the "good character" criterion. It applies only to individuals, and not to bodies corporate. It should also apply to bodies corporate, not just individuals, given New Zealand and international experience of overseas investment in recent years. For example:

- Waste Management International, the former US parent of Waste Management New Zealand, was allowed to invest in New Zealand despite a long and appalling record of bribery, bid rigging, price fixing, price gouging and environmental breaches, and tens of millions of US dollars in fines and penalties. It had over US$170 million in fines against it between 1980 and 1996 with one judge citing fraud and dishonesty as part of the company's operating culture. The State of Indiana blocked WMX's expansion plans under its "good character" law.

- Archer Daniels Midland was allowed to take part ownership of Canterbury Malting Company even though some of its executives were imprisoned in the US for massive international price fixing crimes for which it was fined US$100 million. It was described by Janet Reno, US Attorney General: as follows:

  > "Archer Daniels Midland has agreed to plead guilty and pay a $(US)100 million criminal fine, the largest criminal antitrust fine ever, for its role in two international criminal conspiracies to fix the price of lysine, a feed additive used to ensure the proper growth of livestock, and citric acid, a flavor additive and preservative found in soft drinks, processed foods, detergents and other products. Because of these illegal actions, feed companies, poultry and swine producers, and ultimately America's farmers, paid millions more to buy the lysine additive. Also, manufacturers of soft drinks, processed foods, detergents and other materials, paid millions more to buy the citric acid additive, which ultimately caused consumers to pay more for these products" ("Rats In The Grain: The Dirty Tricks and Trials of Archer Daniels Midland, The 'Supermarket to the World'", by James B. Lieber, publ. Four Walls, Eight Windows, 2000, p38).

  In June 2000, the European Union fined ADM and four Asian companies $US105 million for price fixing (on top of a $C16 million fine for ADM, in 1998, for price fixing in Canada).

- MCI/WorldCom (partner with Telecom in the cross-Pacific Southern Cross Cable, which took over internet service provider, Voyager) and Tyco (owner of Wormald, Armourguard, and Rhino security companies, plus several manufacturing operations in New Zealand), are both the subject of huge accounting scandals in the US. Scott Sullivan, the former chief financial officer of WorldCom which in 2002 filed for the largest bankruptcy protection in US history, has admitted in court to lying on more than a dozen occasions about the financial health of the company. The former chief executive of WorldCom, Bernard Ebbers, is similarly charged with fraud (e.g. *Press*, "WorldCom CFO admits many lies", 18/02/2005, p.B16). Former Tyco International chief executive Dennis Kozlowski and former chief financial officer Mark Swartz are also on trial for stealing $US150 million ($NZ193 million) of unauthorised bonuses and defrauding shareholders by selling stock whose price they inflated by misrepresenting

Tyco's financial condition. They face 31 counts of stock fraud, falsifying business records, grand larceny and conspiracy. Kozlowski is a former director of New Zealand subsidiaries Tyco New Zealand Ltd and Danks Bros Ltd. (*Sydney Morning Herald*, "Former Tyco chief 'concealed nothing'", by Andrew Dunn, 29/1/2005.)

- The Noboa family, owners of Bonita bananas in Ecuador, own 30% of Turners and Growers (through Bartel Holdings Limited). Human Rights Watch released a report on 25 April entitled "Tainted Harvest: Child Labor and Obstacles to Organizing on Ecuador's Banana Plantations." The New York-based group found children as young as 10 or 11 often working 12-hour days and handling dangerous fungicides, while getting paid an average of US$3.50 a day. The *New York Times* reported the employers included Noboa plantations (*New York Times*, "In Ecuador's Banana Fields, Child Labor Is Key To Profits", by Juan Forero, 13/7/2002). Bonita pays its banana workers some of the lowest wages in Latin America. According to a 2000 study by US/LEAP, a banana worker's average monthly wage was US$500 in Panama, US$200 to US$300 in Colombia, US$150 to US$200 in Honduras, and US$56 in Ecuador. This is being used by other transnational banana companies to bargain down wages in other countries in Latin America. In response to strike action by workers to try to raise the wages, Noboa responded by using armed men, many wearing hoods, who pulled workers out of their homes, beat them and shot several, one of whom lost his leg as a result. "In a May 31, 2002 meeting with US/LEAP staff, two U.S. congressional aides, and a representative of the U.S. embassy, Mr. Alvaro Noboa openly admitted that his company brought in the security guards, claiming that workers were damaging (or about to damage) his property. No evidence has been provided to substantiate this claim nor was it explained why the eviction, even if necessary, was carried out by private security guards in the dead of night rather than through the normal legal process."
(http://usleap.org/Banana/Noboa/AttackNL802.html).
- Edison Mission Energy which controlled the privatised Contact Energy from 1999 until 2004, is a subsidiary of Edison International Inc. which is also the parent holding company of Southern California Edison a company heavily involved in the collapse of California's deregulated electricity system in the late 1990s. Edison Mission was a joint venture partner with General Electric (GE) of the US in an Indonesian project involving the construction of the country's first private power station. The joint venture eventually won the deal after securing crucial contacts within the then ruling Suharto family and their close associates to get the project approved. Deals with the Suharto family and associated senior government figures included commitments to purchasing excessively priced coal supplies and boilers from companies associated with them, and giving some an essentially free share in the project. The company got President Suharto to personally approve its high prices. There was no competitive bidding, and there is evidence that Edison overruled its partner, GE, to waive a requirement that its Indonesian partners sign a "no corruption" clause in the contract. The result was that the project, Paiton One, was one of the most expensive power deals of the decade, anywhere in the world. PLN, the

state-owned electricity company, said that it didn't want to buy any electricity at all from the Edison-GE plant in 1999. The U.S. government, whose agencies provided loans for it, pressured PLN to buy the power at the high contracted price. Edison applied heavy political pressure to get the deal. (*Wall Street Journal*, 23/12/98, "Wasted Energy: How US Companies And Suharto's Circle Electrified Indonesia. Power Deals That Cut in First Family And Friends Are Now Under Attack. Mission-GE Sets The Tone", by Peter Waldman and Jay Solomon, p. A1.)

3.21. The principles underlying this are virtually identical to those underlying the requirement for good character for individual investors, but more generally, are analogous to the requirements placed on permanent immigrants to New Zealand. Given that the effects of bad behaviour of a large corporation can be far greater than that of a badly behaved individual, protections such as we propose are long overdue.

3.22. A corporate code of conduct would be an appropriate way to define good character for companies. It would cover such matters as asset stripping, tax evasion, high levels of tax avoidance, health and safety records, compliance with human rights, labour, consumer and environmental protection laws and employment and customer agreements, court convictions and losses in civil cases. This has precedent. As mentioned above, a number of US states have good character or "bad boy" laws. There are a number of international "codes of conduct" that could form the basis for such legislation. We attach CAFCA's own "Corporate Code of Responsibility" in Appendix 1 which provides a useful checklist.

Recommendation 8 **Bodies corporate should also be subject to "good character" provisions, based on a Code of Conduct.**

Flexibility in criteria

3.23. In the current Overseas Investment Act, the Ministers have a significant degree of flexibility in the criteria they use, in two ways. Firstly they may regulate for new criteria; and secondly they may use other criteria as they think fit "having regard to the circumstances of the particular overseas investment". This appears in the criteria for investment in both farm land (s. 14D(2)(f) and (g)) and non-farm land (s. 14E(c) and (d)):

- Such other matters as may be prescribed:
- Such other matters as the Minister and the Minister of Lands, having regard to the circumstances of the particular overseas investment, think fit.

3.24. Virtually identical provisions are in the Fisheries Act 1996, s.57(4)(b)(ii) and (iii). They remain in similar form in the 57H(2)(b) proposed in cl.73 of this Bill for decisions on ownership of fishing quota.

3.25. However for investments other than in fishing quota, the Bill proposes only prescribed matters, and then only for investment in sensitive land (cl.18(2)(f)). We submit that Ministers should retain the right to use other criteria, not just ones in the bill or in regulation. This right should apply to all investment, not only in sensitive land. The model should be as is proposed for fishing quota investment, and as is in the current legislation.

3.26. A recent example of the value of this – or rather, the dangers of not having such a power – was in the approval given to Prime Infrastructure to take over the electricity lines company, Powerco. The Minister of Finance Michael Cullen was clearly outraged at the deal. In a rare public release on an OIC decision, he complained that he had approved it:

> … primarily on the basis of precedent and advice that a judicial review would likely succeed were the application declined.
>
> "The purchase complies with New Zealand's regulatory framework so the government cannot credibly intervene to prevent it and Ministerial decisions under the Overseas Investment Act are subject to appeal in the courts. It is not the government's role to interfere in lawful commercial transactions, especially when they are as far advanced as this one is and as strongly supported by shareholders," Dr Cullen said.
>
> "The buyers clearly meet the criteria of the Act in that they are of good character, have demonstrated the necessary financial commitment and have relevant business experience. It is, however, with great reluctance that I am letting the deal proceed as there were aspects of the process that concerned me.
>
> "Although the Audit Office found that the New Plymouth District Council was not required under the Local Government Act to consult ratepayers before deciding to quit its shareholding in Powerco, consultation would have been desirable given the size and significance of the asset involved.
>
> "And the decision by the Takeovers Panel to grant a waiver allowing Prime to structure its offer differently for New Zealand and overseas shareholders can only be described as unfortunate given the shambles which ensued," Dr Cullen said. (Media Statement by Dr Michael Cullen, "Powerco sale reluctantly approved", 21/10/04, http://www.beehive.govt.nz/PrintDocument.cfm?DocumentID=21283.)

3.27. However we note that, as with other issues of interpretation, the OIC has been exceedingly cautious in advising the Ministers on their power under the "such other matters" provision. In the case of the 2000 applications to buy out Brierley Investments Ltd's 50% share of the Sealord Group, the OIC interpreted this provision as being quite limited. In its internal documents, released to CAFCA under the Official Information Act, the OIC stated in commenting on a submission: "as the negative impact claimed by [suppressed] is supposedly generic to all foreign fishers it is not a matter than can be considered under the 'other' category in section 57(4)(b)(iii) as it is not a matter that relates to the circumstances and nature of the particular application." The OIC's view was that general objections cannot be taken into account, only ones specific to the case. The interpretation is debatable, and if accepted has a bizarre effect. It is as if a doctor was told that she could not advise a patient against smoking because it does not relate to the specific circumstances the patient is consulting her about, despite the fact that *in general* it causes cancer and a host of other health problems.

3.28. The aspects of any particular investment proposal can not be expected to be anticipated. Even regulation is too inflexible, and this appears to be recognised with respect to fishing quota. We cannot see why weaker powers are needed in other forms of investment.

Recommendation 9 **In clauses 18 and 19, Ministers should have the right to both take into account such other matters as they think fit and prescribe additional criteria by regulation. It should be made clear that this can apply to generic matters as well as those strictly specific to a particular application.**

Retrospective consents and exemptions

3.29. The OIC regularly gives retrospective consents to applicants, sometimes for purchases going back several years.

3.30. For example, in July 2004, the OIC gave Riverside Casino Limited, which owns the Hamilton Casino, retrospective approval for acquiring the land on which the Hamilton Casino is sited. It had been operating on a site it did not have a legal right to own since 2000. According to the OIC, "Consent was not sought by RCL at the time of acquisition as the fact that the property was entered in the Historic Places Trust Register was overlooked."

3.31. In August 2004, it gave retrospective consent to Awassi (N.Z.) Limited, owned 80% by George Antonios Assaf of Australia and 20% by Hmood Al Ali Al Khalaf of Saudi Arabia, to acquire 385 hectares of leasehold at 5494 State Highway 50, Tikokino, Hawkes Bay for $313,913. The approval was for a transaction dating back to 1998. The OIC stated that "The Applicant entered into a lease of the subject property from 1 July 1998 for a term of three years plus a further three years right of renewal. The lease expired on 30 June 2004 and has not been renewed or extended. Consent was not obtained by the Applicant at the time of entering the lease due to an oversight by the Applicant's then legal advisor."

3.32. In September 2004, the OIC gave Young Nicks Forest Partnership retrospective approval to acquire 413 hectares at Williams Road, Muriwai, Gisborne for $1,063,125. This was a forestry development promoted by Roger Dickie (NZ) Ltd of Aotearoa which dated back to 1997.

3.33. There were at least 17 approvals given retrospectively in 2004 alone. In addition one application was refused retrospectively.

3.34. Retrospective consents should not be allowed without penalty. Otherwise it becomes an invitation to ignore the law. It is like offering unlicensed drivers a retrospective licence after they are caught.

3.35. In addition there are wide provisions for exemptions from the legislation, both in the current Act and in the proposals in this bill. We submit that provision for exemptions from the legislation should be strictly limited and the conditions under which exemptions can be made spelt out in the legislation, rather than be left to regulation. Such exemptions could negate the effect of the legislation and so should not be left to regulation.

Recommendation 10 **Retrospective consents under Clause 26(1)(e) should not be allowed without penalty, and then only in exceptional circumstances.**

Recommendation 11 **If retrospective consent is not granted then the transaction should be regarded as cancelled unless the parties to the transaction obtain a court order to the contrary. Clauses 26(2) and 28 should be amended accordingly.**

Recommendation 12 **Provisions for exemptions from the legislation should be strictly limited, and the conditions under which they can be made be part of the legislation, not subject to regulations. Clause 61(1)(j) and (k) should be deleted and explicit provisions for exemptions inserted.**

The Regulator

3.36. In order to have a greater assurance of independence, the regulator should have the status of a Parliamentary Commissioner (like the Parliamentary Commissioner for the Environment) rather than being the permanent head of an existing government agency as is proposed.

3.37. The current Overseas Investment Commission has shown itself to be inadequate in its task, to robustly interpret and implement the legislation, to resist possibly *ultra vires* instructions from Ministers, to safeguard the public interest, and to give balanced advice to the government of the day on the advantages and disadvantages of foreign investment.

3.38. Evidence for these assertions is given elsewhere in this submission and as follows.

3.39. On 8 May 2000, the Treasurer (Michael Cullen) stated in a press release, “Foreign bids for BIL’s Sealords stake declined” (and in similar terms in a formal letter to the OIC):

> We note that the previous National Government’s delegation to the Overseas Investment Commission to make such decisions contained a presumption in favour of approving applications.
>
> This presumption was in the general context of all applications under the Overseas Investment Act. Our revocation of that delegation in the case of Sealords applicants also, as a consequence, revoked for those applications the policy statement containing this presumption.
>
> In any case, we have been advised that in that respect, the delegation made by the previous government may well be *ultra vires* the legislation and that we should approach the applications with no such or any other presumption.

3.40. Dr Cullen made a similar statement in reply to a Parliamentary question from Damien O’Connor, MP:

> I have received advice that delegations made in November 1999 to the Overseas Investment Commission by the previous Minister of

> Fisheries and the previous Treasurer may be *ultra vires* the Fisheries Act 1996 and the Overseas Investment Act. The delegation instructed the Overseas Investment Commission to grant consents unless there was good reason to refuse them. Both the Fisheries Act and the Overseas Investment Act require an even-handed approach to applications, with no prior presumption. (Hansard, 9/5/00.)

3.41. A detailed analysis of the OIC's handling of the 2000 applications to buy out the Brierley Investments Ltd interest in Sealords, which was declined by the Ministers overruling the OIC's views is in Appendix 2. (A subsequent application was accepted.) This covers many of these and other points, with important implications for this legislation.

3.42. The OIC has also argued, when amendments to the Overseas Investment Act have previously been proposed, for draconian provisions allowing it to suppress information in the interests of investors, but clearly contrary to the public interest. In the case of the 1994 amending bill, for example, the Privacy Commissioner felt obliged to intervene. Consistently with this, in the particular example of the Sealords case, the OIC (unsuccessfully) urged the Ministers to resist making public their decisions or even how many applications they had been considering, including providing written samples of ways to avoid answers to queries they might receive.

3.43. We are also concerned that insufficient expertise in business-related matters exists in the proposed agency, Land Information New Zealand.

3.44. Independent policy advice to government on overseas investment is required.

Recommendation 13 **That implementation of this legislation should be the responsibility of a specialised Parliamentary Commissioner, not an existing agency. Section 3 of the bill should be amended accordingly.**

3.45. We address matters concerning the Regulator and use that terminology in this submission for clarity, but that is without prejudice to this strong recommendation.

Responsibilities of the Regulator

3.46. There should be a right for the public to make submissions on applications made by investors under the legislation (a comparable process to that of the Commerce Commission for example). At present the public may make submissions, but have no right to do so, and as a matter of practicality are unlikely to be able to do so. This is because applications are not publicly notified. Unless a person hears about an application by other means (such as through the news media), and hears about it before a decision has been made, a submission is pointless. In addition, sufficient information about each application needs to be made public for an informed submission process.

3.47. The OIC for many years resisted providing information on a regular basis to CAFCA and to the public. It has been more forthcoming in recent years, but is still very backward compared to other government agencies. This legislation should take the opportunity to reinforce the responsibility of the Regulator (or, as we recommend, the Parliamentary Commissioner) to make information and statistics on decisions under the Act (including details of decisions) readily available to the public.

3.48. In addition, as indicated in Part 2 of this submission, there is a desperate lack of reliable information on overseas ownership of land in New Zealand. The Regulator should also have the role of collating and then maintaining a database of overseas land ownership, including information on its use and locality.

Recommendation 14 **The responsibilities of the Regulator should include, in Clause 32, notifying applications publicly, and providing sufficient information about them to allow informed public comment, and inviting and considering submissions from the public prior to making its decisions.**

Recommendation 15 **The responsibilities of the Regulator should also include, in Clause 32, to make information and statistics on decisions under the Act (including details of decisions) readily available to the public, and providing reports to Parliament.**

Recommendation 16 **The public should have the right to make submissions on decisions and on changes in guidelines, regulations, and lists of sensitive reserves and parks (in Clause 38).**

Recommendation 17 **The Regulator should also have responsibility for collating and maintaining a database of overseas ownership of land in New Zealand, including information on its use and locality. The database should be available to be searched publicly, and statistical information deriving from it should be made publicly available.**

Urban land

3.49. We oppose the proposed distinction between urban and non-urban land. This is for a number of reasons.

3.50. The definition of "non-urban land" (Clause 6) appears to exclude roads and areas used for public services (such as schools, hospitals, local community facilities) if they could be described as commercial, industrial or residential. That description is likely if privatisation occurs. So, for example, the definition would appear to make the acquisition of roads by overseas investors, or their construction for operation, exempt from the legislation unless it fell within the "significant business" category. This is a major concern, as such acquisitions raise huge public concern, and are amongst those most needing scrutiny.

3.51. Land in an urban environment may be sensitive even if not adjoining parks, reserves, or other land defined as sensitive under the bill's Schedule 1. For example an urban subdivision may have significant effects on neighbours and the general community. A prominent location may make a commercial building of significance for reasons other than those described.

Recommendation 18 **All land, not only "non-urban land" should be subject to the legislation.**

Enforcement

3.52. We support the higher penalties for offences against the legislation proposed in Subpart 5. However, fines should be higher for bodies corporate, and individuals in control of such bodies should be liable to imprisonment (as are individuals breaching the legislation). Otherwise individuals can escape responsibilities under the legislation simply by hiding behind a corporate body.

3.53. In addition, affected members of the public should be able to take court action against investors breaching the legislation. This right should not be the sole preserve of the Regulator.

Recommendation 19 **In Subpart 5, fines should be raised for bodies corporate, and individuals in control of such bodies should be liable to the same penalties as individuals breaching the legislation.**

Recommendation 20 **Affected members of the public should have the right to take court action under Clauses 48-52 without requiring the consent of the Regulator.**

4. Analysis of the Bill – by clause

4.1. The following analysis is in addition to the amendments recommended above.

4.2. **Clause 3 Purpose** is ambiguous in an important respect. It is directed at "sensitive New Zealand assets", yet "sensitive" is not defined in the bill. It is used directly with respect to land (e.g. Clauses 10(1)(a) and 12, and Schedule 1) but only by implication (from the title of the section) for significant business assets and fishing quota in Clause 10. The purpose becomes particularly important with regard to the power under the legislation to regulate (e.g. Clause 61(1)(k) and 61(3)). The definition of "sensitive" is also important elsewhere, such as in the functions of the Regulator (Clause 32(h)).

4.3. It is therefore most important that it should be made clear that all three categories of investment are "sensitive".

Recommendation 21 **That "sensitive" should be defined. One avenue would be to amend Clause 10(1) to read "A transaction *is a sensitive New Zealand asset and* requires consent under this Act if it will result in—– [etc]".**

4.4. **Clause 6 Interpretation**: The definition of "governing body" should logically include "manager" (in the sense of Chief Executive) for any body corporate, not only unit trusts (as in (c)). It should also iteratively include the governing body of a manager where that manager is itself a body corporate. By way of example, the prominent infrastructure investment company, Infratil Ltd, is managed by HRL Morrison & Co Limited.

4.5. In addition, we would like it to be clear that the definition of "security" includes interests in and rights over land such as *profit à prendre*, including private and Crown forestry rights. Such rights create a situation not greatly different from freehold or leasehold in the sense that the owner may wish to restrict access to land, and may use it in ways that give rise to community concerns.

Recommendation 22 **In Clause 6 Interpretation, the definition of "governing body" should include the manager (in the sense of Chief**

Executive) of any body corporate, and the governing body of a manager where that manager is itself a body corporate.

Recommendation 23 **In Clause 6 Interpretation, interests in and rights over land such as *profit à prendre* including private and Crown forestry rights should be explicitly included in the definition of "security".**

4.6. **Clause 6(3)** allows a person to be regarded as "ordinarily resident in New Zealand" if they are out of the country for 6 months (183 days) of any year. We submit that this is excessive and open to abuse. While absence for such a period is acceptable occasionally, we suggest that there should be a requirement to be in New Zealand for an average of 274 days a year over any five year period.

Recommendation 24 **In Clause 6(3), there should be a requirement for persons to be present in New Zealand for an average of 274 days a year over any five year period to maintain their status of being "ordinary resident in New Zealand" unless they have New Zealand citizenship.**

4.7. **Clause 6(4)(a)**, which is part of the definition of "25% or more ownership or control interest" is inconsistent with Clause 7(2(c)(i). To be complete, it should refer to *any class of* security in the subject of the interest (B).

Recommendation 25 **Clause 6(4)(a) should read "a beneficial entitlement to, or a beneficial interest in, 25% or more of *any class of* B's securities; or".**

4.8. **Clause 6(5)(b)** which is part of the definition of "25% or more subsidiary of another company", should use the term "governing body" as defined in this Clause, rather than "board". This covers a broader range of control (including the board) that can have the effect of making one company a subsidiary of another. In addition it should cover the position where members of a governing body have different voting powers. Less than 25% of the membership of a board could have more than 25% of the voting power.

Recommendation 26 **Clause 6(5)(b) should read to the effect: "(b) A controls the composition of 25% or more of the *governing body* of B *or controls the exercise of 25% or more of the maximum number of votes that can be exercised within the governing body*; or".**

4.9. **Clause 7** defines "overseas person". Subclause (f) includes the circumstance that the manager of a unit trust is an overseas person. We submit that the rule should apply to any body corporate, whether the manager is an individual (in the sense of Chief Executive) or itself a body corporate. We gave the example above of the prominent infrastructure investment company, Infratil Ltd, which is managed by HRL Morrison & Co Limited, an overseas company.

4.10. Further, it is insufficient in 7(2)(e)(i) for the definition to include only that "25% or more of A's governing body are overseas persons". Again, depending on voting power, less than 25% of the membership of a governing body could have more than 25% of the voting power.

Recommendation 27 **In Clause 7, any body corporate should fall within the definition of "overseas person" if the manager is an overseas person, whether the manager is an individual (in the sense of Chief Executive) or itself a body corporate.**

Recommendation 28 **In Clause 7(2)(e)(i) should also include the event that overseas persons control more than 25% of the voting power of the governing body.**

4.11. **Clause 8 Meaning of Associate** should continue to include personal relationships such as blood relationships or marriage, as is the status quo.

Recommendation 29 **Clause 8 Meaning of Associate should include personal relationships as in the status quo (S. 2A of the Overseas Investment Act 1973).**

4.12. **Clause 12 What are overseas investments in sensitive land** defines this concept, but does not include the case where two or more overseas investors who are not associates each own or control less than 25% of a body corporate, but in aggregate control more than 25%. This would allow a piece of sensitive land to be 100% overseas owned by (for example) five overseas owners, each with 20%. Further there is no provision requiring consent if any two or more of these owners become associates subsequent to the initial acquisition by all of them.

Recommendation 30 **Clause 12 should be amended to firstly, require consent if an acquisition by an overseas investor brings the total overseas ownership of sensitive land to more than 25%; and secondly, require consent if two or more overseas investors who in aggregate own more than 25% of a person which owns or controls sensitive land subsequently become associates.**

4.13. **Clause 14 What are overseas investments in significant business assets** begs the question of how the valuation of the assets will be carried out, and by whom. Particularly open to abuse is 14(1)(b)(ii) which refers to "total expenditure *expected to be incurred before commencing the business*". This does not apply any objective test: only "expectations", realistic, justified or otherwise. In addition, no account is taken of post establishment expenditure in establishing (or expanding the business). This means that a business could be established for a token amount (enough to register a company for example), which would be below the threshold requiring consent. Then the overseas investor could expand rapidly without necessarily requiring any further consent, even if the total expenditure exceeded the threshold. The investor could for example acquire any number of other business assets, each valued below the threshold.

4.14. We understand Clause 14 (1)(a)(ii) to mean that an investment in business assets becomes significant if either

- the value of the transaction (which may be for part of the target company A); or
- the total value of the assets of A (regardless of what proportion is being acquired by the overseas investor); or

- the total value of the assets of A plus its 25% or more subsidiaries (regardless of what proportion is being acquired by the overseas investor)

(i.e. the maximum of these) is over the threshold. We would support this approach but submit that it could be more clearly worded.

Recommendation 31 **Clause 14 should specify the nature of valuations to be used, and processes in case of dispute. It should also require new consents for expenditure on assets acquired within a specified period (for example, five years) of the initial investment, which, together with value of existing assets, total more than the threshold.**

Recommendation 32 **Clarify that Clause 14 (1)(a)(ii) means that an investment in business assets becomes "significant" and hence requires consent if the greater of: (a) the value of the transaction (which may be for part of the target company A); or (b) the total value of the assets of A (regardless of what proportion is being acquired by the overseas investor); or (c) the total value of the assets of A plus its 25% or more subsidiaries (regardless of what proportion is being acquired by the overseas investor), is over the prescribed threshold.**

4.15. **Clause 16(3)** defines "relevant individual overseas person", who must have business acumen, good character, etc. The proposed 16(3)(b)(i) is weaker than the current provision in this regard. The Overseas Investment Act 1973 in, for example, s.14A(2)(c), requires that these criteria be applied to "Every person who will have not less than a 25% beneficial interest in the overseas investment … or, if the overseas person is not an individual, each individual exercising control over the overseas person …". The proposed provision is only for "each individual who has a 25% or more ownership or control interest in a relevant overseas person". The former applies to individuals with any degree of control; the latter only to those with 25% or more control. We submit that this should not be changed.

4.16. The proposed 16(3)(b)(ii) should also include chief executives.

Recommendation 33 **In Clause 16(3)(b)(i), the status quo should be retained in that all individuals with any control of the investor should be included as "relevant overseas persons". Chief executives should also be included with members of the governing body in Clause 16(3)(b)(ii).**

4.17. **Clause 17(a)** requires that "all the relevant individual overseas persons have business experience and acumen relevant to that overseas investment". There is no such requirement in total however. For example all of the "relevant individual overseas persons" may have experience and acumen in financial matters, but none have experience and acumen relevant to the specifics of the industry. New Zealand has seen examples of this to its detriment. The requirement should be both for individuals and for balanced experience and acumen relevant to the investment between all of them.

4.18. **Clause 17(b)** requires "demonstrated financial commitment" to the investment. That should be *long-term* financial commitment with a balance of debt and equity to avoid heavily debt-reliant takeovers with the aim of asset stripping.

4.19. **Clause 17(e)(i)** exempts individual overseas persons who "intend" to reside in New Zealand from the requirement for substantial and identifiable benefits in 17(f) and from the more extensive criteria required for investment in sensitive land. This risks shutting the stable door after the horse has bolted. If the individuals are not actually residing in New Zealand indefinitely, the criteria and consent process should be applied until they are in fact demonstrating that they are doing so.

Recommendation 34 **Clause 17(a) should, as well as requiring business experience and acumen relevant to that overseas investment for each relevant individual overseas person, require that in total those persons have a suitable balance of experience and acumen needed to successfully manage and improve the relevant business.**

Recommendation 35 **Clause 17(b) should require *long-term* financial commitment to the investment, including a balance of types of funding and non-financial capital that demonstrate that commitment.**

Recommendation 36 **In Clause 17(e) the provision giving an effective exemption to individual overseas persons who "intend" to reside in New Zealand should be deleted.**

4.20. **Clause 18** lists the criteria for assessing benefit of overseas investment in sensitive land. We submit that in 18(1)(a), Ministers should be required to consider all the criteria, though the weight given to different criteria may differ from case to case. The criteria may conflict with each other: for example, enhanced competition may lead to the destruction of a domestic industry and loss of jobs. Therefore it is important to consider all of the criteria to obtain a balance of costs and benefits.

4.21. We also submit that the criteria should be modified as follows:

4.21.1. There should be an overarching requirement to strengthen the productive capacity of New Zealand, and confer social benefits. For example, greater competition and enhanced efficiency and productivity may (in a strict economic sense, which is how it has been interpreted) lead to production and other activities moving offshore.

4.21.2. There should also be a requirement that the criteria should be applied freshly in each case (that is, as if the comparison was to New Zealand ownership), not weakened by comparison with a previous overseas owner. Where possible there should be a comparison of the relative benefits of overseas and local ownership.

4.21.3. There should be a preference given to proposals with less rather than more overseas control and ownership.

4.21.4. All criteria should be reworded to make clear that negative effects (such as loss of jobs or competition) should also be taken into account in considering the balance of costs and benefits.

4.21.5. The specific criteria for farmland from the Overseas Investment Act 1973 14D(2)(a), (b) and (c) should be added.

4.21.6. There should be requirements (not just criteria) for investors to provide access over rural land they purchase, and the opportunity should be taken to force the sale of privately owned foreshore or seabed land to the Crown before ownership changes (18(2)(d) and (e)).

4.21.7. The criterion for creating jobs should be for jobs for New Zealanders and New Zealand residents (18(2)(a)(i)).

4.21.8. The criterion for developing new export markets should specify that those markets should not be in competition with existing New Zealand exporters (18(2)(a)(iii)). In addition, markets should be disregarded that are opened due to preferential treatment given to the proposed overseas owners of the investment. The Sealords case illustrated the fact that if overseas owners get preference to export to their home country, then the result is unfair competition.

4.21.9. In weighing the criteria, Ministers should take into account the different tax and regulatory treatment of overseas parties when assessing the economic effects (including effects on employment). In the Sealord case, overseas fishing companies were allegedly able to escape tax, ACC, GST, our employment law and working conditions.

4.21.10. Criteria should include protection of the environment and conservation of resources; and upholding Treaty of Waitangi obligations.

Recommendation 37 **Clause 18(1)(a) should require the Ministers to consider all the criteria to obtain a balance of costs and benefits.**

Recommendation 38 **Clause 18(2)(d) and (e) should be amended to require investors to provide access over rural land they purchase, and require the sale of privately owned foreshore or seabed land to the Crown before ownership changes.**

Recommendation 39 **Criteria in Clause 18(2) should be further amended as follows:**

- **There should be an overarching requirement to strengthen the productive capacity of New Zealand, and confer social benefits.**
- **There should also be a requirement that the criteria should be applied freshly in each case (that is, as if the comparison was to New Zealand ownership), not weakened by comparison with a previous overseas owner. Where possible there should be a comparison of the relative benefits of overseas and local ownership.**
- **There should be a preference given to proposals with less rather than more overseas control and ownership.**
- **All criteria should be reworded to make clear that negative effects (such as loss of jobs or competition) should also be taken into account in considering the balance of costs and benefits.**

- **The specific criteria for farmland from the Overseas Investment Act 1973 14D(2)(a), (b) and (c) should be added.**
- **The criterion in Clause 18(2)(a)(i) for creating jobs should be for jobs for New Zealanders and New Zealand residents.**
- **The criterion in Clause 18(2)(a)(iii) for developing new export markets should specify that those markets should not be in competition with existing New Zealand exporters. In addition, markets should be disregarded that are opened due to preferential treatment given to the proposed overseas owners of the investment.**
- **In weighing the criteria, Ministers should take into account the different tax and regulatory treatment of overseas parties when assessing the economic effects (including effects on employment).**
- **Criteria should include protection of the environment and conservation of resources; and upholding Treaty of Waitangi obligations.**

4.22. **Clause 19** lists the criteria for assessing benefit of overseas investment in significant business assets. As noted in Parts 2 and 3 of our submission, it is our view that the criteria for investment in businesses are totally inadequate. As well as the corporate code of conduct proposed there, we submit that a similar range of criteria should be applied to business investment as is applied to land, amended as above. “Substantial and identifiable benefits” should be required.

4.23. Our comments regarding 17(a) and (b) also apply to 19(a) and (b), even more emphatically because of their greater significance in this context.

Recommendation 40 **That a similar range of criteria should apply to overseas investment in significant business assets in Clause 19 as apply to land in Clause 18. “Substantial and identifiable benefits” should be required.**

Recommendation 41 **Clause 19(a) should, as well as requiring business experience and acumen relevant to that overseas investment for each relevant individual overseas person, require that in total those persons have a suitable balance of experience and acumen needed to successfully manage and improve the relevant business.**

Recommendation 42 **Clause 19(b) should require *long-term* financial commitment to the investment, including a balance of types of funding and non-financial capital that demonstrate that commitment.**

4.24. **Clause 31 Regulator** gives the Minister power to designate the Regulator. Without prejudice to our strong preference for an independent Parliamentary Commissioner rather than the proposed Regulator, we note that there is no requirement in the proposed regime for the Minister to designate any Regulator. It would therefore be possible for the Minister to effectively close down many of the processes in the bill by neglecting to designate a regulator. We therefore submit that the Minister should be required to designate a Regulator.

Recommendation 43 **Clause 31 should make clear that the Minister must designate a Regulator and that a designation may not be revoked without immediately designating a new Regulator.**

4.25. **Clause 33** allows Ministers to delegate their powers under this legislation and consequent regulations. It allows delegation of *all* their powers, including the power to delegate. We believe that this delegation is inappropriately wide. In particular it appears to give the power to delegate powers such as Ministerial directive letters (Clause 35) and approval of guidelines (Clause 37(2)). We submit that Clause 33 should be reviewed.

Recommendation 44 **Clause 33 gives excessively wide powers of delegation, and should be reviewed (particularly but not only in regard to Clauses 35 and 37(2)) with a view to restricting those powers.**

4.26. **Clause 37** provides for the issue of guidelines by the Regulator on a number of matters. We assume that the guidelines should be consistent with this legislation. We also submit that they should not be issued without opportunity for public submissions.

Recommendation 45 **Clause 37 should make clear that guidelines issued should be consistent with this legislation. It should also provide for public notification of proposed guidelines before they are adopted to allow for public submissions.**

4.27. **Clause 38** provides that the Regulator should compile and keep a list of reserves and public parks that are sensitive. While it provides for the list to be published on a web site, it does not provide for any public input to that list. We submit that changes to the list should not be made without opportunity for public submissions. There should also be provision for the public to propose additions to the list.

Recommendation 46 **Clause 38 should provide for public notification of proposed changes to the list of reserves and public parks that are sensitive before they are adopted to allow for public submissions. Members of the public should also have the right to propose additions to the list.**

4.28. **Clause 61** provides power to make regulations under this legislation. We note that some of the powers which existed under the Overseas Investment Act 1973 have been removed, in particular those in s.14(a) (to allow prohibiting, controlling, or regulating overseas investment) and 14(b) (relating to issuing, transfer, provision of information and other matters with regard to securities). We submit that these are important powers that should be retained.

Recommendation 47 **Clause 61 should retain the power to make regulations for such matters as are covered in s.14(a) and (b) of the Overseas Investment Act 1973.**

4.29. **Clause 73** contains amendments to the Fisheries Act 1996.

4.30. The amendments to the Fisheries legislation that allowed any level of overseas ownership of fishing quota, and the transfer of its administration to the OIC have shown themselves to be weak and bad for New Zealandisation of fisheries. We consider that there should be return to a hard limit on overseas ownership of any fishing quota. We submit that that limit should be 24.9%.

4.31. In proposed **section 57G** of the Fisheries Act we submit that the criteria common to business and land investments should also apply: relevant business acumen and experience, and financial commitment, as amended as proposed in Recommendation 41 and Recommendation 42 above.

4.32. In proposed **section 57H**, consistently with our Recommendation 37 with regard to investment in land, submit that the Ministers should be required to consider all the criteria, though the weight given to different criteria may differ from case to case. The criteria may conflict with each other: for example, enhanced competition may lead to the destruction of the domestic fishing and processing industry. Therefore it is important to consider all of the criteria to obtain a balance of costs and benefits.

4.33. The protection of fishing quota was part of the move to "New Zealandisation" of our fishing industry. Yet it protects only the ownership of quota, not the fishing industry itself. The OIC has used this distinction to weaken the usefulness of this regime.

4.34. This apparent technicality that played an important part in the considerations over the Sealord quota (see above and Appendix 2). The criteria encompass whether the *change of ownership of the quota* would result in job creation, new technology or business skills, etc. It does not matter that the investor's business plans would or would not result in those desiderata unless it was as a result of acquiring the quota.

4.35. For example at least one submission to the OIC argued that no new job opportunities would be created nor would retention of employment be assisted by the overseas ownership of Sealord's quota. "This is because there are New Zealand companies that can fund the purchase and develop Sealord." The submitter also believed "that a foreign fishing company is likely to want to fish the quota with its own vessels or other foreign vessels. This would likely lead to a loss of shore- and sea-based jobs."

4.36. The OIC responded that "the job losses alluded to flow more from *who owns and operates fishing vessels not quota*" [our emphasis]. That is, the legislation protects quota, not fishing vessels and companies. The OIC points out that fishing vessels and processing create jobs, not quota. So the criteria are almost irrelevant in protecting the ownership of quota.

4.37. Similarly, when submitters pointed out that some foreign fishing companies received tax breaks that gave them an unfair advantage over New Zealand fishing operators, the OIC's response was that (aside from the matter that taxation matters were not criteria to be considered) the tax breaks were on fishing vessels. Even if taxation were a relevant consideration, it was saying, since the argument applies to the vessels and not the quota, it would still not be relevant.

4.38. We therefore submit that it is crucial that the criteria should apply not only to the *ownership of fishing quota* but to consequent operations and effects resulting from that ownership. They should apply to all the activities resulting from the ownership of the quota – fishing, processing, marketing, exporting.

4.39. We also submit that the criteria in proposed **section 57H** should be modified as follows (in most cases consistently with Clause 18 for land investment):

4.39.1. There should be an overarching requirement to strengthen the productive capacity of New Zealand, and confer social benefits. For example, greater competition and enhanced efficiency and productivity may (in a strict economic sense, which is how it has been interpreted) lead to production and other activities moving offshore.

4.39.2. There should also be a requirement that the criteria should be applied freshly in each case (that is, as if the comparison was to New Zealand ownership), not weakened by comparison with a previous overseas owner. Where possible there should be a comparison of the relative benefits of overseas and local ownership.

4.39.3. There should be a preference given to proposals with less rather than more overseas control and ownership.

4.39.4. All criteria should be reworded to make clear that negative effects (such as loss of jobs or competition) should also be taken into account in considering the balance of costs and benefits.

4.39.5. The criterion for creating jobs should be for jobs for New Zealanders and New Zealand residents (57H(2)(a)(i)). This is particularly important for fishing because of wide concerns that jobs on fishing vessels are going to crew from outside New Zealand, paid at much lower rates than New Zealanders.

4.39.6. The criterion for developing new export markets should specify that those markets should not be in competition with existing New Zealand exporters (57H(2)(a)(iii)). In the Sealord case (and more generally), New Zealand fishing companies are concerned that overseas owned competitors in New Zealand waters receive subsidies and other benefits from their home countries that mean they can easily undercut the New Zealand companies in the same export markets using New Zealand fish.

4.39.7. In addition, markets should be disregarded that are opened due to preferential treatment given to the proposed overseas owners of the investment. The Sealord case illustrated the fact that if overseas owners get preference to export to their home country, then the result is unfair competition.

4.39.8. In weighing the criteria, Ministers should take into account the different tax and regulatory treatment of overseas parties when assessing the economic effects (including effects on employment). In the Sealord case, overseas fishing companies were allegedly able to escape tax, ACC, GST, our employment law and working conditions.

4.39.9. The criteria should include conservation of fish, aquatic life, seaweed, and the marine environment; protecting or enhancing New Zealand ownership and control of our fishing resources and industry; and upholding Treaty of Waitangi obligations.

Recommendation 48 **There should be return to a hard limit on overseas ownership of any fishing quota. That limit should be 24.9%.**

Recommendation 49 **In proposed section 57G of the Fisheries Act, the criteria common to business and land investments should also apply: relevant business acumen and experience, and financial commitment, as amended as proposed in Recommendation 41 and Recommendation 42 above.**

Recommendation 50 **Proposed section 57H(1)(a) should require the Ministers to consider all the criteria to obtain a balance of costs and benefits.**

Recommendation 51 **The criteria in proposed section 57H should apply not only to the ownership of fishing quota but to consequent operations and effects resulting from that ownership. They should apply to all the activities resulting from the ownership of the quota – fishing, processing, marketing, exporting. A possible amendment to this effect would reword 57H(2)(a) to read: "whether the overseas investment *and consequent operations and effects of that overseas investment* will, or *are* likely to, result in — [etc]".**

Recommendation 52 **Criteria in proposed section 57H(2) should be further amended as follows:**

- **There should be an overarching requirement to strengthen the productive capacity of New Zealand, and confer social benefits.**
- **There should also be a requirement that the criteria should be applied freshly in each case (that is, as if the comparison was to New Zealand ownership), not weakened by comparison with a previous overseas owner. Where possible there should be a comparison of the relative benefits of overseas and local ownership.**
- **There should be a preference given to proposals with less rather than more overseas control and ownership.**
- **All criteria should be reworded to make clear that negative effects (such as loss of jobs or competition) should also be taken into account in considering the balance of costs and benefits.**
- **The criterion in proposed section 57H(2)(a)(i) for creating jobs should be for jobs for New Zealanders and New Zealand residents.**

- **The criterion in proposed section 57H(2)(a)(iii) for developing new export markets should specify that those markets should not be in competition with existing New Zealand exporters. In addition, markets should be disregarded that are opened due to preferential treatment given to the proposed overseas owners of the investment.**
- **In weighing the criteria, Ministers should take into account the different tax and regulatory treatment of overseas parties when assessing the economic effects (including effects on employment).**
- **Criteria should include protection of the environment and conservation of resources; and upholding Treaty of Waitangi obligations.**

4.40. Proposed **section 58** differs from the status quo in that forfeiture of fishing quota is no longer provided for breach of any permission granted (compare the current s.58(1) of the Fisheries Act 1996). We believe that this provision should be retained. In addition, forfeiture is no longer available as a penalty if a quota owning company becomes an overseas company without consent. Again, this should be retained as a potential penalty.

Recommendation 53 **In proposed section 58, forfeiture of fishing quota should be retained as a penalty for breach of any permission granted and for the situation where a quota owning company becomes an overseas company without consent.**

4.41. In **Schedule 1**, land should also be regarded as sensitive if it includes or adjoins a river bed or water way.

Recommendation 54 **In Schedule 1, land should also be regarded as sensitive if it includes or adjoins a river bed or water way.**

5. List of recommendations

Appendix 1: Corporate Code of Responsibility

Human Rights: *Transnationals shall*

- not kill, enslave or imprison people
- improve, and not take advantage of or worsen, the position of the disadvantaged in society
- aid and not hinder the desire of peoples to protect and enhance their own cultures
- in all of their activities ensure freedom from physical, emotional or sexual abuse
- in all of their activities not discriminate on the basis of sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, union membership, family status or sexual orientation, except as permitted by law to improve the position of disadvantaged groups.

Workers' Rights: *Transnationals shall*

- not use their international power and mobility as a weapon or threat against workers
- not use child or forced labour
- pay wages and salaries to their workers that allow a dignified existence
- protect the right of their workers to work no more than a forty hour week, paying penal rates for any time worked in excess
- allow workers the freedom and right to belong to a union, associate, organise and bargain collectively
- negotiate with workers' authorised representatives in good faith
- give preference to residents of Aotearoa for employment
- provide safe and healthy working conditions
- respect and maintain the rights of their employees to take statutory annual leave and holidays
- abide by all International Labour Organisation (ILO) conventions.

Legal and government: *Transnationals shall*

- not use their international power and mobility as a weapon or threat against governments, their policies, taxation and other revenue, currencies or economies
- not demand greater benefits than local people or investors
- not interfere in intergovernmental relations
- not interfere in the internal affairs of host countries or attempt to manipulate or defeat public opinion or political leaders

Treaty of Waitangi: *Transnationals shall*

- act in accordance with Te Tiriti o Waitangi

Environment: *Transnationals shall*

- ensure all their activities maintain the integrity of local and global ecosystems
- protect air, water and soil from pollution, accepting and implementing required standards as a minimum
- accept the anticipatory principle: that it is better to prevent a problem than fix it afterwards
- accept the precautionary principle: that in the absence of sufficient scientific knowledge, the benefit of the doubt shall be given to the course of action that has least risk of serious damage to health, safety or the environment
- respect local environmental legislation and standards
- accept the necessity to deposit substantial bonds and to pay for any damage caused
- reduce, re-use and recycle materials wherever practical
- preserve and protect indigenous vegetation, wildlife and habitats
- respect animal rights.

Commercial practices and consumers: *Transnationals shall*

- not exploit a dominant market position, nor attempt to gain such a position
- not use their international power and mobility as a means to manipulate prices
- not use their intellectual property rights to deprive people of rights formerly theirs, or of benefits they should reasonably expect
- ensure the health and safety of customers and communities in marketing their products, freely disclosing to the public all appropriate information on the products' contents and possible hazardous effects
- provide good and fair service to all customers
- obey in letter and spirit the standards of host countries, and international standards where they are more stringent, regarding financial information and consumer protection.

General: *Transnationals shall*

- not purchase from, sell to, or contract work to, parts of their own or other businesses which disobey these principles
- at all times obey both the spirit and the letter of the law of host countries
- promote and adhere to the goals of sustainable and equitable development and full employment
- respect the monitoring and enforcement of this code and comply with any resulting recommendations.

Campaign Against Foreign Control of Aotearoa, P.O. Box 2258, Christchurch, New Zealand/Aotearoa. February 1998.

Appendix 2: Sealord Sale – OIC Exposed

Bill Rosenberg

In May, no less than six applications were refused by the Overseas Investment Commission (OIC). Most details, other than that they were in the "Marine Fisheries" industry were suppressed. All turned out to be the applications of three unidentified companies seeking approval to buy the half of the Sealord Group owned by Brierley Investments Ltd (BIL). Sealord is the largest fishing company in Aotearoa, one of the world's ten largest seafood companies, and has subsidiaries, joint ventures or alliances in 16 countries. It fishes in "the waters of South America, the African continent, Indian and Pacific Ocean, the Antarctic, Australia, as well as New Zealand" (*Press*, 7/09/00, "Size places Sealord in top league", p.14). In Aotearoa it owns 149,037 tonnes, or 23%, of the total fish quota in various species. The main species is Hoki, but it also owns quota for the slow-growing and highly valued Orange Roughy.

Three applications refer to the purchase of BIL's share (it owns its 50% through a shelf company called Basuto Investments Ltd), and the other three to the overseas ownership that would then exist in Sealord itself. The other half of Sealord is owned by the Treaty of Waitangi Fisheries Commission, through its company Te Waka Unua Ltd. (In fact the ownership of Sealord is more convoluted even than that: Basuto and Te Waka Unua each own half of another company, Te Ika Paewai Limited; Te Ika Paewai owns all but one share of Sealord; that share is owned by Basuto. Some smart corporate lawyer would be able to explain why.)

The refusals were the end result of a little publicised change in the fisheries law in 1999 by the previous, National led government, with the support of Labour; a devious piece of last minute work by the outgoing government; a significant change in attitude by the new Labour/Alliance government; and intense lobbying by fishing and other interests to retain the fishing quota owned by Sealord in New Zealand hands. Because of the importance of the events – both to the fishing industry, and to the way in which OIC applications will be treated under the new Government – CAFCA wrote to the OIC, Ministry of Fisheries and Treasurer asking for the full files on these sales. The material below draws on these files, which consist of several hundred pages, although considerable information continues to be suppressed from them. Information suppressed includes most legal advice, and all identification of the applicant companies and some of the objectors to the sale.

While the identities of the applicant companies have not been revealed officially, news reports name Irvin and Johnson, the largest frozen food company in South Africa, and Nissui (Nippon Suisan Kaisha), Japan's largest fishing company (e.g. *Press*, 20/6/00, "Commission may bid for Sealord", p.13). A number of local consortia also made bids, as will be seen below, and the Treaty of Waitangi Fisheries Commission also had pre-emptive right over the shares.

National waters down fisheries protection

The Fisheries Act 1996 disallows more than 24.9% of a quota-owning company being overseas owned unless exempted by the relevant Ministers. The criteria for exemption are very similar to those for sales of land to foreign owners. It puts the administration of applications in the hands of the OIC.

The 1996 Act was originally tighter in that such an exemption could not be given for a company more than 40% overseas owned, but was never put into force. In 1999 the National coalition government amended the Act in the Fisheries Act 1996 Amendment Bill, which was passed in September 1999, not long before Parliament broke up for the election. In an astounding display of either ignorance or wanton negligence, almost the entire Parliament voted in favour of the Bill, the only exception being the Alliance. The tone of the debate on the overseas ownership provision was self-congratulatory: none other than Labour spokesperson, Jim Sutton, had proposed it. Even Green Party co-leader, Jeannette Fitzsimons (then still part of the Alliance), seemed not to oppose the change in principle, though she rightly opposed it on the grounds that the OIC would fatally undermine it. As she said in the Third Reading debate, reported in *Hansard* (2/9/99):

> I commend Jim Sutton for his member's Bill to implement, finally, the clauses of the 1996 Bill to restrict foreign ownership of fishing quota. We worked through the issues involved with that quite well in the select committee, and came to some

> reasonably good conclusions. But it may yet be a rather hollow achievement because the Overseas Investment Commission is to oversee the implementation of this part of the Bill on the same basis that it does for land – another scarce and important natural resource. Therefore we have put in special conditions relating to ownership of fish quota that do not apply to, for example, just investing in a business. Nevertheless, the Overseas Investment Commission has turned down only one application in the last 6-month period, while approving 150 sales of land, and it is pretty well known that it is not difficult to get permission from the Overseas Investment Commission to invest in New Zealand, to buy land and to buy businesses in New Zealand.

The new legislation took effect on 1 October 1999 and the government delegated the OIC authority to approve overseas sales of fishing quota on 19 November 1999, just days before the government was voted out of office. The instructions to the OIC specified that all applications meeting the criteria "should be approved unless good reason exists to refuse them". In March 2000, the responsible Minister, John Luxton (by then a mere opposition MP) claimed in Parliament that the instructions "were set in place to cover the interregnum period of the election" (*Hansard*, 30/3/00). However, both the OIC itself and the new Treasurer, Michael Cullen strongly disputed that interpretation, the OIC Secretary in a tone of some anxiety: "I was concerned to hear in Parliament today … I am at a loss to know the basis for Mr Luxton's comment." (letter from the OIC to the Treasurer, Minister for Land Information and Minister of Fisheries, 30/3/00; and *Hansard* 30/3/00).

It is important to appreciate that the present applications were judged by the OIC twice: first under the Overseas Investment Act, and second under the Fisheries Act. What is not clear from the present applications is that the OIC had apparently already approved them under the Overseas Investment Act. It was the evaluation of the applications under Fisheries Act that led to their refusal.

A further technicality that played an important part in the considerations is that the crucial "national interest" criteria under the Fisheries Act apply only to the *ownership of fishing quota*, not to what the company owning them might do. The criteria encompass whether the change of ownership of the quota would result in job creation, new technology or business skills, new export markets, added market competition, greater efficiency or productivity, additional investment for significant development, or increased processing in New Zealand of seafood. It does not matter that the company's business plans would or would not result in those desiderata unless it was as a result of acquiring the quota. More of this below.

Brierley announces it wants to sell

BIL announced in February that it was looking for a buyer for its half share of Sealord, and that interest was being sought from overseas as well as from within Aotearoa (*Press*, 5/2/00, "Brierley seeks buyer for 50% stake in Sealord Group", p.21). Deutsche Bank was given the job of organising the sale.

A number of local bidders lined up. One was a joint venture formed for the purpose, New Zealand Seafood Investments Ltd, equally owned by Sanford and Amaltal Corporation. Amaltal is in turn equally owned by Amalgamated Marketing, a subsidiary of Amalgamated Dairies and Talley's Fisheries (*Press*, 11/3/00, "Sealord application", p.28). The Treaty Tribes Coalition also tried to make a bid, its chairman, Harry Mikaere, expressing concern at it being sold overseas.

The Treaty of Waitangi Fisheries Commission also had a pre-emptive right to buy BIL's stake, but indicated it preferred to have a partner, possibly from overseas. As matters slowly progressed, that right expired. However, Sir Graham Latimer, on behalf of the New Zealand Maori Council, wrote to the Ministers of Fisheries and Maori Affairs and the Attorney-General asking that the Treaty of Waitangi Fisheries Commission be required to purchase BIL's share in Sealord and hold it in trust for all Maori until eventual allocation of the Commission's assets. Minister of Fisheries, Pete Hodgson, reflecting his ministry's advice, commented "Sir Graham draws a long raku" (letter to Minister of Fisheries from Chief Executive, Ministry of Fisheries, 18/2/00).

As it became apparent that a number of the interested buyers were from overseas – BIL indicated it had "about five buyers, local and overseas" – intensive lobbying broke out both within government circles and by New Zealand fishing interests. Seafood Consortium Ltd, not a bidder itself, put full-page advertisements in daily newspapers around the country, calling for the government to prevent the BIL-owned half being sold overseas. “If a New Zealand company wants to export fish to Japan they have to pay huge duty, often over 50%. If a New Zealand company wants to export to South Africa we face duties of up to 25%. The South Africans are currently proposing a total ban on foreign ownership. Why then should we allow foreigners to own quota when they prevent fish caught by New Zealanders being freely sold on their domestic markets? This creates an anomaly that could force other New Zealand companies to sell their quota to foreign interests in order to remain competitive.” (*Press*, 29/4/00, “An Open Letter to New Zealanders”, p.32.) Seafood Consortium Ltd was formed in 1995 and controls some 25% of New Zealand fish quota. It includes Independent Fisheries Ltd, United Fisheries Ltd, Ngai Tahu Fisheries Ltd, Deep Cove Fisheries Ltd, and Tainui-owned Raukura Moana Fisheries Ltd (*Press*, 2/5/00, “Call to buy Sealord stake”, p.4; letter to OIC, 27/4/00).

Lobbying, anti-lobbying

BIL’s announcement set in train heated lobbying of the government by New Zealand fishing interests, Maori, other MPs, lobbyists, and concerned citizens. The OIC resented this. In a letter to the Treasurer on 28/2/00, the OIC secretary Stephen Dawe took the unusual step of warning him not to listen. In response to one unnamed objector who questioned the OIC’s legal right to make decisions on the case, and who complained that the delegation of authority from the Minister to the OIC “removed his ability to directly lobby MPs prior to the exercise of ministerial powers under the Fisheries Act”, Dawe wrote:

> “As noted in our post-election briefing paper there are significant risks to Ministers if MPs are lobbied. There is a strong risk that considerations other than the statutory ones will be taken into account in making decisions. This would then make such decisions open to judicial review. This risk is particularly so when the lobbyist has a pecuniary interest in the outcome of the decision. The more traditional role for Ministers is to decide frameworks and set policy – not to be involved in individual application decisions. The framework for allowing foreign ownership of fishing quota is set in the legislation.”

In other words, his view was that such decisions have become purely bureaucratic ones, outside the influence of normal political processes. But as will be seen, the lobbying continued unabated.

In the same letter, Dawe revealed that he had told BIL in January that permission for “another foreigner” (BIL is “around 70% foreign owned”) to buy their share, “in principle” could be granted, so long as the criteria in the legislation were met. The government was, deliberately or not, set up for maximum damage if the applications were not approved.

The Labour/Alliance Government first approves the sale …

What has not become publicly apparent in the fuss over the refusal of the transfer of fishing quota was that in March, the Treasurer (Michael Cullen) and Minister of Land Information (Paul Swain) agreed to the sale to any of three overseas companies, under the Overseas Investment Act. It included **seven hectares of freehold land in Pelorus Sound, Marlborough** adjoining the Sounds Foreshore Reserve. As noted above, the sale of the quota required a separate approval under the Fisheries Act. In a letter dated 23 March 2000, the two Ministers took the OIC’s advice in overriding objections that the sale was, for various reasons, not in the national interest.

The objections came from a number of parties. The OIC was not swayed: it informed the Ministers that “our conclusion is that the issues raised do not materially alter our view about whether the applications … are in the national interest and that we still recommend that the applications should be approved.” It is instructive to see what the OIC regards as valid arguments regarding what is the national interest.

The OIC reports four substantive issues that were raised by objectors at this stage. (We have no way of knowing whether these are a fair summary of the objections raised.)

1. *The New Zealand fishing resource is a taonga or treasure.* As the OIC comments, this “raises more generally obligations in relation to the Treaty of Waitangi”. But, it points out, the Overseas Investment Act and its regulations lay down no requirements regarding the Treaty or Maori. While it recognises a special status for wahi tapu areas, their protection and that of Maori land are the responsibility of other legislation, not the OIC. As far as fisheries are concerned, the “nurturing of the fishing resources occurs via the operation of the quota management system, and, in particular

the determination of total allowable catch rather than in relation to who owns the quota". In other words, the OIC doesn't think that who owns the resource makes any difference to its conservation: at that point it is simply "a private property right". The total allowable catch system solves all such problems. Obligations to Maori have been addressed "in the context of the Treaty of Waitangi (Fisheries Claims) Act 1992. Among other things that Act explicitly acknowledges the existence of the Sealord joint-venture between Maori and BIL. It also indicates in section 5(b) of that Act that Parliament was supportive of foreign interests taking a 50% share in the joint-venture."

This highlights the necessity to consider whether Treaty of Waitangi obligations should be part of national interest criteria for both investment and fishing quota.

2. *The company buying the assets should come "from a country that has a similar tariff regime to ours for the importation of our products."* The point being made is that some countries have substantial tariffs on seafood imports, where Aotearoa does not. That means that an overseas owner from such countries gets both preferential (low tariff) entry to their home market, and uncontrolled access to the New Zealand market in competition with the local fishing industry, undermining the local industry on both counts – using its own fish. The OIC replies that is not necessarily so, because the overseas owner is not necessarily selling to their home market. Anyway, while "the development of new export markets or increased export market access for New Zealand exports" is a criterion, the tariff regime of their home country is not. Further, "the concept of taking into account reciprocal tariff arrangements in the host country of the applicant … has not been articulated as a policy platform of the Government", at least in instructions to the OIC.

   At this point, rather desperately, the OIC pulls out the wild card of the WTO and other trade agreements: "It is also possible that favouring applicants from one country over another would breach New Zealand's international obligations to the OECD, under the General Agreement on Trade in Services, within APEC and under bi-lateral Investment Promotion and Protection Agreements, to the concept of 'Most Favoured Nation' treatment. That concept requires New Zealand to treat investors from any country in the same way as it treats investors from any other country." Never mind that neither the OECD nor APEC are binding, that the General Agreement on Trade in Services (part of the WTO) does not apply to fishing, and that it is not stated that any bilateral agreement actually applies to any of the cases at issue.

   This reveals how the OIC bureaucracy is – in this case quite improperly – using international trade and investment agreements to resist change to the investment regime.

   But it also shows a crucial weakness in the "development of new export markets" criterion. Given the highly protected nature of some overseas markets, if an overseas company selling to its home market has privileged access avoiding that protection, it can guarantee "export" development of its home market and will romp home on this criterion. So this criterion encourages economic powers to maintain high tariffs and use foreign investment to take over the resources of other countries such as Aotearoa.

3. *Sealord should remain in New Zealand ownership.* The OIC rightly points out that since BIL is an overseas company, selling its share to another overseas company will make no difference to Sealord's 50/50 Aotearoa/overseas ownership status. However, it sees no problem with the current 50/50 arrangement, nor even with the Treaty of Waitangi Fisheries Commission selling its share on top of that: that is up to the Fisheries Commission, or to Sealord itself in its constitution. So, the OIC says, this issue is not relevant to the current case.

4. *An overseas company should form part of a New Zealand led consortium*. The OIC notes that Sealord is already run as a joint venture. That misses the point that BIL should be replaced by a consortium. However, the OIC says, there is no government policy that requires joint venture arrangements, and it is not among the criteria. Hence it is not relevant to the decision.

… the OIC advises complete acceptance …

Having approved the applications under the Overseas Investment regulations, the next hurdle was the Fisheries Act criteria. By 1 May, the OIC considered it had finished processing the applications and sent them to the Ministry of Fisheries for comment.

The reply from the Ministry of Fisheries was remarkable. Though almost all of the material has been suppressed by the OIC in its release to CAFCA, the heart of it was to "question the good character of the persons controlling" at least some of the companies (file notes by Stephen Dawe, 4/5/00). For any overseas investment, individuals controlling the investor must be of "good character".

In one case the Ministry of Fisheries provided evidence that

> "subsidiaries in New Zealand have committed a number of fisheries related offences in New Zealand. Although most of the offences were technical nature [sic] there was one substantive case where [suppressed] pleaded guilty and received a conviction with discharge and the vessel was forfeit."

Dawe's response was to put the matters to the fishing company's lawyers. He accepted their response that they were mainly minor matters or very old. With regard to the forfeited vessel, he read the court's judgement and noted that there was no intention to commit the offences: they "arose out of inadvertence or inattention etc that has now been remedied". He also noted that some of the directors had changed since the offence. The lawyers also contained "a statement attributed to [suppressed] at the Ministry of Fisheries commenting about [suppressed] good compliance record and stating that directors and senior management are beyond reproach in terms of Fisheries Act compliance." He noted that the Ministry agreed that the company should have its exemption approved to acquire the share of Sealord. Accordingly, he did not change his mind that this company's applications should be approved. One wonders how seriously the Ministry of Fisheries takes its own fisheries laws, and what it would take for the OIC to judge an investor to be not of good character.

In another case, the Ministry of Fisheries

> "came into possession of a video tape and a number of documents that showed that during the [line suppressed] operating in the New Zealand exclusive economic zone (EEZ). The papers showed that this [words suppressed] was carried out at the express orders of [suppressed]… The Ministry of Fisheries [words suppressed] and senior officials of the Ministry of Fisheries presented evidence. [words suppressed] officially warned [suppressed] and banned [suppressed] from operating in New Zealand waters
>
> The Ministry of Fisheries sees [words suppressed] as the most serious threat to the integrity of the New Zealand EEZ and the quota management system due to the huge quantities involved. This incident raises questions about the desirability of having this company operating in New Zealand.

Again, Dawe's response was to meet with lawyers and representatives of the company, including the President, Chief Financial Officer, and Global Marketing Manager. They acknowledged the incident occurred, but said the OIC needed to know how the company operated: subsidiaries have operational independence from the parent company. The fishing vessel in question was not actually owned, but chartered. The company's spokesman had given "a personal undertaking that [suppressed] would act with complete integrity in their New Zealand fishing operations". The spokesman said they were a "good company with a good reputation", and "[suppressed] was one of the finest, ethical, trustworthy [suppressed] individuals he had ever come across".

Dawe was impressed by (and reproduced) one of the company's philosophies (but insufficiently impressed to release it to allow us to read it). After some legal discussion he "remained satisfied that … the individuals controlling [suppressed] of good character and that the applications involving [suppressed] should be approved."

While much of the legal argument leading to this conclusion was suppressed, it may have been at least partly based on the loophole that "good character" applies only to "natural persons" (real people as opposed to "legal persons" such as companies). A company can break the law repeatedly and still not be caught by the "good character" provision.

Meanwhile, other objections had been flowing – and continued to flow – into both the Ministers and the OIC's offices, and the OIC was methodically rejecting them. For example:

- **Former New Zealand First MP Deborah Morris**, now working as "Government Relations Manager" for PR firm, Communications Trumps, opposed the applications. Her information on the applications came from a [name suppressed] Sunday newspaper. She cited the "distinct commercial advantage" the overseas companies have in the bidding process because "they do not pay tax, ACC levies or GST when they fish our waters – therefore their bids could be wildly inflated. There is a real issue here re: tariffs too. [Suppressed] companies, for example, can take their NZ catch and sell it into Japan as local product therefore avoiding the kinds of tariffs NZ companies face in Japan." The result would be to "severely undermine the fishing industry here – and all the jobs that go with it." (Note that the OIC suppressed information coming from public sources, namely a Sunday newspaper. It is not clear whom Morris was representing in this letter.)
- **Labour MP Damien O'Connor** noted he had raised the issue with Caucus and with Michael Cullen directly. He considered that the Fisheries Act intended that ownership of quota should remain with companies with less than 25% foreign ownership and control. The BIL ownership was "clearly an anomaly". He believed "passionately in the need to retain control of sovereign assets, such as the right to exploit our fish stocks in the hands of New Zealanders. Unlike land that can never be physically taken from our shores, the fish can be caught, processed and sold without any direct benefits to New Zealanders. A situation like that is simply unacceptable." It was an issue that will "clearly distinguish us from the previous National Government and one where we should make a stand and ensure ownership remains with New Zealanders."
- The **New Zealand Recreational Fishing Council** considered that the Sealord Group "was a positive influence in the sustainable management of the New Zealand fishery". The Council wrote that "the public did not allocate these quotas for the advantage of foreign owned companies many of which are based in countries that subsidise their fishing fleets". It cited trade barriers and high tariffs against New Zealand fish exporters, and alleged a lack of sustainable harvesting and management philosophies in the foreign companies. Once sold overseas, quota will not be returned. It opposed the sales.
- The **Seafood Consortium Ltd** (see above) opposed the sale because of the large amount of quota held by Sealord, whose sale overseas would "seriously alter the dynamics of the seafood industry in New Zealand" through loss of export earnings and less sustainable harvest practices. They also were concerned that foreign companies would be subsidised by their home countries, and at the unfair effect of tariffs and trade barriers. "This will produce a spiral effect with more and more of our nation's fisheries resources passing into foreign ownership". They wrote to the OIC, but also promised meetings with key Ministers.
- **Barry Wilson**, lawyer, government-appointed member of the New Zealand Fishing Industry Board, member of the Fisheries Task Force 1991, and chair of the Rock Lobster Steering Committee, wrote a detailed, ten-page submission opposing the sale to any foreign owner. He emphasised that he was not opposed to foreign investment as such: he currently acts for Stagecoach in New Zealand as well as other overseas companies. But he considered foreign investment was appropriate only in areas of the economy where the investment can be replicated, where a startup is involved, or where resources or capital are not adequate. But it was clear to him that "none of these considerations would apply in this case". He outlined the complexity of the industry. He raised the possibility that a foreign owner would take the processing and marketing knowledge of the industry and use it elsewhere, where labour and assets are cheaper, catches are unrestricted, and markets closer, rather than "run its New Zealand investment to full capacity". We lose control of the fishery and knowledge of how to run it. He considered the criteria in turn, answering each time that they could not be satisfied.

Again, the OIC's responses were revealing. A number of the common objections were answered in an internal OIC memo dated 20 April 2000. They include the four issues dealt with under the Overseas Investment Act (summarised above). We summarise some of the others shortly. Though the memo predates some of the submissions, it anticipates many of their arguments.

All the submissions were annotated with hand-written comments. For example, the OIC wrote that Barry Wilson "appears to close eyes to possibility of criteria being met in any case" [sic], in response to his criticism of any foreign investment in the fishing industry. In response to his suggestion that a foreign owner might make use of knowledge it gained from the New Zealand industry to the country's and Sealord's disadvantage, the OIC writes, "these comments are geared at saying foreigners should never be allowed into the industry – we can not close our eyes in this manner". This is a particularly asinine comment given that the OIC was at that stage instructed to "approve applications unless good reason exists to refuse": in other words, close its eyes to all but the most blatant breaches of the criteria. Its actions indicate that it accepted those instructions with enthusiasm.

On another argument of Wilson's, that our fishing secrets could be used "to outmanoeuvre us in the marketplace", the comment is that "this is a global argument for saying no foreigners". Apparently general arguments are not to be accepted by the OIC, unless they are favourable to foreign investment: the comment assumes that foreign investment is always good, and that the only argument against it (and rarely accepted) is one specific to an application. (More of this below.) Yet when Wilson makes his argument that the six statutory criteria are not complied with, the OIC responds with generality: to Wilson's reasoning that our fishing industry are world leaders and so it is unlikely that foreign investment introduces "new technology or business skills", the OIC rejoins that he "ignores product development, general fish product research, processing practice etc". Elsewhere they respond with specific knowledge of the applications that Wilson and other objectors are not allowed to see, let alone scrutinise and evaluate. Again, the weakness of the criteria and the process are glaring.

The internal 20 April memo rebuts 23 different points made by unnamed objectors. Some have been censored to the point where they are indecipherable. The most important remaining ones are as follows:

Submission: *The sale could lead to the loss of millions of dollars of tax revenue.*

OIC response: Taxation effects are not matters that are dealt with under the national interest criteria. Anyway it is already overseas owned, by BIL, which can be assumed to be avoiding tax as "efficiently" as any other corporate. Moreover, "the tax treatment of fishing is a generic matter for the revenue authorities, not a matter directly relevant to this transaction." It then makes two interesting arguments:

- It quotes a New Zealand Institute for Economic Research (NZIER) report that concludes that taxation arrangements tend to favour foreign ownership of *fishing vessels* rather than *quota*. While interesting in its own right, and contradictory to its primary argument, that taxation matters should not be considered, this also reveals another potential weakness in the legislation. It is pointing out that the criteria apply to ownership of *quota*, not of the fishing vessels or company. Even if taxation were a relevant consideration, it is saying, since the argument applies to the vessels and not the quota, it would still not be relevant.
- "Further", the OIC continues, "as the negative impact claimed by [suppressed] is supposedly generic to all foreign fishers it is not a matter than can be considered under the 'other' category in section 57(4)(b)(iii) as it is not a matter that relates to the circumstances and nature of the particular application." The section referred to states that the Ministers, when judging whether approval is in the national interest may also have regard to "such other matters as [they], having regard to the circumstances and the nature of the application, think fit". The OIC is saying (as it does in its critique of Barry Wilson's objections) that this means that *general* objections cannot be taken into account, only ones specific to the case. The interpretation is debatable, and if accepted has a bizarre effect. It is as if a doctor was told that she could not advise a patient against smoking because it does not relate to the specific circumstances the patient is consulting her about, despite the fact that *in general* it causes cancer and a host of other health problems.

Submission*: The sale to a foreign party is almost certain to move other major companies off-shore with a corresponding loss of jobs.*

OIC response: It is already foreign owned. The sale from one foreign owner to another does not change things. Moreover, one of the criteria is "enhanced competition". If some companies choose to respond to that by moving off-shore that could still be in the national interest if the overall result was greater exports etc. "Moreover, any job losses resulting from a particular company moving offshore could be offset by growth in jobs at Sealord, elsewhere in the fishing industry or elsewhere in industries servicing or linked to fishing due to expansion of Sealords". How a company moving offshore could lead to further jobs in Aotearoa is not explained. But it illustrates the barbed nature of the competition criterion. It can be satisfied by the destruction, or sale overseas, of the rest of the industry. This is repeated in the response to the next submission.

Submission*: The sale to a foreign party will lead to the collapse of fishing companies through an inability to remain competitive against non-taxed New Zealand product which is processed off-shore.*

OIC response: Again the OIC cites the "enhanced competition and efficiency" criterion. Though some of its response is suppressed, it cites the NZIER report as suggesting that "quota ownership is unlikely to lead to the taxation benefits [sic] alluded to". "Moreover, the positive effects claimed by the applicants appear more likely to result than the claims in the submission". Once again, the objectors are at the disadvantage of not knowing, or being able to respond to, what the applicants are proposing.

***Submission**: "The sale will directly affect the New Zealandisation of our fisheries which has been a policy of both Labour and National governments for many years. [Suppressed] believes the political party issues will need to be considered."*

OIC response: "The proposed sale is from one overseas person to another. Therefore the 'New Zealandisation' of fisheries is neutral as a result of this transaction. It is inappropriate to consider political matters – the matters to consider are those set out in the legislation. That legislation essentially provides that foreigners can own 'quota' so long as benefits are delivered to New Zealand. The legislation is geared at regulating foreign participation in the ownership of quota, not preventing it outright."

It is interesting to note the OIC's frequent use of the argument that since the asset is already in overseas hands, nothing, however bad, will make a difference to the status quo. On that logic, once sold overseas, the OIC will never prevent an asset being onsold to another overseas owner.

It is also important to emphasise what the OIC is correctly pointing out about the Fisheries legislation. Despite the self-congratulatory behaviour of Labour in supporting the legislation in 1999, and the evident belief by many, including MP Damien O'Connor, that it prevented the sale of quota overseas, the legislation does nothing of the sort. It simply delivered its sale into the hands of the OIC.

***Submission**:"[Suppressed] claims that no new job opportunities will be created nor will retention of employment be assisted. This is because there are New Zealand companies that can fund the purchase and develop Sealord. [Suppressed] also believes that a foreign fishing company is likely to want to fish the quota with its own vessels or other foreign vessels. This would likely lead to a loss of shore- and sea-based jobs."*

OIC response: "The source of funds (New Zealand or otherwise) is not relevant to determining whether Sealord will generate jobs." Anyway, Sealord, rather than the new owner, makes decisions about which vessels to fish the quota with. Even if it were 100% New Zealand owned it could decide to fish with chartered foreign vessels. That might lead to more jobs through processing on shore and exports, even if it lost some jobs. "More generally, the job losses alluded to flow more from *who owns and operates fishing vessels not quota*" [our emphasis]. First, the logic that the "source of funds is not relevant" escapes us. What the submission says is that just as many jobs could be retained or created if it remained in local ownership. But that is not relevant to the OIC: all that is relevant is whether the new owner would retain or create jobs. Second, the importance of the technicality that the legislation protects quota, not fishing vessels and companies, is reiterated. The OIC points out that fishing vessels and processing create jobs, not quota. So the criteria are almost irrelevant in protecting its ownership.

***Submission:** "[Suppressed] believes that a sale to a foreign country will reduce competition and production efficiency within New Zealand. The reasons revolve around expectations that foreign vessels will be used, off-shore processing will occur and no taxes will be paid."*

OIC Comment: "While that could occur in relation to specific aspects of the fishing industry, the overall result is likely to be a more efficient industry measured at macro levels. More importantly, the legal test is not geared at determining whether competition etc will be reduced (that is a Commerce Act matter) but at whether there will be more competition or efficiency… the claims of the applicants on this matter have more credence than those of [suppressed] … the assertion in the submission does not seem to outweigh the NZIER viewpoint." No analysis is made to justify the statement that the industry will be "more efficient measured at macro levels". And the OIC don't care if competition or efficiency is reduced (and they concede it might be) – only if it is increased. Figure that one out.

In summary, nothing persuaded the OIC to change its mind that the sale of the share of the quota was in the national interest and should be approved.

… but finally the government enforces "national interest"

BIL had given potential buyers until 5 May to put in their bids. By 1 May, the OIC was desperately trying to get a decision from the Ministers on the second lap of the applications under the Fisheries Act, in order to please its clients. Apparently there was no consideration given to asking BIL to relax its deadline. The OIC was showing signs of frustration with the government. At least six substantial memos flowed from the OIC's secretary to the Ministers responsible, all labelled "Commercial Secret", between 1 and 5 May.

Some of the material in them has been totally suppressed by the OIC. But the sequence appears to be as follows.

On 1 May the Ministers were asked to prepare for a meeting on 4 May to give them the opportunity to "express their views" before the OIC made a decision. By then, the OIC was clearly ready to approve the applications, happily using its usual "approve unless good reason exists to refuse them" instruction and delegation from the National administration. Until almost the last moment, the government insisted it would not change the delegation. However, the OIC was aware that the Ministers might after all want to make the decisions themselves, requiring a change in the delegations. It obligingly prepared some alternative documents.

On 2 May, a sizeable pile of documents was sent to each Minister to prepare them for the meeting on 4 May. They consisted of OIC analyses of each application, the 20 April memo detailed above, an analysis of further submissions received, a legal opinion on the administration of the fisheries legislation (suppressed), and letters from the Ministry of Fisheries regarding the allegations outlined above, but agreeing to the approval of the applications. The covering memo warned the Ministers that "one outcome of this process could be legal action being taken against the OIC/Crown" due to the strong views being taken. The legal advice (suppressed) presumably addressed that possibility, and the OIC was being careful to dot all its i's. It once again warned the Ministers against listening to objectors: "we also remind you that it would be inadvisable to agree to meet with any parties to discuss these applications" presumably to avoid the risk of "irrelevant considerations" being taken into account.

By then however, political temperatures had risen considerably. In a letter dated 3 May, to the Chairman of the OIC, the Ministers revoked the delegation to the OIC of its right to make decisions under the Fisheries Act with regard to the Sealord case. Presumably the Ministers no longer trusted the OIC to take into account all relevant considerations.

On 4 May, further submissions were forwarded to the Ministers, including those from Deborah Morris, Damien O'Connor and Barry Wilson (to whom special attention is given), and further letters from the Ministry of Fisheries. There was a further legal opinion on the issue of "good character", highly relevant in regard to the Ministry of Fishery's information. The OIC secretary is still not moved however: "each of the applications is in the national interest". However he is still investigating "certain allegations" – presumably the Ministry ones. His unchallenging mode of investigation is outlined above.

Two other memos followed that day in a rising sense of panic. In the first, it was clear that the OIC secretary had not yet received the revocation of its delegation, but was expecting it. But "the timing of events is very tight", so the Ministers were urged to read all the material and approve all but two applications whose investigation was continuing.

In the second, the remaining matters raised by the Ministry of Fisheries were analysed. It "goes to the issue of the 'good character' of the individuals controlling [suppressed]". Nonetheless Mr Dawe remained satisfied of their good character and urged the approval of the remaining applications. But if the Ministers were not satisfied as to the good character of the individuals, they should allow the individuals to make further representations on the issue (but no thought of allowing objectors the same privilege).

He urged the Ministers "to resist making public your decisions or even how many applications you have been considering" because of the commercial secrecy he asserted was required. "Moreover, you are under no strict obligation to tell the world of your decisions", he wrote, continuing the Commission's long-held penchant for secrecy. He kindly supplied some written samples of ways to avoid answers to queries they might receive.

On 4 May the Ministers made their decision and the Treasurer conveyed it by telephone to the OIC.

The OIC wrote tersely to the Ministers on 5 May in a letter headed "Brierley Investments Sale of Interest in Sealord – Decision Reaction". The secretary had "communicated" the Ministers' decision to refuse the applications because it was not in national interest.

> "The reaction of all applicants was very similar – universal disbelief and disappointment. The representatives of [suppressed] asked me to specifically let you know how disappointed and surprised they were with the decision in relation to the applications they were associated with. Some applicants have asked what aspects of their proposal they could improve to have you reconsider your decision. Please give that some thought and let me know what you would like us to communicate in response to that or similar questions."

The OIC had become a conduit of commercial pressure on the Ministers: the quasi-judicial façade it had tried to construct in analysing the decisions and recommending their approval had disappeared and they were acting as lobbyists for the companies.

All that was publicly said was a press release on 8 May. On the same day, the Ministers wrote formally to OIC Secretary Stephen Dawe recording the reasons for their decision.

They had withdrawn their delegation to the OIC because they were "determined to apply a neutral test" rather than the previous instruction to grant consents unless there was a good reason to refuse them. "We believe that this instruction may be *ultra vires* the Act." More of this little bombshell below.

They agreed that each of the applicants met the good character requirement of the Act. They evaluated each of the applications against the other criteria. Much of their reasoning has been suppressed, but they concluded that some of the benefits "seem somewhat nebulous. There is no indication that similar advantages could not be obtained by something less than a permanent loss of New Zealand control of quota." They noted that "we would need to take the claims of benefit on trust, and this does not offer us enough comfort that the national interest test has been met" – a radically different approach from the OIC's standard practice.

After noting the descriptions of benefits used words like "potentially", "possible", "if" and "should", and the lack of quantification or evidence of benefit beyond Sealord itself, they wrote, "there is far too much doubt about the benefits, and they are far too vaguely specified to allow us to conclude that the national interest test has been met". Under additional considerations, they recognised the policy of successive governments (including their own) to support the New Zealandisation of the fishing industry, and noted the large amount of quota at stake.

They concluded by stating that although they "noted the comments of various third parties", they were not persuaded by them. "The substantive reason for our disagreement with your general recommendations was that we were evaluating the applications in the context of a specification of government policy and applying a different standard of national interest than you had been instructed to…" They thanked Dawe and his staff "for the very detailed and professional manner in which you discharged your statutory duties with regard to these very complex matters of immense national significance and high public interest."

The Ministers' press release, under the name of the Treasurer, Michael Cullen, "Foreign bids for BIL's Sealords stake declined", announced that the two Ministers had declined all the overseas applications to purchase BIL's stake in Sealord. They had "carefully considered the criteria laid down in the relevant legislation". They "recognise that it has been an explicit or implicit policy of successive governments to support the New Zealandisation of the fishing industry." They then carefully covered themselves over the crucial distinction (see above) between ownership of quota, which is subject to the Fisheries Act, and ownership of the industry:

> While we accept that there is no necessary linkage between foreign shareholding in New Zealand fish quota and the New Zealandisation of either fishing or fish processing, it is clear to us that past and present government policy nonetheless

> implies that the relevant property rights should ordinarily be held by New Zealand interests.
>
> We were not satisfied that any of the overseas applications satisfactorily met the required national interest tests to outweigh that consideration.

But they had a sting in their tail for the OIC:

> We note that the previous National Government's delegation to the Overseas Investment Commission to make such decisions contained a presumption in favour of approving applications. This presumption was in the general context of all applications under the Overseas Investment Act. Our revocation of that delegation in the case of Sealords applicants also, as a consequence, revoked for those applications the policy statement containing this presumption.
>
> In any case, we have been advised that in that respect, the delegation made by the previous government may well be *ultra vires* the legislation and that we should approach the applications with no such or any other presumption.

The suggestion that the OIC's delegation and therefore its decisions had been for years *ultra vires* (beyond the powers given by) the legislation was naturally more than a little upsetting to the OIC, already feeling raw at having its preferred course of action reversed. Perhaps all its decisions for several years had been invalid! Cullen rubbed salt into the wound in Parliament the next day when he said in reply to a question from Damien O'Connor:

> I have received advice that delegations made in November 1999 to the Overseas Investment Commission by the previous Minister of Fisheries and the previous Treasurer may be *ultra vires* the Fisheries Act 1996 and the Overseas Investment Act. The delegation instructed the Overseas Investment Commission to grant consents unless there was good reason to refuse them. Both the Fisheries Act and the Overseas Investment Act require an even-handed approach to applications, with no prior presumption. (*Hansard*, 9/5/00.)

The OIC exploded. On 10 May its Assistant Secretary, Peter Hill, wrote to all three Ministers (the Treasurer, Minister for Land Information and Minister of Fisheries):

> I refer to your press release about the Sealord applications and response to a Parliamentary question on Tuesday 9 May 2000 about the validity of the delegation/directive letter to the Overseas Investment Commission. I note that neither was prepared with input from this office. I attach an opinion from the Commission's legal advisers on this topic. You will see that their advice is that the delegation/directive letter is *vires* the legislation. You will also note that they were asked for and provided the same view before the current version of the directive letter was formulated.
>
> Your public pronouncements have left us in an impossible position. Our ongoing processing of applications is placed in jeopardy because, unless this issue is resolved in Court, public confidence in our decisions is eroded.

He makes the assumption that there is indeed public confidence in their decisions.

He tells the Government that it has five courses of action available to it:
a) wait for a legal challenge;
b) seek a declaratory judgement;
c) re-issue the delegation and directives but "remove or alter the passage(s) referred to by Crown Law";
d) re-issue the delegation and directives but "remove or alter the passage(s) referred to by Crown Law" and revoke the delegation under the Fisheries Act;
e) issue a completely new directive and delegation in line with Government policy.

In the meantime they will send all decisions to the Minister so that the validity of their decisions cannot be questioned. (If you don't like the way we do it, do it yourself!) Treasury had been consulted in the preparation of the letter and agreed with it. An urgent meeting was sought to discuss the issues.

The Ministers declined to meet with them. Instead they indicated that they intended to change the directive to the OIC. The same day, the OIC sent them a choice of four revised directives (letter from the OIC to the Treasurer, 10/5/00). They responded:

> I refer to the Overseas Investment Commission report 816 of 10 May 2000, which raises difficulties associated with public pronouncements made by myself and Hon Pete Hodgson. Until further notice, we are revoking clause 2(b)(ii) of the statement of government policy outlined in the letter from the Office of the Treasurer and dated 19 November 1999. (Letter to the Chairman of the OIC, 11/5/00.)

Clause 2 (b)(ii) of the 19/11/99 letter is the instruction to approve applications "unless good reason exists to refuse them".

On 6 July the Government revoked the 19 November 1999 delegation and directive completely, replacing it with one that retained the responsibility for approving fishing quota sales in the hands of the Ministers, and explicitly stated "that there are no doubts that the Commission's responsibilities under its legislation should be exercised in a neutral manner". In practice, other than for fishing quota, it is doubtful that there will be much change in the OIC's practice. The Ministers' letter states: "Please note that these changes are technical in nature and the Government remains committed to an open and facilitative overseas investment regime."

The lack of any controls on general overseas investment, other than where land or fishing quota are involved, is well known. This episode highlights the weakness of even the stricter "national interest" criteria in these cases. In particular it indicates that the criteria should

- *all* be satisfied: satisfying only one can be destructive. For example, enhanced competition may lead to the destruction of the domestic fishing and processing industry;
- have an overarching requirement to strengthen the productive capacity of Aotearoa, and confer social benefits. For example, greater competition and enhanced efficiency and productivity may (in a strict economic sense, which is how it has been interpreted) lead to production and other activities moving offshore;
- take into consideration negative effects such as the possibility of lower competition or employment;
- under the enhanced export markets criterion, disregard markets that are opened due to preferential treatment given to the proposed overseas owners of the investment. This case illustrated the fact that if overseas owners get preference to export to their home country, then the result is unfair competition. That logic leads to the whole of the industry being overseas owned, as well as encouraging such discriminatory treatment;
- provide that the criteria should be applied freshly in each case (that is, as if the comparison was to New Zealand ownership), not weakened by comparison with a previous overseas owner as the OIC did here. Where possible there should be a comparison of the relative benefits of overseas and local ownership;
- test the "good character" of legal persons (such as companies) as well as natural persons (real people);
- favour proposals with less rather than more overseas control and ownership;
- take into account the different tax and regulatory treatment of overseas parties when assessing the economic effects (including effects on employment). In this case, overseas fishing companies were allegedly able to escape tax, ACC, GST, our employment law and working conditions, for example;
- make clear that the "such other matters as the Minister, having regard to the circumstances and the nature of the application, thinks fit" provision, which allows the Minister to take into account matters not anticipated by the other criteria, can apply to generic matters as well as ones specific to the particular case;
- make provision for protection of the environment and conservation of resources;
- make provision for upholding Treaty of Waitangi obligations.

The above should apply to all investment, but in the particular case of fishing quota, the legislation should make clear that the criteria

- should apply to all the activities resulting from the ownership of the quota – fishing, processing, marketing, exporting – not only to the ownership of the quota itself;
- should rule out more than a fixed proportion of overseas ownership – we suggest 24.9%.

Finally, at least for major sales like this case, there needs to be provision for the public to be properly informed of the facts of the proposals and be given appropriate time to make submissions before decisions are made.

November 2000

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Appendix 3: Estimate of overseas land ownership in NZ

According to the Overseas investment Commission (OIC), ("Appendix A of a Briefing Paper on the Overseas Investment Commission", available on their website at http://www.oic.govt.nz/invest/brief/117511.pdf):

> OIC estimated that approximately 777,500 hectares of New Zealand land was foreign owned as at 31 December 1997 (this figure included 276,857 hectares of freehold land which the OIC had approved for sale to overseas persons for the period 1/1/91 to 31/12/97 and approximately 500,000 hectares owned by Fletcher Challenge and Carter Holt Harvey). This represented 2.8% of all New Zealand land and 3.6% of all forested and arable land.

The OIC has approved the sale of a net 292,013 hectares since then to 31 Dec 2003 (the latest annual statistics available), making a total of 1,069,513 hectares (just over a million hectares) foreign owned as at 31 December 2003. It is likely to be more than that as it appears that the OIC counted only Fletcher Challenge's and Carter Holt Harvey's land ownership prior to 1991. In addition, all the problems with the OIC's definition of "net" apply (see paragraph 2.34).

In correspondence with Rod Donald MP (14, 15 February 2005), the OIC has confirmed that it is "more comfortable with the 1m hectare figure total estimate" than other estimates it has made. It has also calculated that the "net" sales from 1 January 1998 to 30 June 2004 (six months beyond the above calculation) is 269,197 hectares (a fall from the 31 December 2003 figure) and that the transfer to overseas entities more than 25% owned (i.e. not using their "net" method) was 279,607 hectares over the same time period. The latter would give a total of 1,057,107 hectares foreign owned at 30 June 2004.

New Zealand has 15,600,000 hectares of pasture, arable land and production forest ("NZ Forestry Facts and Figures '99", publ. NZ Forest Owners Association, MAF), so 6.8% of our commercially productive land area is foreign owned.

The largest owners are the forestry companies, who own or manage approximately 1,800,000 hectares of forest land. They own most but not all of what they manage – some is in forest cutting rights or leases for example. We estimated that in 2003, at least 1,018,000 hectares was overseas owned or managed, using information from the publication "NZ Forest Industry facts and figures 2002/2003" (NZFOA, MAF). Some of this is of course counted in the above 1,069,513 hectares. Since then there have been substantial changes in forest ownership, and the table of ownership published by NZFOA and MAF has not been updated. However we doubt that the area in foreign ownership has changed significantly as most of the area sold by foreign owners has been to other foreign owners.