The Overseas Investment Bill 2004:

The power of international capital and the loss of sovereignty

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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 repayments and dividends which the company could ill afford. In plain words, they asset 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. The original investors sold their shares years ago leaving us to suffer the consequences and pay to put things right.

The Roger Awards for the worst transnational corporation operating in New Zealand (which TranzRail won three times) provide more examples of corporations behaving badly. Last year's winner was forestry company 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.

Telecom, which undeservedly has yet to win a Roger Award is the subject of Sue Newberry's contribution this evening. She looks at the ominous accounting games it's playing, but in addition its overseas owners have sacked thousands of employees and have already extracted billions from New Zealand in profits and capital, while overcharging for services (such as broadband networking to the home) which will be the background 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 1996 to 2000 it paid out more than its net earnings in dividends, its capital expenditure barely covering depreciation. It was running down its assets. More recently it has used its cash to invest (rather un-

successfully) in Australia rather than develop the extensive new services needed in New Zealand. As investment analyst Brian Gaynor described the effect of the privatisation:

> 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.[1]
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> … These are extraordinary figures for a company that is supposed to be at the cutting edge of new technological developments.
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> In other words, a huge amount of money had been extracted from Telecom …

I could go on with further examples: the Air New Zealand; the banks; Carter Holt Harvey, Citic, Huaguang and other forestry companies; the corporations whose feeding frenzy helped create the ongoing mess that is now our electricity system, not to forget Comalco, whose smelter has for decades been a reason for high electricity prices for all but itself; the promising local manufacturers and technology companies which have been bought up and closed down by foreign buyers; and more. CAFCA chronicles these horror stories in every issue of *Watchdog*.

What is almost as appalling as the damage to our economy, society, environment, to workers, neighbours and other ordinary New Zealanders, caused by these psychotic organisations, is the attitude of successive governments to the problem. They have uncritically applauded more overseas investment, averted their eyes from the problems, weakened the laws governing foreign investment and signed New Zealand up to international agreements which hamstring the ability of future governments to put the situation right.

The reason we are here tonight is that yet another binge of undermining the overseas investment laws is about to take place. What I want to do is first outline some of the reasons why we should reclaim the ability to control overseas investment in New Zealand, and then take you through what is proposed in the Overseas Investment Bill 2004 which is being introduced into Parliament under urgency, we understand on Friday.

Those defending overseas investment, like Michael Cullen, say that it brings access to new markets and to new technology and ideas, including better management. 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. Did Telecom's overseas owners bring new technology? No, the company closed off options rather than developed new ones. Did they bring new ideas other than innovative ways to extract money from the company? Certainly many of their staff do not think so. I was told for example by one of their senior account managers – someone very loyal to the company – when the US privateers announced that they were selling out, that not to worry: they

[1] "Testing years ahead for Telecom", by Brian Gaynor, *New Zealand Herald*, 26 May 2001.

had contributed very little to the running of the company. Did the new owners of any of these companies bring better management? Not unless you equate good management with high rates of profit – so high in many cases that they run the company into the ground, as has been graphically illustrated by TranzRail in the last few years.

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). Of course, 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. I have even heard the Prime Minister complain about this pattern. And good management? Well 61% of respondents in a recent survey didn't think so. On 3 December, under a headline "Workers don't trust bosses", TVNZ reported a survey of 2000 employees by employment agency Seek.

> A survey of New Zealand workers has found 61% don't trust their bosses … Across all industry sectors, 61% of employees said management in their organisation does not inspire trust, and 62% believed management is not open and honest with employees. Asked if there is anything they hate about their current job, quality of management was nominated by 53% of survey respondents, followed by salary and stress levels, both cited by 47%, and a lack of feedback and appreciation, stated by 46% … Seek NZ general manager Jude Manuel says lack of trust in management is endemic in New Zealand workplaces.

The recent report by the government-backed Workplace Productivity Working Group stated coyly, making 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]

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*

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[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.

overseas investors *may* bring these benefits. Many we know from our own experience do exactly the opposite. This is precisely why – 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 can be left to maraud other parts of the world.

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 2002 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 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." It proposed that New Zealand should be selective about which foreign investment it chose.

Selection is hardly a radical idea. It is precisely what we do to select *people* who want to come to New Zealand permanently. Though immigrants are welcomed by most (including me) – 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.

And yet the damage potentially done by one badly behaved immigrant pales beside a huge transnational corporation misbehaving in New Zealand. Why then have successive governments have given away the right to make any but the most superficial choices when selecting most investment entering New Zealand. Why are corporations so privileged over ordinary people – or in political economy terms, why is capital so privileged over labour?

Our rules for selecting overseas investment are already notoriously weak. There are only three criteria, except where land and fishing quota are involved. Investors must have "business acumen" and must make a financial commitment. This is about as rigorous as selecting a car on the criterion that it has wheels.

The only potentially meaningful criterion is that individuals controlling the investment must be of "good character". But good character is undefined, and applies only to individuals – not corporations. 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. Archer Daniels Midland was allowed to take part ownership of Canterbury Malting Company even though some of its executives were imprisoned for massive international price fixing crimes for which it was fined US$100 million (and more fines of a similar size have followed).

Even where individuals are concerned, the Overseas Investment Commission routinely accepts as "evidence" letters from solicitors attesting to their clients' good character. One such individual gave substantial sums of money to the Renamo, the violent group which attempted to overthrow the post-independence government of Mozambique. The US State Department reported that "'100,000 civilians may have been murdered' as a result of wide-spread violence and brutality by [Renamo]. Vic-

tims were beaten, mutilated, starved, shot, stabbed or burned to death"[4]. Renamo was a terrorist group in the truest sense of the word.

The government's 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 I have outlined, 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. 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.

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 so-called "foreign direct investment" – the type of investment that comes under the overseas investment legislation's criteria. 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.

Why is the government persisting with such reckless rules? Pressure from overseas investors themselves is part of the answer. With 46% of the share market and probably a similar share of the entire commercial economy, they have enormous economic and political leverage, particularly given New Zealand's high overseas debt.

But international trade and investment agreements are also to blame. Officials state that commitments made in 1994 under the General Agreement on Trade in Services in the World Trade Organisation prevent us tightening the rules. So do an OECD code, and the free trade agreement with Singapore. The recently signed free trade agreement with Thailand will lock us in further. We have bilateral investment agreements with Hong Kong and China. Signing more such agreements – particularly with the US, as Australians have discovered in their Free Trade Agreement – would narrow our ability to regulate our own economy and society still further. The trade agreements reflect opposition to regulation of overseas investors from powerful quarters, including the major economic powers – especially the European Union and the US – mainly within the rich countries' club, the OECD (in which the MAI was nurtured).

So what is the government proposing in the new Overseas Investment Bill?

The current rules have three variants: for land, for fishing quota, and for other foreign investment – mainly corporate takeovers.

The rules for investment involving land and fishing quota have more extensive criteria than for corporate takeovers. That is because land and fishing are areas for which New Zealanders have for good reason shown a high degree of concern. In some ways however, that priority in the legislation is a strange one. The sums involved for land and fishing quota are relatively small – perhaps tens of millions of dollars a year. For corporate takeovers however we are talking about billions of dollars every year. They affect every corner of our lives, our economy, environment and society.

[4] "Right-Wing U.S. Coalition Aiding Mozambican Rebels", *New York Times*, 22 May 1988, p.14.

As I have mentioned, all forms of investment must satisfy three very weak criteria – financial commitment, business acumen and good character. Good character only applies to individuals, not corporate bodies. In addition, for corporate takeovers, investments require approval from the Overseas Investment Commission only if they have a value over a certain threshold. If the value is less than the threshold, there are no controls over the investment at all. Currently that threshold is set at $50 million – a figure that was increased from $10 million without public debate by the National government just before the 1999 election. It is now embedded in both CER and the free trade agreement with Singapore.

For land and fishing quota there are additional so-called "national interest" criteria. They cover such matters as the creation or retention of job opportunities; the introduction of new technology or business skills; the development of new or increased export markets; added competition, greater efficiency or productivity; or increased processing in New Zealand of New Zealand's primary products. There is an important discretion too: the Ministers ultimately responsible for these decisions (those responsible for Finance, Land and Fishing), may add additional criteria by regulation, and take into account "Such other matters as [they], having regard to the circumstances of the particular overseas investment, think fit." I would assume this discretion was used by the government in its recent decisions on the Nicks Head Station and Shania Twain's purchase of two large stations in Wanaka, where it forced a degree of access and conservation provisions.

For farmland, the sellers must in addition advertise locally on the open market first, and the sale must be likely to result in "substantial and identifiable benefits". Additional criteria are whether experimental or research work will be carried out on the land; the proposed use of the land by the applicant; and in the case of an individual (as opposed to a corporate body), whether the overseas person intends to farm the land for his or her own use and benefit and is capable of doing so. For all land there is a lower financial threshold – the old $10 million figure, because it was embedded in the legislation and could not be changed by the whim of Cabinet. This applies only to the value of the land itself however, not the improvements on it, so in practice it comes into effect only for high value central business district properties in the main centres.

For fishing quota there is a strong provision that means that fishing quota held by an overseas investor without consent is automatically forfeited to the Crown. Carter Holt Harvey ran up against this in 1991 when it owned Sealords. It became an overseas company when Brierley Investments sold its shareholding to the U.S. owned International Paper Company. The Director-General of Fisheries eventually gave an exemption allowing 40% of Sealords to be overseas owned and restored the quota.

When granting approval, the consent may be subject to conditions, though typically those conditions are minimal. The Overseas Investment Commission says it does monitor the approvals it has given, and has even threatened or actually prosecuted some investors. Investors have to report on their adherence to the conditions. But in fact the monitoring and enforcement is very weak. There is no provision for public submissions before decisions are made, though the Overseas Investment Commission has been known to receive and read them – although on one occasion it told the responsible Ministers they should take no notice of lobbying. But unless an application

for approval has independently received publicity, the people who would wish to make submissions would not know about it even after the decision has been made (unless they read *Watchdog*!).

There are various thresholds applying to land. For most land it must be over 5 hectares to require approval, but for land on islands, on or adjoining the foreshore, lakes or certain reserves, the threshold is variously zero, 0.2 hectares or 0.4 hectares. These are part of the legislation.

We have outlined many of the problems with the new legislation in the sample submissions you should have found on your seats.

The government is advertising the new legislation as tightening up the rules for land. It says that the way it will work is that applicants wanting to buy land but not intending to reside in New Zealand will have to include an asset management plan with their application showing how they will manage any historic, heritage, conservation or public access factors relevant to the property as well as any economic development planned. These will be made conditions of consent, but will be monitored only by requiring investors to report regularly on their compliance.

There are some positive aspects: fines are increased; the monitoring and enforcement provisions are improved. Offering any foreshore and seabed land which is the part of the deal to the Crown will be taken into account as part of the criteria. It is not a universal requirement however. Similarly provision of walking access over the land will be a criterion, but not a universal requirement.

Those should be requirements.

The legislation is also weakened in some ways. Some examples:

1. Virtually none of the promises about the new procedures are in the legislation. They are subject to regulation. Even the thresholds for land sizes and investment values are proposed to be in regulation rather than the statute. This is dangerous. It means that if a government makes new promises on weakening the regime during free trade agreement negotiations, it can strip the legislation of most of its teeth without the public even knowing, let alone having the opportunity to comment. Parliament's consent will not be required. In addition, any good in these new rules can stealthily be undone by a future government without public oversight.
2. The self-monitoring of conditions by investors is absurd. We need to have proper monitoring and enforcement. Should we be relying on investors to dob themselves in?
3. The important discretion that Ministers currently have to use other criteria when making their decisions has gone. Ministers can put further criteria in place by regulation, but lose the ability to treat each case on its merits or demerits. For some reason they retain this right for decisions on fishing quota.
4. Individual overseas investors don't have to meet a number of important criteria if they "intend" to reside in New Zealand. The criteria should be met unless they have actually obtained a right to permanent residence.
5. Some of the additional criteria for farmland have been dumped.

6. Purchases involving land with an unimproved value of more than $10 million will no longer require consent unless they fall into other categories.

On balance, for land, the proposed legislation is a very modest improvement, but there are some grave weaknesses and much more could be done as our sample submission suggests.

For fishing, the power to forfeit fishing quota from companies which are taken over by overseas investors without consent has disappeared. The sample submission suggests some improvements, for example that the criteria for investment in fishing quota should include conservation of fish, aquatic life, seaweed, and the marine environment.

But it is in the area of corporate investment (called "business investment" in the bill) that the bill is a danger, a further backward step, and a lost opportunity. Instead of reclaiming our right to select the overseas investment that comes into New Zealand, the government says that it will further increase the threshold from an already gaping $50 million to $100 million. If this was a shark net it would be letting the sharks right through.

Making it even worse, the threshold will be by regulation rather than embedded in the legislation. It can be changed by Cabinet without public scrutiny the next time pressure comes on from Australia under CER or from some other country during free trade agreement negotiations where the government is looking for something to pay for export access for yet another carton of unprocessed dairy produce or another log to be made into furniture somewhere outside New Zealand.

But this is only one aspect of an almost powerless regime that urgently needs to be strengthened. This is a tragically missed opportunity. Again, our sample submission gives some ideas of what else could be done. For example:
1. Overseas investment is still defined as being at least 25% overseas owned. Yet control can be achieved at a much lower level. Statistics New Zealand uses 10%, the common standard internationally. The threshold should be lowered to 10%.
2. The test of "good character" is not defined in the bill, but should be. There should be means to enforce it after the investment has been made. It should also apply to companies etc, not just individuals. A corporate code of conduct would be a useful 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 labour and environmental laws and employment agreements, court convictions and losses in civil cases.
3. Criteria for investment in business assets should be similar to those for land and fishing, but also deal with matters such as those I have described for a corporate code of conduct.
4. Retrospective consents, which are commonly given at present – rather like saying people should be let off driving without a licence as long as they get one after they've been caught – should not be allowed without penalty.
5. The Overseas Investment Commission is being abolished. We shed no tears. It will be replaced however by a "Regulator", employing existing Commission staff. The Regulator will be the head of Land Information New Zealand, an agency with little expertise in business-related matters. 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.

6. The Regulator's responsibilities should also include: making information on its decisions readily available to the public; and considering submissions from the public on its decisions.
7. Independent policy advice to government on overseas investment is required – not just from Treasury.
8. For offences against the Act, fines should be higher for corporate investors than individuals, and individuals in control of such bodies should be liable to imprisonment (as are individuals breaching the Act).
9. Affected members of the public should be able to take court action against investors breaching the Act.

The principles of the bill as it currently stands are a display of corporate power, overriding demonstrated needs for effective government, and privileging itself over the rules applied to ordinary people. I urge you to consider seriously the matters we are raising tonight, and take whatever action you are able, to achieve the opportunities and remove the threats inherent in this legislation. Otherwise New Zealand's economy, society and environment cannot develop in the interests of the people of New Zealand. The outcome depends on you.