Submission to the Finance and Expenditure Select Committee on the Overseas Investment Amendment Bill No 3

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1. Introduction

1.1 My full name is Ivo Geoffrey Bertram. I hold a doctorate in Economics from the University of Oxford. I taught in the School of Economics and Finance at Victoria University for more than three decades before retiring in 2009. I am currently a Senior Associate at the University's Institute for Governance and Policy Studies.

1.2 This submission is focused on the changes to the so-called "benefit to New Zealand test" laid out in clauses 8 and 9 of the Bill, which are proposed to replace the existing sections 16A and 17 of the Overseas Investment Act 2005.

1.3 My central argument is that the "benefit to New Zealand test" in the existing legislation is in fact a sham, not a genuine test at all, and that the proposed amendments to the Bill that are before the Committee fail to change that. The Act should be amended to enable Ministers of the Crown to (i) carry out proper cost-benefit assessment of each proposed new overseas acquisition of sensitive land, and (ii) be able to decline consent without being stymied by blatantly prejudicial detailed wording in the statute.

1.4 It is my submission that the Committee should delete the proposed new sections 17(b)(2)(ii) and 17(2)(b)(iv) entirely, and substitute new wording making it clear that the function of Ministers in assessing applications to purchase sensitive land is to properly take account of all relevant factors, without the extreme limitations imposed by the obscure and convoluted wording in the Act - both as it stands, and as it will remain if the proposed Bill is passed.

2. The High Court's September 2020 decision in the *Oceana Gold* case

2.1 In September 2020 the High Court released its decision in the case *Coromandel Watchdog v Minister of Finance and Associate Minister of Finance and Oceana Gold*, [2020] NZHC 2345[1]. The issue before the Court was a simple one: does the Overseas Investment Act 2005 permit Ministers to exercise their judgment on the basis of a full cost-benefit assessment of applications to buy up sensitive land, or are Ministers (i) barred from taking into account any matters not explicitly listed in s.17 of the Act, and

[1] Online at https://forms.justice.govt.nz/search/Documents/pdf/jdo/dc/alfresco/service/api/node/content/workspace/SpacesStore/8d5c21da-8e19-488f-b80b-e6d1d741fdcb/8d5c21da-8e19-488f-b80b-e6d1d741fdcb.pdf .

(ii) barred from taking into account all relevant detrimental effects of a proposed purchase? The Court has ruled that Ministers are so barred on both counts.

2.2 The facts of the case were straightforward. Oceana Gold (NZ) Ltd wished to buy a dairy farm near Waihi in order to convert it into a tailings dump for their mining operations at Waihi. The application was strongly opposed by local groups opposed to expansion of the mining industry. Strong arguments both in favour of the project and against it meant that the Government's decision on the application was controversial. Section 24(1)(a) of the Overseas Investment Act 2005 requires two Ministers of the Crown, including the Minister for Land Information, to sign off on any consent. In this case, for the first time since the Act was passed, two Ministers reached opposite positions, meaning that the application was declined[2].

2.3 Rather than taking a case for judicial review to test whether ministerial discretion had been properly exercised, the company submitted a second application later in 2019, which was successful[3] because the Minister for Land Information who had ruled against the earlier application was removed from the case under section 7 of the Constitution Act 1986, and replaced by another Minister who was prepared to sign the consent. Consequently, the task of seeking judicial review to settle the meaning and proper interpretation of the "benefit to New Zealand test" set out in sections 16A and 17 of the Overseas Investment Act 2005 fell on the shoulders not of the well-resourced transnational company, but on those of the impoverished voluntary organisation Coromandel Watchdog, against which the Court subsequently awarded costs – an outcome typical of the general climate of intimidation that surrounds cases of this nature when transnational capital confronts local community opposition.

2.4 The Court judgment has confirmed that the precise wording of the Act means that when Ministers are considering a proposed purchase of sensitive land under section 24, anything not <u>explicitly</u> listed as a <u>positive</u> benefit in the highly prescriptive section 17 must be ignored. Officials had therefore been correct in September 2019 when they advised the Ministers given the task of approving the Waihi consent application, "you are limited to considering the benefits of the transaction by reference to the 21 benefit factors set out in the Act and Regulations. You cannot consider matters outside

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[2] https://www.linz.govt.nz/overseas-investment/decision-summaries-statistics/2019-05/201710162-201810122 ; and "Reasons for decision by Ministers on application by Oceana Gold (New Zealand) Limited in respect of approximately 178 hectare of land in Waihi", https://www.linz.govt.nz/sites/default/files/media/doc/reasons_for_decision_by_ministers_on_application_by_oceana_gold_new_zealand_ltd_-_redacted.pdf , both accessed 25 October 2020.

[3] https://www.linz.govt.nz/overseas-investment/decision-summaries-statistics/2019-10/201900432; http://canterbury.cyberplace.co.nz/community/CAFCA/cafca19/fi-2019-10.html accessed 25 October 2020.

of those factors. The Act allows you to consider the *benefit* of transactions, but in most cases does not allow you to consider the *detriment* of transactions"[4].

2.5 The following are the High Court's words[5]:

> The provisions enacting the factors and criteria that are relevant to a consideration of an overseas investment application are not only highly prescriptive, they are limiting. There is no 'catch-all' provision enabling Ministers to consider 'any other matters' the Minister consider to be relevant. The legislature has left no such discretion to the relevant Ministers…… the Act's 'benefit to New Zealand' test is heavily circumscribed. It constrains decision-makers to a greater extent than similar tests in other statutory contexts.

2.6 The press release announcing approval of Oceana Gold's application was explicit in stating the limitations under which the consenting Ministers had made their decision[6]:

> The Ministers noted that they are required to assess only the benefits described in the Overseas Investment Act when making their decision" [emphasis added].

3. That was not cost-benefit analysis

3.1 From my perspective as an economist, any assessment of "benefit to New Zealand", as those words are commonly understood in the well-established literature on project evaluation as well as in other New Zealand policy contexts with which I am familiar, requires a focus on net benefit, with any identifiable detriments offset against identifiable benefits. To do otherwise must inescapably result in an unbalanced outcome, leading to decisions with the potential to cause substantial reductions in the national welfare of New Zealand, as economists understand that expression.

3.2 A "benefit test" from which consideration of detriments is excluded is no test at all. I am not aware of any other situation in the economic literature or in public policy where benefits alone are considered determinative in the absence of any consideration of offsetting costs. All economic models of rational decision-making of which I am aware take for granted that costs must be weighed against benefits. All the standard authorities on project evaluation describe that process as "cost-benefit analysis" with explicit consideration of both sides of the equation.

3.3 To take just one example, competition policy, section 67(3)(a) of the Commerce Act 1986 provides that in considering merger applications the Commerce Commission may approve a merger or acquisition only if it is "satisfied that the acquisition will result, or will be likely to result, in such a benefit to the public that it should be permitted".

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4 Land Information New Zealand, *MEMORANDUM BRF 20-091 Applications for consent under the Overseas Investment Act from Oceana Gold (New Zealand Limited)*, BRF20-091, 3 September 2019, p.4 paragraph 27 (released under the Official Information Act).

5 [2020] NZHC 2345 at paragraph 57.

6 "Ministers approve application to extend Waihi mine", press release dated 8 October 2019, https://www.beehive.govt.nz/release/ministers-approve-application-expand-waihi-mine accessed 26 October 2020.

3.4 No precise definition of the word "benefit" is provided in that Act, nor are the words "cost" or "detriment" anywhere mentioned. But in considering and deciding on merger applications the Commerce Commission has consistently treated "benefit to the public" as involving a careful balancing of detriments against benefits. Precisely which factors should be included as detriments and benefits has been much debated over the years and has recently been the subject of an important Appeal Court judgment, which I summarise below. But to my knowledge, at no time since the Commerce Act 1986 was passed into law has any party to proceedings under that Act questioned the proposition that detriments must be considered alongside benefits in application of the public benefit test specified in the Commerce Act.

3.5 The Appeal Court judgment to which I have referred above arose from a 2017 decision of the Commerce Commission which declined a merger application from two media companies, Fairfax and NZME, on the basis that the detriments outweighed the benefits. The Commission made clear that ([2017] NZCC 8 paragraph 1062) "in assessing public benefits, a "net" approach is taken whereby any costs or 'disbenefits' incurred in realising the benefits are deducted."[7] The Commission's decision was resoundingly upheld on appeal in both the High Court[8] and the Court of Appeal[9].

3.6 One of the key questions before the Appeal Court was ([2018] NZCA 389 paragraph 4(a)) "Was the High Court correct, as a matter of law, to find that the Commission has jurisdiction to take into account non-economic, unquantified detriments (in the form of plurality concerns) when applying the legal test for authorisation under s.67(3) of the Act?". The Appeal Court's answer was "yes" ([2018] NZCA 389 paragraphs 81 and 138(b)).

3.7 A second question before the Appeal Court was ([2018] NZCA 389 paragraph 4(c)) "Did the High Court err in law and fact in its approach to balancing unquantifiable detriments against the net quantifiable benefits of the transaction?". The Appeal Court's clear answer was "no" ([2018] NZCA 389 paragraphs 137 and 138(c)).

3.8 In its extensive review of the authorities on interpretation of "public benefit" ([2018] NZCA 389 paragraphs 55-75 and 85-87) the Appeal Court made clear both that detriments are relevant in evaluating "public benefit" and that "non-economic" detriments are to be included in the balancing exercise and may be determinative.

3.9 I cannot see any economically intelligible basis on which "benefit to New Zealand" in the Overseas Investment Act 2005 should be given a meaning that differs from "benefit to the public" in s.67(3)(a) of the Commerce Act 1986. That is, however, the position resulting from the extremely narrow pro-foreign-investment wording of the former Act.

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7 Commerce Commission decision *NZME Limited and Fairfax New Zealand Limited* [2017] NZCC 8, 2 May 2017 , https://comcom.govt.nz/__data/assets/pdf_file/0032/77639/2017-NZCC-8-NZME-Limited-and-Fairfax-NZ-Limited-Authorisation-determination-2-May-2017.pdf , Section 6 "Public benefits and detriments".

8 [2017] NZHC 3186, https://comcom.govt.nz/__data/assets/pdf_file/0029/78266/Commerce-Commission-v-NZME-Limited-and-Fairfax-NZ-Limited-High-Court-Judgment-18-December-2017.PDF

9 [2018] NZCA 389 https://comcom.govt.nz/__data/assets/pdf_file/0030/98904/Commerce-Commission-v-NZME-Limited,-Fairfax-Media-Limited-and-Stuff-Limited-Court-of-Appeal-Judgment-26-September-2018.PDF.

In my submission this is incompatible with any claim that New Zealand's vetting procedures are adequate to weed out predatory and destructive cases of foreign investment. The effect is to tar all foreign investment with the same brush, giving greatly increased credibility to arguments against foreign investment in general.

3.10 The Committee's task now ought to be to clean up this mess and make it crystal clear that any assessment of a proposed foreign investment must jump through the same analytical hoops as are required for public investments and merger applications. The obscure and convoluted proposed new wording of section 17(2)(b) in the Overseas Investment Amendment Bill (No 3) only makes matters worse, and must inevitably lead to further judicial review at some stage. In that proposed new section,

- Sub-sections (i) and (ii) codify the "counterfactual test"[10] in an extremely limited form which prevents (undefined) "non-directly-comparable aspects" from being netted off from the "factors" narrowly set out in section 17(1).

- Sub-section (iv) requires the Ministers to set aside any particular factor which turns out negative once "directly-comparable aspects" have been netted out for that particular factor

- Sub-section (iii) thereby loses all serious meaning, given that it allows Ministers to consider only positive, not negative, net benefits when adding-up factor scores

- The entire scheme of the proposed section is to block any overall consideration of the issues that most attract public scepticism regarding the alleged benefits of foreign investment.

3.11 Properly assessing net benefit – the only concept of "benefit" that makes economic sense - automatically involves assessing detriments including detriments that are genuine, whether or not they have been explicitly listed in the menu of "factors" provided in the Act.

4. Conclusion

4.1 Speaking in the Committee stage of debate on the Overseas Investment Act 2005, Green Part co-leader Rod Donald described the legislation as "a con job"[11]. Experience with the Act in practice has confirmed that judgment. This Committee now has the chance to give the law some credibility. The proposed amendments do not achieve this goal.

4.2 I shall be happy to speak to this submission if the Committee wishes.

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10 Established in *Tiroa E and Te Hape B Trusts v Chief Executive of Land Information* [2012] NZHC 147 and codifed

11 *Hansard*, Vol.626, 14 June 2005, p.21553.