COMPARISON BETWEEN NEW ZEALAND AND AUSTRALIAN LAWS AND POLICIES RELATING TO OVERSEAS INVESTMENT

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From the early days of European settlement direct foreign investment has played an important part in the development of both countries, with the bulk of the foreign investment originating from Britain and the United States of America. In the case of New Zealand direct investment from Australia was also important although there was little flowing in the opposite direction. The reason for this concentration in the origin of investment is historic since controls have generally made no distinction between investors on the grounds of nationality. Things are changing, and the records of both the Foreign Investment Review Board (FIRB) and New Zealand's Overseas Investment Commission (OIC) show that proposals involving investment from what may loosely be called "non traditional sources" are now more common.

Deane, in his 1970 study on foreign investment in New Zealand manufacturing (1) found that Australian firms were among the very first to arrive in New Zealand. He found that geographical proximity seemed to generate a greater awareness by Australians of the New Zealand market, leading to what a number of companies referred to as a "logical market expansion" by coming across the Tasman. One of the major motives given by Australian firms, but not by firms of any other country, was the desire to increase or maintain a share in the New Zealand market.

New Zealand continues to be the recipient of a substantial amount of direct foreign investment from Australia and of all countries has the greatest number of firms which are affiliated with Australian companies. From data prepared by the Australian Bureau of Statistics relating to 1980 it was found that 81 Australian based companies held investments in 369 enterprises in New Zealand, which represented 26% of the total number of Australian's overseas affiliates. By comparison countries in the ASEAN region had 240 enterprises with Australian investment, Papua New Guinea 143 and the United Kingdom 134 (2). Records kept by the New Zealand Department of Trade and Industry show that the number of firm enquiries from Australia to establish a business in New Zealand is rising in numbers and in addition represent a growing proportion of total enquiries.

Firm Investment Enquiries from Overseas

Source	1979 No.	1979 %	1981 No.	1981 %	1982 No.	1982 %
Australia	9	14	41	19	51	29
USA	20	30	54	26	36	20
Fed Rep of Germany	11	17	30	14	17	10
UK	6	9	27	13	24	14
Other	20	30	60	28	48	27
Total	66	100	212	100	176	100

Source: Department of Trade and Industry

New Zealand involvement in Australia has been small and usually warrants no mention in official records as a major source of direct investment. However, there is evidence of a growing interest on the part of New Zealand companies to invest across the Tasman. Figures made available by the Australian Treasury; indicate that during the period April 1976 to March 1983 there were 380 New Zealand investment proposals, of which 289 (76%) were approved unconditionally, 76 (20%) gained conditional approval, 3 were rejected and 12 withdrawn.

The Broad Policy

The policy of both Governments is to welcome foreign investment because of the contribution it has made to the development of the respective economies and the demands for new investment in the future which may be difficult to meet or to finance from each countries own resources.

In 1982, the Australian Treasurer made the following statement which summarised his country's overall policy:

> "The Australian Government welcomes the contribution foreign investment can make to the development of Australia's industries and resources. Capital from other countries supplements Australia's domestic savings and so adds to the funds available for investment. Foreign investment can also provide access to new technology, management skills and international markets. It is valuable in enhancing Australia's productive capital by increasing the resources available to the economy. The Government's policy is therefore to encourage foreign investment, provided such investment is consistent with Australia's national interests and meets the needs of the Australian community." (3.).

There has been speculation in the media that since the Labour Government came to power the rejection or delay of a number of foreign takeover proposals (including two from New Zealand) indicates a hardening in attitude towards foreign investment. While denying this to be the case the following statement which now accompanies the publication - "Australia's Foreign Investment Policy" - shows that the new Government is unwilling to accept the Liberal Government's policy in toto:-

> "The Australian Labour Government recognises that foreign capital has a significant role to play in the development of the Australian economy and is in general agreement with broad thrust of the policy outlined herein. There are inevitable differences of emphasis on some points of policy and when these have been developed in detail, a new guide to foreign investors will be issued."

We will have to wait until the next guide is published to learn the extent of these "differences of emphasis."

The policy of the New Zealand Government is also to welcome foreign investment as this extract from a Ministerial press statement indicates:

> "There is no doubt that New Zealand will benefit from more foreign investment and the inflow of technology and innovation that it can bring. The new criteria and guidelines make it quite clear that New Zealand welcomes foreign investment that can contribute to this country's development." (4.)

The Administration of Foreign Investment Policy

In Australia the Treasurer is responsible for the administration of foreign investment policy which covers the legal requirements of the Foreign Takeovers Act 1975 and other requirements which are established by way of statements of policy. The administration of Policy is based on the powers contained in that Act, the Banking (Foreign Exchange) Regulations and controls over exports. The Treasurer has delegated certain powers to the head of the Foreign Investment Division of the Treasury.

In New Zealand the Minister of Finance is responsible under the Overseas Investment Act 1973 for foreign investment matters, but he has delegated wide powers to the OIC which makes most of the decisions (in conformity with settled policy) and attends to the day to day administration.

In practice, the Australian Treasurer is more directly involved in decision making than is his New Zealand counterpart.

The Foreign Investment Review Board (FIRB) and the Overseas Investment Commission (OIC)

The FIRB advises the Treasurer as to the administration of foreign investment policy. It is an administrative body that has no statutory existence, thus the Foreign Takeovers Act 1975 makes no reference to the FIRB. The foreign investment Guidelines which relate to the establishment of new businesses indicate that the Treasurer is ultimately responsible for foreign investment policy but that the FIRB is the main source of advice to the Minister.

The FIRB has three members - two of whom, including the Chairman, are men from the world of business, while the third is the head of the Foreign Investment Division of the Treasury.

The main functions of the FIRB are:

(i) to examine proposals by foreign interests for investment in Australia and make recommendations to the Government on these proposals;

(ii) to advise the Government on foreign investment matters generally;

(iii) to foster an awareness and understanding, both in Australia and abroad, of the Government's policy;

(iv) to work towards a high level of Australian equity participation in new investment projects;

(v) to give guidance, where necessary, to foreign investors so that their proposals may be in conformity with Government policy;

(vi) to keep in touch with the activities of foreign-controlled businesses operating in Australia; and

(vii) to maintain liaison with State Government authorities.

It can be seen from the above that the FIRB is clearly at the centre of regulating foreign investment, notwithstanding that it has no authority to make final decisions.

The New Zealand Overseas Investment Act 1973 established a five member OIC, comprising two members from the private sector, one of whom is the Chairman. The representatives from the private sector make available to the Government the thinking and experience of people familiar with commerce and business. The other members represent the Treasury, The Reserve Bank of New Zealand and the Department of Trade and Industry.

The functions of the Overseas Investment Commission are of two kinds. First, it has the power to make decisions under delegated authority from the Minister of Finance and in practice very few of the investment proposals are referred to him. Secondly, the Commission has a duty to advise on foreign investment matters generally.

The specific functions of the OIC which are set out in section 9 Overseas Investment Act 1973 are:

(i) to consider proposals concerning overseas investment that are to be submitted for approval, consent, permission or exemption in accordance with regulations made under the Act;

(ii) to advise the Minister, or, as regulations made under this Act may so require, to determine, whether the proposals so submitted are in the national interest and whether any approval, consent, permission or exemption to them should be granted or refused;

(iii) to advise the Minister, or as regulations made under the Act so require, to decide, on the compatability of any proposal for overseas investment with the policy of the Government relating to any other matter;

(iv) to advise the Government on such means as will ensure that the fullest possible benefit from overseas investment will accrue to New Zealand in promoting economic growth and development by the efficient utilisation of resources, and the highest degree of production, trade and employment;

(v) to keep under continuous supervision, and, if regulations made under this Act so require, to control the level and extent to which overseas persons may own or control property in New Zealand, and to report from time to time on this matter to the Minister.

(vi) to advise the Government on all matters relating to overseas investment in New Zealand;

(vii) to exercise and perform such functions, powers and duties in relation to overseas investment as are confirmed or imposed on it under this Act or regulations made under this Act.

The idea of a Commission to deal with overseas matters was mooted publicly in the 1972 Labour Party Manifesto, where the Party indicated that it would supervise overseas investment, whether in new enterprises or existing concerns.

The Hansard report of the Parliamentary debate indicates the responsibilities which the Labour Government had in mind for the OIC. The Hon. W.E. Rowling (then Minister of Finance) when moving in March 1973 that the Bill be introduced, said this:

"The final powers of decision and control of overseas investment in New Zealand will remain with the Government, as this is an area of such importance to the future of New Zealand."

This extract suggests that the Minister of this early stage probably envisaged a vetting procedure that would involve him (or the Government) in more of the decision making than in fact emerged once the Overseas Investment Regulations 1974 became operative.

During the second reading of the Bill he said:

"The Commission's major duty will be to advise the Government, and when in doubt, the matter must be and will be referred to the Government." (Emphasis added).

An interesting point to emerge from the Parliamentary debate was the enunciation by the Government of a general principle that the onus of proof was on the applicant to show that the economy would benefit from any overseas takeover or other significant overseas capital injection. Since these earlier days, the emphasis has changed and the policy is now that applications will generally be approved unless there are good reasons why a proposal should not be allowed.

Decision Making

The FIRB member who is also the Treasury official has power delegated to him and he makes many of the routine decisions. About 70% of proposals are dealt with this way. The remainder are considered by the FIRB which merely makes recommendations to the Treasurer, for his final decision.
The position in New Zealand is different. The Minister of Finance has delegated decision making powers to the OIC which in turn has delegated certain powers to the Secretariat which deals with proposals that fall clearly within policy. Applications involving takeovers or commencing business are generally decided by the OIC while those outside settled policy, but containing elements which could warrant special consideration, are referred to the Minister. There are about twenty such cases a year and the Minister's decision may be taken as setting a new policy against which subsequent proposals are measured.

A comparison between the functions of the FIRB and the OIC draws out an important difference which largely accounts for the current difficulties between the Australian and New Zealand Government over harmonising foreign investment policy. The FIRB has an obligation to promote a high level of Australian participation in investment porposals. Indeed as we see later, this objective is central to Australia's foreign investment policy. By comparison the OIC has no explicit duty to foster local participation and in practice is more comfortable with higher levels of foreign ownership than is the case in Australia. In other words, although the degree of local share participation is taken into account in New Zealand in asessing proposals, it would appear to be interpreted more flexibly than in Australia.

The Australian Foreign Takeovers Act 1975

It should be understood that the Act only applies to acquisitions, therefore the policy has rather limited control over a foreigner establishing a new business. Unless a new business or project is in a sector of the economy which is subject to special restrictions (i.e. finance, insurance, the media, civil aviation and uranium), proposals to establish a new business are only examinable under the Policy where the total amount of the investment (including the value of any leased assets) is $5 million or more. An acquisition of real estate valued at less than $350,000 does not require approval unless the acquisition is part of a property investment programme or an acquisition of a business. A proposal to establish a new business will, however, almost certainly involve a transaction requiring exchange control approval, even it it only involves the incorporation of a company with a nominal share capital.

The Act contains detailed provisions designed to catch any means by which an Australian business or company may fall under the control of a foreigner. The following provisions in the Act are of particular significance:

- Sections 18 and 19 empower the Treasurer to prohibit or reverse an acquisition of shares or assets by a "foreign person" that results in "foreign control" of a business or corporation that would be contrary to the "national interest:;

- Section 25 provides that such power is not available to the Treasurer once he has been notified of the proposed transaction but does not issue a prohibiting or interim order within 30 days;

- Section 26 requires that any proposal by a foreigner to acquire shares in an Australian corporation, that would result in, increase or alter the ownership of a "substantial interest" in the corporation must be notified to the Treasurer.

- The meaning of "foreign person" and "foreign control" depend upon the term "substantial foreign interest" defined as an interest of 15% in ownership or voting power of a corporation or business by a single foreign interest (either alone or together with associates) or an interest of 40% in the aggregate in the ownership of voting power of a corporation or business by two or more foreign interests (either alone or together with associates);

- The Act applies to "foreign-to-foreign takeovers" where a foreign-owned business or company is to be take over by another foreigner;

- The Act similarly applies to "off-shore takeovers" where an overseas company that conducts a business in Australia is acquired by another overseas company and the value of the assets of that Australian business within the target overseas company exceeds $3 million (Section 13);

- The Policy states that the Government will not usually intervene in proposals falling within the scope of the Act where the total assets of the business or corporation are less than $2 million unless the acquisition is in the specially restricted sectors referred to above or involves the acquisition of real estate. Note that no account is taken of liabilities since "total assets" are measured as the higher of:

(i) the last balance sheet gross value of all assets employed in the target business (including any tangible assets); or

(ii) the total consideration to be paid for the business.

A foreign investor will seek to come within Section 25 by notifying the Treasurer of the proposal and submitting that the Treasurer should not make a prohibiting or an interim order within the 30 day period. If the Treasurer does not make such an order and instead responds by stating that he has no objections to the proposal in terms of the Policy, the investor will have received what is termed a FIRB Approval.

There are limits imposed on the Treasurer's consideration and the options available to him. These are as follows:

- if he fails to make an order within 30 days and does not publish it within 10 days of its making then the proposal cannot be prohibited;

- the order can be a final prohibiting order under Sections 18, 19, 20 or 21 or an interim order under Section 22 prohibiting the proposal for 90 days after the publication of the order (therefore giving the Treasurer a maximum of 130 days from notification to consider the proposal);

- if after making the interim order the Treasurer does not make a final prohibiting order within the 90 day period, then again the proposal can proceed;

- under Section 23 the Treasurer can revoke any order when he is satisfied that, prior to the expiry of that 90 day period, the proposal should proceed.

The two criteria to which the FIRB apparently gives greatest weight in arriving at a recommendation are the "Net Economic Benefits Test" and the "Australian Participation Opportunity Test".

The "Net Economic Benefit Test" examines against the circumstances in the relevant industry whether or not the proposal would produce net economic benefits to Australia in relation to the following matters:

- competition, price levels and efficiency;

- introduction of technology or managerial or work-force skills new to Australia;

- improvement in the industrial or commercial structure of the economy or in the quality and variety of goods and services available in Australia; and

- development of or access to new export markets.

The "Australian Participation Opportunity Test" examines the extent to which Australians are to take part in the proposal through equity participation and the degree of local management and control following the implementation of the proposal.

The new Labour Government appears to be enforcing the "Australian Participation Opportunity Test" quite vigorously and is asking applicants to demonstrate that no Australian interests are willing to participate in the proposed takeover on reasonable terms. It is now important that there be a public announcement of the proposal as early as possible to convince the authorities that the public is aware of the proposed transaction. The Government's attitude is brought out clearly in the Treasurers' press statement dealing with the proposed takeover by New Zealand's Healing Industries Limited of the English owned firm - Lawrence Smith and Canning Pty Limited.

> "In view of its concern about the extent of foreign control of Australian industry, the Government considers that the Australian interests should have an opportunity to submit offers to buy businesses, be they currently Australian or foreign owned, which are the subject of foreign investment proposals."

Other criteria contained in the Policy which are taken into account by the FIRB are:

(i) whether the business could be expected to be conducted in a manner consistent with Australia's best interests in such matters as:

- local processing of materials and the utilisation of Australian components and services;
- involvement of Australians on policy-making boards of the businesses;
- research and development;
- royalty, licensing and patent arrangements; and
- industrial relations and employment opportunities;

(ii) the interests of Australian shareholders, employees, creditors and policyholders affected by the proposal;

(iii) whether the proposal would be in conformity with other government economic and industrial policies and with the broad objectives of national policies concerned with such matters as Australia's defence security, aboriginal interests, decentralisation in the environment, as well as with Australia's obligations under international treaties; and

(iv) taxation considerations, including the manner in which the proposal is to be financed.

<u>New Zealand Overseas Investment Regulations 1974</u>

This legislation provides a mechanism whereby new foreign investment can be screened and covers borrowing in New Zealand by overseas companies and borrowing overseas by companies incorporated in New Zealand.

In respect of new investment consent is required for:

(i) "an overseas person" to acquire 25% or more or any class of share in a company;

(ii) a company incorporated in New Zealand to issue or allot shares to an "overseas person" if the effect of the transaction is to give the "overseas person" 25% or more of any class of share;

(iii) an "overseas person" to commence business in New Zealand.

An "overseas person" can be an individual or a company not resident in New Zealand, or a resident company in which 25% or more of any class of share is owned by an overseas person.

The takeover of a company, whether by the acquisition of shares or the assets used in carrying on the business is normally approved automatically where the consideration is under $500,000. (In practice a detailed application is still needed to ensure that an investments accords with policy.)

On receipt of a notice of a proposed takeover that complies with the requirement of Regulation 7, Overseas Investment Regulations 1974 the Secretary of the Commission must "forthwith", record the notice in a register and a decision as to whether or not to grant consent must be made within 6 weeks of the date of registration.

On receipt of a notice that does not comply with regulation 7 the Secretary may, at his discretion, record the notice in the register. The six weeks in which a decision must be made runs from the time of registration.

Consent is required for an overseas company to raise funds in New Zealand where the total amount of borrowings undertaken by that company exceeds $300,000. The definition of borrowing is wide, covering loans, overdrafts, mortgages and the acceptance of any bill of exchange or the issue or any promissory note except where the acceptance or issue a directly associated with a trade transaction.

Consent is also required for companies incorporated in New Zealand to borrow overseas.

In 1979 the Minister of Finance revised the criteria to be used by the OIC in its assessments of investment proposals. In so far as the criteria conveyed by the Minister to the OIC constitute "...general or special directions given by the Minister to the Commission.....", the Commission is obliged under Section 9 (2) Overseas Investment Act 1973 to make decisions with close regard to the criteria. They are:

(i) added competition to local industry, lower prices and greater efficiency;

(ii) the introduction of new technology, managerial or technical skills;

(iii) the development of new export markets or increased market access;

(iv) the extent to which the proposal is likely to make a net positive contribution to the balance of payments;

(v) the creation of new job opportunities;

(vi) the promotion of New Zealand's economic growth.

As additional considerations the OIC is also expected to take account of:

(i) the degree of equity participation by local shareholders in relation to proposals which involve the ownership and control of New Zealand's natural resources;

(ii) the potential impact of the proposal on the environment and on regional development;

(iii) the implications of the proposal for the Government's other economic and industrial policies and any other national policies which might be affected by the proposal;

(iv) the relative opportunities of shareholders in small private companies to dispose of their shares to the best advantage.

Australian Participation and the "Naturalisation" of Companies

The Australian Government holds strongly to the view that its citizens should have the opportunity to participate fully in the development of Australia's industries and natural resources. For this reason one of the criteria against which foreign investment proposals are assessed is the extent of Australian participation which is sought and the level of Australian ownership, management and control which will exist once the proposal is implemented. In view of the importance attached in foreign investment policy to provide opportunities for Australians to participate in the control of Australia's industries and natural resources it is normally expected that the existance of a proposal for the acquisition of a significant Australian business be a matter of public record. A public announcement is not usually required in respect of small takeover proposals (that is proposals where the assets of the target company are less than $2 million).

In line with its policy of giving Australian citizens an opportunity to participate in companies operating in Australia the Government welcomes proposals by foreign companies already operating in Australia to increase the level of local participation in their operations. There is a framework and an incentive under the naturalisation provision of the foreign investment Policy for companies that are predominantly foreign owned to increase the level of Australian operations. The benefits arising from a naturalisation proposal include the right to undertake new projects in Australia. (Other than projects in the uranium, finance, insurance, media and civil aviation sectors).

It is rare for the OIC to insist on a public announcement as to the intentions of an overseas person to acquire a company operating in New Zealand. Similarly the Commission has no policy which explicitly encourages New Zealand participation in existing businesses which are overseas owned. However, policy relating to local borrowings provides an indirect incentive for companies to become at least majority New Zealand owned in order to gain unrestricted access to the local capital market. Under the present policy companies which are 50% or more overseas owned have local borrowing limits based on turnover. Once a company is majority owned and controlled by New Zealand interests, it is allowed free access to the New Zealand capital market, notwithstanding that there may still be a significant minority overseas shareholding.

Is Australia's Policy More Restrictive than New Zealand's?

There is a good deal of similarity between the two countries' foreign investment policies, which by international standards are liberal. Each country has special features which reflect its resource endowments; for example Australia has tight control over the utilisation of mineral resources, while New Zealand virtually excludes overseas ownership of rural land. The main differences are:

- Australia has a lower threshold of overseas share ownership than is the case in New Zealand before the vetting procedures come into play. (15% compared with 25%);

- Both foreign investment policies require a demonstration of net national benefit. This appears to be generally administered less restrictively in New Zealand than in Australia;

- Australia places a high priority on promoting Australian shareholding and control in ventures. By contrast although New Zealand also favours local share participation, it ususally adopts a more relaxed attitude to the level of overseas ownership and control;

- Notice of an overseas takeover is generally given to allow Australians the opportunity to make a counter bid. As a general policy this is not the case in New Zealand.

All told it is probably fair to conclude that the Australian foreign investment regime is some what more restrictive than that of New Zealand.

The Future

Foreign investment has been relegated to a "second generation" issue for consideration under CER. However, the subject deserves a higher priority and recent developments indicate that reconciling the two investment regimes is an urgent task, which will exercise the wit and ingenuity of the respective Governments and their advisers.

The reductions of trade barriers under CER is very likely to lead to greater flows of investment between the countries and the new arrangements will alter the relative attractiveness of Australia and New Zealand as recipients of investment from other countries. Income gains from freer trade should encourage investment in each country from the other as decision makers perceive improved opportunities for growth. On the other hand direct investment which owed its origin to the presence of trade barriers may ease as protective levels are reduced. Thus, changes to the foreign investment guidelines are likely to affect flows of investment between the countries but a measure of these cannot be determined in advance, with certainty.

The New Zealand Government has made it known that its policy is to have the investment regimes in the two countries harmonised once CER comes into operation. (5).

Even if this aim is not achieved in the short term, New Zealand should still benefit from the investment from Australia and from investment arising from third countries attracted by the prospect of an extended Australasian market.

1. Deane R.S. Foreign Investment in New Zealand Manufacturing, Sweet and Maxwell (NZ) Ltd Wellington 1970.

2. Australian Direct Investment in New Zealand - Bureau of Industry Economics. Australian Government Publishing Service, Canberra 1983.

3. Foreword. Australia's Foreign Investment Policy. Australian Government Publishing Service, Canberra 1982.

4. Hon. R.D. Muldoon Press Statement 27 July 1979.

5. Hon R.D. Muldoon Press Statement 29 Jun 1983.

<u>Sources.</u>

Australian Direct Investment in New Zealand. Bureau of Industry Economics. Canberra 1983.

Australia's Foreign Investment Policy. Department of the Treasury. Canberra 1982.

Foreign Investment Review Board - Annual Report 1982.

<u>Papers</u>: Administration and Legal Requirements of Australia's Foreign Investment Policy and Exchange Control. Leigh Brown - Solicitor-Sydney 1983