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To: Minister of Finance

AIDE MEMOIRE: ADDITIONAL OPTIONS FOR OVERSEAS INVESTMENT REVIEW

This note provides information further to our recent report (T2009/1692 refers) for our meeting with you on 21 July in relation to two issues:

- (i) *sensitive land test* – three alternative options for the criteria overseas investors must meet for approval in sensitive land; and
- (ii) *'national interest' test* – alternative options for a new criterion that could be added to the test for significant business assets.

These additional options have been prepared in a short timeframe and should be seen as indicative at this stage.

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OPTIONS FOR SENSITIVE LAND TEST

Option 1: Investor test and rely on domestic legislation

Under this option investors would need to:

1. **Good investor.** Meet the investor test of good character, relevant business acumen and experience, and financial commitment to the investment.
2. **Identification.** Identify sensitive features on the relevant land that relate to historic areas, indigenous vegetation, wildlife protected under the Wildlife Act (such as salmon and trout habitat), and where walking access has been customarily provided.
3. **Statement of obligations.** Sign a certificate stating that they are aware that:
 - the relevant land contains sensitive features. and;
 - New Zealand legislation has provisions to protect these features.

The aim of this test is to make investors aware of sensitive features on the relevant land and that New Zealand legislation provides some protection for these features.

The only condition of consent would be that they must continue to meet the investor test (as occurs under the current Act).

Advantages	Disadvantages
<ul style="list-style-type: none">• Significantly simpler regime• Significantly more predictable for investors• Overseas investors face the same legal requirements as domestic investors.	<ul style="list-style-type: none">• Relying on domestic law may result in less protection for sensitive features than would be provided by a domestic owner. For example, New Zealand owners may be more likely to voluntarily provide public walking access, which is not required by law.• Requirement to identify significant features is more than what domestic investors must do, and is potentially costly.

Option 2: Investor test and negotiation over additional protections

Under this option investors would need to:

1. **Good investor.** Meet the investor test of good character, relevant business acumen and experience, and financial commitment to the investment.
2. **Identification.** Identify sensitive features on the relevant land that relate to historic areas, indigenous vegetation, wildlife protected under the Wildlife Act (such as salmon and trout habitat), and where walking access has been customarily provided.
3. **Statement of obligations.** Sign a certificate stating that they are aware that:
 - the relevant land contains sensitive features;
 - New Zealand legislation has provisions to protect these features;
4. **Negotiation and report.** As a condition of consent, agree to negotiate with the relevant government agency over how to provide protection for any sensitive features on the land within six months of consent. The investor must then report to the Ministers of Finance and Land Information on the outcome of the negotiations.

As well as making investors aware of sensitive features on the relevant land and that New Zealand legislation provides some protection for these features, this test requires investors to enter into negotiations that may result in the *voluntary* provision of additional protections for sensitive features. For example, the investor may agree to place a covenant over an area of indigenous vegetation, to provide additional walking access or to support the registration of an historic feature.

Advantages	Disadvantages
<ul style="list-style-type: none">• Investors may voluntarily agree through negotiations to provide protections above what is required by law and in line with what some domestic investors would provide.• Reporting to Ministers provides the ability to monitor what, if any, protections are being provided through the negotiations.	<ul style="list-style-type: none">• As the negotiations provide for voluntary protections, there is no guarantee that investors will agree to provide additional protections.• The objective of the negotiation requirement could be confusing for investors given that they do not have to reach any agreement.• The outcome of any negotiations is not known to the investor before consent is provided, compared to the status quo where protections are a condition of consent.• The process may be viewed as creating an 'informal' obligation to provide additional protection.• Requirement to identify significant features is more than what domestic investors must do, and is potentially costly.

Option 3: Investor test and Ministerial discretion over additional protections

Under this option investors would need to:

1. **Good investor.** Meet the investor test of good character, relevant business acumen and experience, and financial commitment to the investment.
2. **Identification.** Identify sensitive features on the relevant land that relate to historic areas, indigenous vegetation, wildlife protected under the Wildlife Act (such as salmon and trout habitat), and where walking access has been customarily provided.
3. **Walking access.** Where access to waterways, land managed by DoC and areas used for hunting/fishing/recreation has traditionally been provided in the past and there is no other reasonable route, public walking access must continue to be provided unless this is not practicable;
4. **Native vegetation.** Where relevant, Ministers must be satisfied that there will be 'adequate' mechanisms for protecting or enhancing existing areas of significant indigenous vegetation;
5. **Wildlife protection.** Where relevant, Ministers must be satisfied that there will be 'adequate' mechanisms for protecting or enhancing existing areas of significant habitats of trout, salmon, and other wildlife protected under the Wildlife Act 1953;
6. **Heritage protection.** Where relevant, Ministers must be satisfied that there will be 'adequate' mechanisms for protecting or enhancing historic heritage.

This test provides for Ministerial discretion over the protection of sensitive features. The protections provided by the previous owner could be used as a guide to what protections should be provided by the overseas owner (for example, continuing to allow walking access across the property).

Advantages	Disadvantages
<ul style="list-style-type: none">• Ministerial discretion over whether the protections are 'adequate' would ensure that they are at least in line with social norms.• Limiting the protections to being in line with social norms means investors are less likely to face significantly higher compliance requirements that can be imposed under the current Act.	<ul style="list-style-type: none">• Ministerial discretion results in less certainty for investors as at the point of application they don't know what standard they need to meet or what conditions will be imposed by Ministers.• Allowing flexibility for Ministers means there remains the potential for these conditions to be higher than what a domestic owner would provide.• Requirement to identify significant features is more than what domestic investors must do, and is potentially costly.

OPTIONS FOR A 'NATIONAL INTEREST' TEST

A possible test is shown below. Alternative options for the relevant square brackets are indicated in the table.

[If an investment is made in any of the following sectors – energy, telecommunications, air transport, sea transport, or defence –] the Minister of Finance retains the right to decline approval of an investment application if the Minister considers [, on the basis of credible evidence,] that [it is necessary to protect public order and/or essential security interests, where these concerns cannot be addressed under existing law]. [If an application is declined on this basis then the Minister must table the decision in Parliament, within one month of the investor being notified on the Minister's decision.]

Parameter	Broader/Flexible	Narrower/Predictable	Trade-off
Sectors	Do not specify sectors. All business applications could be captured.	"If an investment is made in any of the following sectors – energy, telecommunications, air transport, sea transport, or defence –"	<ul style="list-style-type: none"> • More certainty for investors or less flexibility for Ministers.
Evidence	Do not include.	"on the basis of credible evidence"	<ul style="list-style-type: none"> • Higher hurdle for Ministers or less certainty for investors.
National interest vs National security	Modified OECD text on national interest – "it is necessary to protect vital economic interests, where these concerns cannot be addressed under existing law."	OECD-based text on national security - "it is necessary to protect public order and/or essential security interests, where these concerns cannot be addressed under existing law."	<ul style="list-style-type: none"> • "National interest" covers economic considerations as well as security/order considerations. • "National security" covers only security/order considerations.
	Modified OECD text on national interest – "it is necessary to protect public order, public health, morals or safety and/or vital economic interests, where these concerns cannot be addressed under existing law."	European Commission text on public order/security - "there is a genuine and sufficiently serious threat to a fundamental interest of society, where these concerns cannot be addressed under existing law."	
Reporting	Do not include.	"If an application is declined on this basis, then the Minister must table the decision in Parliament, within one month of the investor being notified on the Minister's decision."	<ul style="list-style-type: none"> • Higher hurdle for Ministers or less transparency/certainty for investors.

FTA Implications: There may be implications in the ability to apply these changes to New Zealand's existing Free Trade Agreements. MFAT is currently exploring this aspect.

International Approaches	
Australia	<ul style="list-style-type: none"> Foreign Acquisitions and Takeovers Act (FATA) prescribes sensitive sectors including media, telecoms, transport (rail, airports, ports etc), investment in the defence sector, encryption technology and uranium/plutonium mining and nuclear power provision. FATA also gives the Treasurer the ability to look across a number of areas which are screened, including acquisition of shares, acquisition of assets, urban land, and control of Australian businesses. If he considers that an investment in these areas is not in the “national interest” then he can reject the application.
United States	<ul style="list-style-type: none"> President can suspend or prohibit any foreign acquisition, merger, or takeover (collectively, “acquisition”) of a U.S. company that he determines threatens to impair the national security of the United States. All foreign investments that may affect national security can be screened and “credible evidence” is required to show that national security would be harmed by the investment. He must also consider that existing legislation does not provide adequate safeguards to protect national security.
United Kingdom	<ul style="list-style-type: none"> The UK does not prohibit any type of private sector investment and there are no conditions placed on investment. No permission is required to establish a business presence in the UK, although there are regulation on the use of business names and certain business sectors which may require licences or authorisation (such as finance, defence and oil exploration).
Germany	<ul style="list-style-type: none"> Allows an investment to be prohibited if it constitutes a genuine and sufficiently serious threat to public order or security. This is defined by the EC Treaty as “a genuine and sufficiently serious threat to a fundamental interest of society”. Acquisitions of 25 % or more of the voting shares of enterprises producing certain military goods, cryptographic equipment for intergovernmental communication, certain earth observation systems. Done by Ministry responsible for legislation initiating an enquiry into a specific investment (not screening all applications). Evidence supporting the decision must be provided to the investor, and decisions can be challenged in the courts
Denmark	<ul style="list-style-type: none"> Denmark places particular safeguards around sensitive sectors including hydrocarbons, defence, aircraft and ships. The safeguards are contained in specific legislation, for example the law requiring the Minister of Justice to approve investments of 40% or more of the equity or 20% or more of the voting rights in a defence company doing business in Denmark. Approval will be granted unless there are foreign policy considerations or security issues weighing against approval.