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Senator Simon Birmingham
Acting Chair, Joint Standing Committee on Treaties
PO Box 6021
Parliament House
CANBERRA ACT 2601

21 DEC 2011

Dear Senator Birmingham

Government Response to JSCOT Report 118 in relation to the Protocol on Investment to the Australia - New Zealand Closer Economic Relations Trade Agreement

Thank you for your letter of 22 September 2011, concerning Report 118 of the Joint Standing Committee on Treaties in relation to the Protocol on Investment to the Australia - New Zealand Closer Economic Relations Trade Agreement (the Investment Protocol). I thank the Committee for its work in considering the Investment Protocol.

I note that a majority of the Committee recommended that binding treaty action be taken in relation to the Investment Protocol. However, I understand that there was a dissenting report made by the Hon. Dr Sharman Stone MP and the Hon. Mr John Forrest MP, which indicates that they could not support the Investment Protocol.

Response to concerns raised in the dissenting report

I note that the dissenting report highlights specific concerns regarding: (i) differing thresholds and domestic considerations for screening of foreign investment as between Australia and New Zealand; (ii) New Zealand charging a fee for the screening of foreign investment; and (iii) commitments made by Australia and New Zealand in relation to Senior Management and Board of Directors protections.

(i) Different screening thresholds and domestic considerations for foreign investment in Australia and New Zealand

Australia and New Zealand set their own screening thresholds, apply different tests when considering foreign investment proposals and have different domestic considerations on what are regarded as sensitive assets. The dissenting report comments that these differences are not addressed by the Investment Protocol and that "we still have not learned much about equal or reciprocal bilateral trade agreements."

The Investment Protocol provides for the liberalisation of investment between Australia and New Zealand and complements other bilateral initiatives. It represents a negotiated outcome between two sovereign nations and is an important step towards the creation of a Single Economic Market (SEM). It is the consideration of outcomes in achieving reforms under the SEM, and not necessarily the harmonisation of law, that is the key principle of the SEM Outcomes Framework.¹ Consistent with this principle, it is not the goal of the Investment Protocol to align Australia's foreign investment screening regime to that of its closest trading partner or vice versa. The threshold, test and classifications of what may be regarded as sensitive assets for one country in the context of the screening of foreign investment may not be desirable or appropriate for another country.

In addition, and as noted in the National Interest Analysis to the Investment Protocol,² the differing threshold for non-sensitive assets agreed in the Investment Protocol (A\$1,005 million in the case of Australia and \$NZ 477 million in the case of New Zealand) reflect the different sizes of the respective economies, with Australia's economy being roughly eight times that of New Zealand. Moreover, these thresholds roughly represent a four-fold increase from both of the current thresholds applied by our respective countries (\$A231 million in the case of Australia and \$NZ 100 million in the case of New Zealand).

To align these thresholds to the same dollar amount would see New Zealand having a threshold that is roughly eight times higher than its current threshold, whilst Australia would have a threshold that is only around four times higher than its current threshold. Such an outcome would represent a less reciprocal agreement than that which was agreed.

(ii) Fees charged by the New Zealand Overseas Investment Office

The New Zealand Overseas Investment Office charges an application fee for foreign investment applications involving significant businesses whereas Australia's Foreign Investment Review Board (FIRB) does not.³ It is on this basis that the dissenting report states that the Investment Protocol does not achieve the harmonization of fees charged.

The ultimate goal of harmonisation in the context of Closer Economic Relations and the SEM is to reduce the regulatory burden for businesses in Australia and New Zealand. The Investment Protocol represents an important step towards this goal by reducing compliance costs on both sides of the Tasman. As noted in the National Interest Analysis to the Investment Protocol,⁴ the need for Australians to apply to invest in business assets is estimated to be reduced by around two-thirds once the new thresholds are implemented, with the incidence of application fees expected to be similarly reduced.

Full harmonisation of specific features of the administration of regulation, including such matters as fees charged, may not always be achievable nor desirable within the broad framework of closer economic relations. Nor it is a requirement of the SEM.

¹ It is recognised in both the *Joint Statement of Intent: Single Economic Market Outcomes Framework*, released by former Prime Minister Rudd and Prime Minister Key on 20 August 2009, and the *Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on the Coordination of Business Law*, which was signed by the Australian and New Zealand Governments on 23 June 2010.

² Paragraph 13 of the National Interest Analysis [2011] ATNIA 10.

³ These fees range between \$NZ 11,960 and \$NZ 13,187.

⁴ Paragraph 14 of the National Interest Analysis [2011] ATNIA 10.

(iii) Commitments made by Australia and New Zealand in relation to Senior Management and Board of Directors protections

The Investment Protocol imposes a range of obligations on Australia and New Zealand to facilitate and protect investment between the two countries. Article 8 (Senior Management and Boards of Directors) provides a limitation upon either Party restricting the nationality or residency of board members or restricting the nationality of the senior management of an enterprise of that Party. The dissenting report expresses concern that this commitment could lead to the situation where a board or senior management is not resident in either country and does not have Australian or New Zealand nationality, but enjoys preferential investment screening treatment.

The commitments made by Australia and New Zealand including in relation to Article 8 (Senior Management and Board of Directors) and the preferential screening thresholds do not apply to benefit investors of third countries. Article 18 (Denial of Benefits) operates to allow Australia to deny the benefits of the Investment Protocol to an investor that is an enterprise of New Zealand in circumstances where that investor has no substantive businesses operations in New Zealand and persons of a third country or Australia own or control the enterprise. New Zealand is provided with the reciprocal ability to deny benefits in corresponding circumstances.

I also note the commitments made under Article 8 (Senior Management and Board of Directors) are not absolute. Nationality or residency requirements may be placed on a minority of board members where this would not materially impair the ability of the investor to exercise control over its investment and residency requirements may be applied to senior management positions. In addition, Australia has reserved against its commitments within Annex I to the Investment Protocol to preserve its ability to specify nationality and residency restrictions in respect of certain corporations,⁵ and a specific reservation is made in Annex II to retain the Australian Government's ability to impose restrictions on the composition of senior management and boards of directors in the privatisation of government assets and enterprises. The *Corporations Act 2001* requirement, that at least one director of a private company must be ordinarily resident in Australia and at least two directors of a public company must be ordinarily resident in Australia, also remains.⁶

I trust this information is of assistance to the Committee. The action officer for this matter in my Department is Ms Belinda Robilliard who can be contacted on 02 6263 3387.

Yours sincerely

WAYNE SWAN

⁵ For example, Annex I to the Investment Protocol contains reservations in respect of the Telstra corporation with the effect that requirements within the *Telstra Corporation Act 1991* regarding the composition of senior management and the board of directors are preserved.

⁶ This is contained within section 201A.