

Reference: 20180132

13 June 2018



Thank you for your Official Information Act request, received on 2 April 2018. You requested the following:

*“Under the OIA, please provide me with all advice provided to the Minister for Land Information, the Minister of Finance, and Associate Ministers of Finance regarding possible changes to the Overseas Investment Act 2005 since 26 October 2017.”*

You subsequently clarified that your request was to be for:

*“Official briefings relating to proposed changes to the Overseas Investment Act 2005, other than those related to the introduced Overseas Investment Amendment Act or related SOP.”*

On 30 April 2018 I wrote to you to extend the time limit for deciding on your request by an additional 30 working days due to the consultations needed.

## Information Being Released

Please find enclosed the following documents:

| Item | Date             | Document Description  | Decision        |
|------|------------------|---|-----------------|
| 1.   | 21 November 2017 | Treasury Report: Overseas Investment Act 2005 - Process for Further Reform        | Release in part |
| 2.   | 6 December 2017  | Aide Memoire: Overseas Investment Act 2005 - Infrastructure and Monopoly Rents    | Release in part |
| 3.   | 15 December 2017 | Treasury Report: Overseas Investment Act 2005 Review - Pre CPTPP Policy Decisions | Release in part |

|    |                 |  |                 |
|----|-----------------|--|-----------------|
| 4. | 19 January 2018 | Treasury Report: Cabinet Paper - Overseas Investment Update and Next Steps | Release in part |
|----|-----------------|--|-----------------|

I have decided to release the relevant parts of the documents listed above, subject to information being withheld under one or more of the following sections of the Official Information Act, as applicable:

- under section 6(a) – to protect the security or defence of New Zealand or the international relations of the Government of New Zealand,
- personal contact details of officials, under section 9(2)(a) – to protect the privacy of natural persons, including that of deceased natural persons,
- advice still under consideration, section 9(2)(f)(iv) – to maintain the current constitutional conventions protecting the confidentiality of advice tendered by Ministers and officials,
- under section 9(2)(h) – to maintain legal professional privilege,
- confidential information, under section 9(2)(j) – to enable the Crown to negotiate without prejudice or disadvantage, and
- direct dial phone numbers of officials, under section 9(2)(k) – to prevent the disclosure of information for improper gain or improper advantage.

Direct dial phone numbers of officials have been redacted in order to reduce the possibility of staff being exposed to phishing and other scams. This is because information released under the OIA may end up in the public domain, for example, on websites including Treasury's website.

Please note that this letter (with your personal details removed) and enclosed documents may be published on the Treasury website.

This reply addresses the information you requested. You have the right to ask the Ombudsman to investigate and review my decision.

Yours sincerely

Robbie Taylor  
**Acting Team Leader, Overseas Investment**

# OIA 20180132

## Information for Release

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|    |  |    |
|----|--|----|
| 1. | <a href="#"><u>Treasury Report: Overseas Investment Act 2005 - Process for Further Reform</u></a>        | 1  |
| 2. | <a href="#"><u>Aide Memoire: Overseas Investment Act 2005 - Infrastructure and Monopoly Rents</u></a>    | 21 |
| 3. | <a href="#"><u>Treasury Report: Overseas Investment Act 2005 Review - Pre CPTPP Policy Decisions</u></a> | 27 |
| 4. | <a href="#"><u>Treasury Report: Cabinet Paper - Overseas Investment Update and Next Steps</u></a>        | 54 |

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## Treasury Report: Overseas Investment Act 2005 - Process for Further Reform

|       |                  |              |            |
|-------|------------------|--------------|------------|
| Date: | 21 November 2017 | Report No:   | T2017/2551 |
|       |                  | File Number: | IM-5-3     |

### Action Sought

|   | Action Sought  | Deadline         |
|---|--|------------------|
| Associate Minister of Finance<br>(Hon David Parker) | <p><b>Agree</b> that officials undertake a wider Overseas Investment Act reform programme in two separate phases.</p> <p><b>Agree</b> that the legislative vehicle for the first phase of work would be a Supplementary Order Paper on the <i>Overseas Investment Amendment Bill</i>.</p> <p>s9(2)(f)(iv)</p> <p><b>Note</b> that officials are considering options to address s6(a) risks arising from foreign investments, including through the Overseas Investment Act.</p> <p><b>Discuss</b> this report at your meeting with officials at 8.30am on Wednesday 22 November.</p> | 22 November 2017 |

### Contact for Telephone Discussion (if required)

| Name         | Position       | Telephone         | 1st Contact    |
|--------------|----------------|-------------------|----------------|
| Simon Duncan | Senior Analyst | s9(2)(k)          | N/A<br>(mob) ✓ |
| Thomas Parry | Team Leader    | s9(2)(a)<br>(mob) |                |

### Actions for the Minister's Office Staff (if required)

**Return** the signed report to Treasury.

Subject to the Minister's feedback, **arrange for consultation** with:

- s9(2)(f)(iv)
- the Minister for Regional Economic Development (Hon Jones) and the Minister for Land Information (Hon Sage) to discuss policy priorities in relation to forestry and cutting rights.

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Note any  
feedback on  
the quality of  
the report

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**Enclosure:** No

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## Treasury Report: Overseas Investment Act 2005 - Process for Further Reform

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### Executive Summary

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This report outlines a plan for wider policy reform to the Overseas Investment Act 2005 (OIA) which we propose to progress over this parliamentary term.

We see merit in considering more fundamental reform to the OIA regime, s9(2)(f)(iv) s9(2)(f)(iv) We are also aware of your policy objectives to restrict foreign investment in infrastructure with monopoly characteristics, s9(2)(f)(iv) s9(2)(f)(iv)

s6(a) and s9(2)(h)

Given this advice, we propose undertaking the wider OIA reform process in two distinct phases:

- **Phase One:** this will consider changes to the OIA needed prior to CPTPP, s6(a) and s9(2)(h) s9(2)(f)(iv). You will receive advice by Christmas, and urgent policy decisions can be taken by Cabinet early in the new-year. The legislative instrument to give effect to these policy decisions is a Supplementary Order Paper introduced as part of the Overseas Investment Bill.
- **Phase Two:** this will consider policy changes to the OIA, not constrained by CPTPP timing, s9(2)(f)(iv) s9(2)(f)(iv)

s9(2)(f)(iv)

Officials are meeting with you on Wednesday 22 November where we can discuss this report in more detail. We have also outlined some questions to discuss with you to help us clarify your policy positions on specific areas.

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## Recommended Action

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We recommend that you:

a **note** you have instructed officials to consider wider reforms to the Overseas Investment Act (OIA) covering:

- restricting foreign investment in infrastructure with monopoly characteristics,
- s9(2)(f)(iv)
- s9(2)(f)(iv)
- s9(2)(f)(iv)

b **note** that we are also aware of commitments to create a foreign land register and we propose to examine options for progressing this;

c **note** that Treasury considers these wider reforms present an important opportunity to progress other changes to improve the overseas investment regime, so as to ensure the regime captures the appropriate foreign investments, and efficiently and effectively screens those investments;

d **agree** that officials will undertake a wider OIA reform programme in two phases:

- Phase One: captures any changes to the OIA needing to be in place prior to the Comprehensive and Progressive Agreement for the Trans-Pacific Partnership (CPTPP).
- Phase Two: captures other policy changes to the OIA, not constrained by CPTPP timing.

*Agree/disagree.*

e **agree** that the legislative vehicle for progressing Phase One policy changes would be a Supplementary Order Paper included as part of the *Overseas Investment Amendment Bill*;

*Agree/disagree.*

f **note** that this will require Cabinet policy decisions as soon as possible in 2018 and officials will provide you with detailed policy advice on proposed Phase One policy changes before Christmas;


g s9(2)(f)(iv)

*Agree/disagree.*

h **note** that officials will progress policy development for the Phase Two work throughout 2018, and will engage you further on this;


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i s9(2)(f)(iv)



j **note** that officials will provide more detailed advice on these options, as well as seeking a decision from you on how to proceed, as part of the package of policy advice you will receive before Christmas;

k s9(2)(f)(iv)



l **note** that you may wish to meet with your Ministerial colleagues with an interest in forestry and cutting rights (such as Hon Sage and Hon Jones) to discuss and confirm policy priorities in this area; and

m **discuss** the contents of this report with officials at your meeting at 8.30am on Wednesday 22 November.

Thomas Parry  
**Team Leader, International**

Hon David Parker  
**Associate Minister of Finance**



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## Treasury Report: Overseas Investment Act - process for further reform

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### Purpose of Report

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1. This report outlines a plan for wider policy reform to the Overseas Investment Act 2005 (OIA) which we propose to progress over this parliamentary term. Building on preliminary legal advice from the Ministry of Foreign Affairs and Trade (MFAT), we suggest phasing this work in two streams – one focusing on changes required before the Comprehensive and Progressive Agreement for the Trans-Pacific Partnership (CPTPP) comes into force; and the other focussing on changes unaffected by the entry into force of CPTPP. We are meeting with you on Wednesday morning, and to support this we also will look to clarify your current views on overseas investment policy.

### Background

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2. As you are aware, significant work is underway to progress the ban on overseas speculators for existing homes through the OIA. You have also instructed officials to consider wider reforms to the OIA, in particular:
  - a restricting foreign investment in infrastructure with monopoly characteristics,
  - b s9(2)(f)(iv)
  - c s9(2)(f)(iv)
  - d s9(2)(f)(iv)
3. In addition, we are also aware of commitments that have been made to create a foreign land register.

### CPTPP timing and links to reform of the OIA

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4. The CPTPP will play a strong role in any advice we will provide to you. In particular, the timing of CPTPP coming into force is a key factor as to what changes might need to be made to the OIA prior to CPTPP as well as what OIA reforms could occur on a longer, more-considered time-frame.
5. The OIA framework covers specific:
  - a **Categories:** the existing types of investments covered by the foreign investment screening regime (eg, sensitive land, significant business assets).
  - b **Criteria:** the factors and tests which need to be taken into account when making decisions on foreign investment that is screened (eg, good character test, creation of jobs).

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6. s9(2)(h)
- s9(2)(h) s6(a) and s9(2)(h)
- s6(a) and s9(2)(h)
7. Other exceptions in FTAs can also be relevant, for instance – while the details vary between FTAs - we have exceptions for public services, water infrastructure, “essential security interests” and the disposition of State Owned Enterprises (SOEs).
8. Should you agree to make changes to the OIA regime which need to be in place prior to CPTPP coming into force, the *Overseas Investment Amendment Bill* provides a legislative vehicle to progress this work with urgency.
9. s9(2)(f)(iv)
- s9(2)(f)(iv) s6(a)
- s9(2)(f)(iv)
- s9(2)(f)(iv)
10. s9(2)(f)(iv)

Proposed OIA reform work programme

11. With your agreement, we will progress this OIA policy work through two phases:
- a **Phase One:** focused on any amendments s9(2)(h) that need to be in place prior to CPTPP coming into force. Comprehensive policy advice covering changes will be provided to you by Christmas. Cabinet decisions can then be taken in early 2018 (noting that the Cabinet meeting schedule for 2018 has not yet been released). A Supplementary Order Paper could then be included as part of the *Overseas Investment Amendment Bill* which would ensure these OIA changes would be in place before CPTPP enters into force.
- b **Phase Two:** s9(2)(f)(iv)
- s9(2)(f)(iv)

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12. A proposed timetable for this work programme is below:

|                                 |  | Phase One: Overseas Investment Amendment Bill | s9(2)(f)(iv)  |
|---------------------------------|--|---|---|
|                                 |  | Wider OIA reform                              |   |
| Friday 24 November              |  |   | Briefing attaching near final draft Bill provided to Minister                           |
| Thursday 7 December             | Draft Treasury Report on policy reform options completed   |   | LEG Committee considers draft Bill<br>Commence engagement with PCO on draft regulations |
| Friday 8 – Thursday 14 December | Departments and governance group consulted on draft paper  |   |   |
| Monday 11 December              |  |   | Cabinet considers draft Bill<br>Bill introduced   |
| Thursday 14 December            |  |   | First Reading<br>Referred to Select Committee   |
| Friday 15 December              | Treasury Report on policy reforms finalised and provided to Minister for Christmas reading   |   |   |
| Tuesday 19 December             |  |   | Select Committee considers and calls for submissions                                    |
| January 2018                    | Draft the policy Cabinet paper for urgent policy changes   |   | Analyse submissions   |
| End of January 2018             | Cabinet agrees any urgent policy reform (perhaps subject to advice on minor detailed design – but most agreed at Cabinet)<br>PCO begins drafting                               |   |   |
| February 2018                   | SOP introduced asap in February (any later than halfway through the select committee (end of Feb) and the SOP would not be folded into the version reported back to the House) |   | Select committee process  |
| March 2018                      |  |   |   |
| April 2018                      | Select Committee report back, Second reading, Committee stage, third reading, enactment (TBC following advice from MFAT regarding CPTPP timing)                                |   |   |
| May – December 2018             |  |   |   |

s9(2)(f)(iv)

13. There are some risks to achieving this timetable, particularly for the Phase One work. However, we consider these risks are manageable with sufficient prioritisation by officials. Risks include the integration of the wider OIA changes into the Select Committee process for the Overseas Investment Amendment Bill. Our aim will be to have the Supplementary Order Paper (SOP) ready for release by mid-February so that there will be some opportunity for public consultation through the Committee (whether written or oral submissions). This means we will need to obtain Cabinet decisions early in the year (noting the Cabinet schedule for 2018 has not yet been released) and will need to work closely with PCO to enable timely drafting of the SOP.

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14. The following sections of this report consider the overarching objectives of wider OIA reform and the specific policy content in each phase of work.

### Overarching objectives of OIA reform

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15. Over the parliamentary term, we consider there is merit in fundamental reforms to the OIA regime which would enhance New Zealanders wellbeing. [REDACTED]  
s6(a)
16. The overarching aim of both phases of work will be to improve the wellbeing for New Zealanders by ensuring the OIA regime captures the appropriate foreign investments, and efficiently and effectively screens those investments.

### Phase One: amendments to OIA definition of 'sensitive land'

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17. As discussed above, while the CPTPP does not further restrict our ability to amend the criteria applied in assessing transactions under the OIA, [REDACTED]  
s6(a) and s9(2)(h)
18. There are three potential streams of work which are likely to require amendment of OIA categories and, therefore, following your approval, will proceed urgently as part of the phase one work required to be undertaken prior to CPTPP coming into force. This work covers: adding monopoly infrastructure (if not already screened), forestry cutting rights, s9(2)(f)(iv)

#### *Adding monopoly infrastructure*

19. We understand that you have concerns about overseas investment in infrastructure with monopoly characteristics, and that you would like to apply a screening criteria to limit foreign interest. You have signalled relevant sectors are:
- a The three-waters (water storage or reticulation networks, and stormwater or sewage disposal networks)
  - b Rail land, lines and buildings and public roads where the road or rail link has significant monopoly characteristics and poor substitutes.
  - c Public hospital land or buildings
  - d State school land or buildings
  - e Irrigation water storage or reticulation networks
  - f Electricity distribution businesses (EDBs)
  - g Airports and Seaports
20. We wish to confirm your final views on which sectors to include in the scope of the OIA because, as noted earlier, [REDACTED]  
s9(2)(h)

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21. To inform your final decision on which infrastructure sectors to include, we have described the potential costs and benefits of limiting foreign investment across the sectors of concern in Table 1, Appendix Two. Potential costs and benefits vary:
- a For three-waters and rail, the impacts would be negligible because there is currently no foreign investment;
  - b For roads, schools, and hospitals, foreign investment is limited to a very small number of Public-Private Partnerships (PPPs). The impacts of reduced foreign investment are therefore likely to be more limited, but reduced competition would increase the risk of more expensive contracts for the Crown, reduced innovation, and reduced service quality. It would not lead to greater domestic ownership of assets (because the Crown retains ownership of all assets under PPP arrangements);
  - c For irrigation, schemes are mostly farmer cooperative-owned therefore the impact is likely to be limited, however where non-farmer equity is sought, reducing foreign investment (and therefore the potential of more beneficial commercial terms) may lead to higher water prices for farmers;
  - d The overall costs and benefits of reduced foreign investment in electricity distribution businesses (EDBs), airports, and seaports are less clear. There may be benefit in reducing foreign investment where there are concerns that foreign investors are subsidised by foreign governments (preventing domestic investors from competing on a level playing field), but we are unable to comment on the extent of this risk.
22. You have previously indicated you wish to explore applying a screening regime to any infrastructure investment over \$10 million, or where an investment equates to 25 percent or more of an infrastructure entity. s9(2)(h)
- s9(2)(h)
23. Finally, we understand part of your concern over monopoly infrastructure relates to the efficiency of monopoly rents. Treasury officials have not had time to fully assess the efficiency of the regulatory regimes in depth – including Part 4 of the Commerce Act – however we are not aware of reasons to presume there are inefficiencies. If, however, you do have concerns, we would be interested in discussing them with you. The most efficient way of addressing them could be by exploring the efficiency of the regulatory regimes themselves, rather than through the Overseas Investment Act, because this could target the problem more effectively.

*Forestry cutting rights*

24. We understand there are concerns about the sale of forestry 'cutting rights' which are currently not screened by the OIA (unless the cutting rights are worth over \$100m, and therefore covered by the significant business assets test). s6(a)
25. s9(2)(h)
- s9(2)(h) s6(a) and s9(2)(h)
- s6(a) and s9(2)(h)

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26. In light of the above, we consider that it would be beneficial for you to meet with your Ministerial colleagues with an interest in forestry and cutting rights (such as Ministers Sage and Jones) to discuss and confirm policy priorities.

**Phase two: amendments to OIA criteria and other changes**

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*Screening Criteria Changes*

27. s9(2)(f)(iv)

28. s9(2)(f)(iv)

a s6(a) and s9(2)(h)

b

c

29. s9(2)(f)(iv)

s9(2)(f)(iv)

s6(a)

s6(a)

, s9(2)(f)(iv)

s9(2)(f)(iv)

30. This policy work will take some time and we do not recommend you undertake it prior to the entry into force of the CPTPP. As outlined previously, s9(2)(h)

s9(2)(h)

s6(a), s9(2)(h), s9(2)(j)

s6(a), s9(2)(h), s9(2)(j)

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s9(2)(f)(iv)

31. We understand that the Government is interested in implementing a foreign ownership register. MFAT advises that this does not need to be implemented prior to CPTPP entering in to force. s6(a) and s9(2)(h)

s6(a) and s9(2)(h)

There are a number of options for implementing the register and there are a number of policy questions which will need to be worked through before recommendations are provided to you.

32. s9(2)(f)(iv)

- 33.

s9(2)(f)(iv)

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s9(2)(f)(iv)



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**Clarification questions**

43. We are meeting with you on Wednesday morning to discuss this report. We would like to use part of this meeting to clarify your current policy position on overseas investment policy. To help this, we have framed some questions below for you to consider:

|  |  |
|--|--|
| s9(2)(f)(iv)                           |  |
| <b>Sensitive land category changes</b> | <ul style="list-style-type: none"> <li>• Are you comfortable with work to ensure the right kinds of transactions are captured by the sensitive land category being undertaken on the accelerated track?</li> </ul>   |
| <b>Objectives</b>                      | <ul style="list-style-type: none"> <li>• Are you comfortable with the objectives recommended for this work? Are there any other objectives you want officials to consider?</li> </ul>  |
| <b>Monopoly infrastructure</b>         | <ul style="list-style-type: none"> <li>• Which industries do you want officials to make changes to the Overseas Investment Act in? <ul style="list-style-type: none"> <li>○ The three-waters (not recommended)</li> <li>○ Rail land, lines and buildings</li> <li>○ Public roads (state highways and local roads)</li> <li>○ Public hospitals and schools</li> <li>○ Irrigation</li> <li>○ Electricity Distribution Businesses</li> <li>○ Seaports</li> <li>○ Airports</li> </ul> </li> <li>• What benefits from increasing Overseas Investment screening do you want to focus on, and what costs do you want to avoid?</li> </ul> |

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## Appendix One

**Table 1: Foreign investment by sector, and implications for limiting foreign investment**

| Sector   | Description of foreign investment   | Extent captured by current OIA   | Possible benefits of preventing foreign investment | Possible costs of preventing foreign investment | Possible alternatives to attain same benefits |
|--|---|--|--|---|---|
| Three-waters (Potable, waste, and storm water) | <ul style="list-style-type: none"> <li>• <b>No foreign investment</b></li> <li>• Under the Local Government Act (LGA), local authorities cannot divest ownership to any private entity.</li> <li>• Three-waters assets developed by Crown Infrastructure Partnerships are Crown owned, and local Councils have the option to buy the infrastructure back in the future. Currently, the LGA prevents foreign-ownership.</li> </ul> | <ul style="list-style-type: none"> <li>• s6(a) and s9(2)(h)</li> </ul> | N/A  | N/A   | N/A   |

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|---|---|---|---|--|--|
| Rail land, lines and buildings                | <ul style="list-style-type: none"> <li>• <b><u>No foreign investment</u></b></li> <li>• The NZ Railways Corporation and KiwiRail are state-owned.</li> <li>• Foreign investment could only materialise if the government of the day chose to float Kiwirail.</li> </ul>   | <ul style="list-style-type: none"> <li>• s6(a) and s9(2)(h)</li> </ul>  | <p><i>[If government legislated to prevent future governments from floating Kiwirail]</i></p> <ul style="list-style-type: none"> <li>• There would be no impact on current arrangements.</li> </ul>       | <p><i>[If government legislated to prevent future governments from floating Kiwirail]</i></p> <ul style="list-style-type: none"> <li>• Future governments would be constrained from considering all available ownership options in the event of a review.</li> <li>• If Kiwirail were floated, barred foreign investment would not reduce the risk of track underinvestment (because domestic investors would exhibit the same profit-seeking behaviours).</li> <li>• If Kiwirail were floated, the price of shares would be lower because of reduced investor demand (which would lower the fiscal returns).</li> </ul> | <ul style="list-style-type: none"> <li>• Do nothing. Any future assessment of the optimal ownership structure of below-track infrastructure could consider the facts at the time, and consider multiple options without being constrained.</li> </ul>  |
| Public roads (State highways and local roads) | <ul style="list-style-type: none"> <li>• There are two roading PPP arrangements:</li> <li>• Transmission Gully Expressway is worth \$850 million. The three financiers are based in Australia, New Zealand, and the UK.</li> <li>• Puhoi-Warkworth is worth over \$700 million. The three financiers are based in New Zealand (3) and Spain (1).</li> </ul> | <ul style="list-style-type: none"> <li>• Roading PPPs are likely to fall under the 'significant business assets' test because investments-to-date are over \$200m (which is the CPTPP threshold, although this is higher for Australia).</li> </ul> | <ul style="list-style-type: none"> <li>• Domestic investors would receive PPP profits (but would also own the corresponding PPP risks, including payment penalties for poor service delivery).</li> </ul> | <ul style="list-style-type: none"> <li>• Significant risk that large PPP arrangements cannot be executed because of a lack of large domestic investors (could be particularly problematic for Auckland and regional growth).</li> <li>• Higher PPP costs, lower innovation, and poorer service delivery through reduced competition (the domestic market is shallow).</li> </ul>   | <ul style="list-style-type: none"> <li>• Ministers can already decide on the merits of a PPP arrangements on a case-by-case basis: if Ministers have concerns over foreign investment, they can choose either not to go ahead with a PPP arrangement, or challenge the chosen PPP consortium.</li> </ul> |

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| Public hospitals and schools | <ul style="list-style-type: none"> <li>• There are no examples of foreign investment in public hospitals.</li> <li>• There are 3 school PPP contracts, representing 'bundles' of several schools, worth several hundred million.</li> <li>• E.g. one of the bundles is worth \$220 million for six schools. ShapEd was selected as the preferred bidder early this year (the equity provider is New Zealand based).</li> </ul> | <ul style="list-style-type: none"> <li>• School PPP contracts worth over \$200m would fall under the 'significant business assets' test.</li> </ul> | <ul style="list-style-type: none"> <li>• Domestic investors would receive PPP profits (but would also own PPP risks, including payment penalties for poor service delivery).</li> </ul>   | <ul style="list-style-type: none"> <li>• Significant risk that large PPP arrangements cannot be executed because of a lack of large domestic investors.</li> <li>• Higher PPP costs and lower service delivery through reduced competition (the domestic market is fairly shallow).</li> </ul>   | <ul style="list-style-type: none"> <li>• Ministers can already decide on the merits of a PPP arrangements on a case-by-case basis: if Ministers have concerns over foreign investment, they can choose to either not to go ahead with a PPP arrangement, or challenge the chosen PPP consortium.</li> </ul> |
| Irrigation                   | <ul style="list-style-type: none"> <li>• The majority of irrigation schemes are owned and run by New Zealand-based farmer cooperatives.</li> <li>• Schemes vary in value, from tens of millions to several hundred million.</li> </ul>   | <ul style="list-style-type: none"> <li>• s6(a) and s9(2)(h)</li> </ul>  | <ul style="list-style-type: none"> <li>• Those schemes that are viable with domestic investment would be owned by New Zealand investors (though it will not lead to an increase in farmer-owned schemes: under the status quo, that option is always fully exhausted by farmer cooperatives anyway).</li> </ul> | <ul style="list-style-type: none"> <li>• Risk eventual water price is higher for farmers (constrained equity market would lead to tougher commercial demands – including the water price – from investors).</li> <li>• No reason to presume domestic investors would have more aligned interests with New Zealand farmers (foreign and domestic investors are profit-maximising alike).</li> </ul> | <ul style="list-style-type: none"> <li>• Continue with the status quo: farmers (i.e. the users of the schemes) are the most well-placed to determine their needs, and can trade off the various commercial terms offered by potential investors (including final water price).</li> </ul>                   |

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| Electricity Distribution Businesses (EDBs) | <ul style="list-style-type: none"> <li>• The majority of ELBs are trust-owned (the trusts hold shares on behalf of their beneficiaries, which in most cases is electricity consumers).</li> <li>• The largest is worth about \$2 billion.</li> <li>• Some are public listed companies. For example, Wellington Electricity Lines Limited, which is worth over \$500 million. It is owned by the Cheung Kong group listed on the Hong Kong Stock Exchange.</li> <li>• Approximately 13 EDBs are worth less than \$200 million</li> </ul> | <ul style="list-style-type: none"> <li>• Where ELB assets are valued at over \$200m (or higher for Australia), the 'significant business assets' test would apply even under CPTPP.</li> </ul> | <ul style="list-style-type: none"> <li>• Where there are concerns that foreign investors are subsidised, it would re-level the playing field with domestic investors (we do not know the extent of this risk).</li> <li>• Minor benefit in current foreign profits going to domestic investors (most EDBs are already trust-owned).</li> </ul> | <ul style="list-style-type: none"> <li>• Unclear whether the domestic market is deep enough to invest at the same level as current foreign investment.</li> <li>• Unless trust-owned companies invested, there is no reason to presume domestic investors would have more aligned interests with New Zealanders (foreign and domestic investors are profit-maximising alike).</li> </ul> | <ul style="list-style-type: none"> <li>• Do nothing, because the majority of ELBs are trust-owned. However, this would not address the minority of ELBs with foreign ownership.</li> </ul> |
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|          |   |   |  |  |   |
|----------|---|---|--|--|---|
| Airports | <ul style="list-style-type: none"> <li>• Of the four international airports, only Auckland and Queenstown has any foreign investment:</li> <li>• Auckland is owned by Auckland International Airports Limited (AIAL), of which foreign investors hold about 40 percent of the shares.</li> <li>• Wellington is owned by Infratil (NZ-based but classified as an overseas person) and Wellington City Council.</li> <li>• Christchurch is owned by the council and the central government.</li> <li>• Queenstown is owned by Auckland Airport</li> </ul> | <ul style="list-style-type: none"> <li>• Several airports (e.g. Auckland) are on sensitive land, and trigger the 'substantial identifiable benefits' test.</li> </ul> | <ul style="list-style-type: none"> <li>• Any future floating of Council shares would go to domestic investors.</li> <li>• Where there are concerns that foreign investors are subsidised, it would re-level the playing field with domestic investors (we do not know the extent of this risk).</li> </ul> | <ul style="list-style-type: none"> <li>• Reduced competition for airport shares would drive down the price, leading to a lower return to councils if they decide to float shares.</li> <li>• Unclear how domestic investors would have more aligned interests with New Zealanders (foreign and domestic investors are profit-maximising alike).</li> </ul> | <ul style="list-style-type: none"> <li>• Do nothing, because none of the major international airports have majority foreign ownership.</li> </ul> |
| Seaports | <p>The largest ports in the country are majority-local council owned:</p> <ul style="list-style-type: none"> <li>• Port of Auckland is owned by Auckland Council</li> <li>• Port of Tauranga is majority-owned by the local council</li> <li>• Lyttelton Port Company is 100 percent owned by Christchurch City Council.</li> </ul>   | <ul style="list-style-type: none"> <li>• Ports are highly likely to be on sensitive land, and trigger the 'substantial identifiable benefits' test.</li> </ul>        | <ul style="list-style-type: none"> <li>• Any future floating of Council shares would go to domestic investors.</li> <li>• Where there are concerns that foreign investors are subsidised, it would re-level the playing field with domestic investors (we do not know the extent of this risk).</li> </ul> | <ul style="list-style-type: none"> <li>• Reduced competition for port shares would drive down the price, leading to a lower return to councils if they decide to float shares.</li> <li>• Unclear how domestic investors would have more aligned interests with New Zealanders (foreign and domestic investors are profit-maximising alike).</li> </ul>    | <ul style="list-style-type: none"> <li>• Do nothing, because none of the major ports have majority foreign ownership.</li> </ul>                  |

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Reference: T2017/2766

File No. IM-5-3

Date: 6 December 2017



To: Associate Minister of Finance (Hon David Parker)

Deadline: None

## **Aide Memoire: Overseas Investment Act 2005 - Infrastructure and Monopoly Rents**

### **Purpose**

1. This Aide Memoire provides an update on our analysis of monopoly rents related to overseas investment in infrastructure. This issue was discussed when you met with officials on Wednesday 22 November.
2. Before Christmas, we will provide a report with detailed recommendations for managing overseas investment in infrastructure. Our analysis indicates that the risk of overseas investors extracting monopoly rents is not likely to be a major driver for changes to the Overseas Investment Act (OIA). The report will reflect a wider range of national interest factors.

### **Background**

3. We understand that you have concerns about overseas investment in infrastructure with monopoly characteristics. You have signalled relevant sectors are three-waters, railways and roads, public hospitals and state schools, irrigation, electricity distribution businesses (EDBs), airports and seaports.
4. The OIA already requires screening for overseas investment in most infrastructure investments, although it does not necessarily do so for 'monopoly rent' purposes. Most infrastructure sectors involve networks valued over \$200m (the proposed threshold for screening overseas investment under the Comprehensive and Progressive Agreement for the Trans-Pacific Partnership (CPTPP)). Networks valued at less than \$200m generally include sensitive land, with the main exception being small electricity distribution networks.



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**Potential for monopoly rents**

5. You have previously indicated an interest in using the OIA regime to manage overseas investment in sectors that where Part 4 of the Commerce Act may apply. This interest relates to the potential scale of regulated returns provided for under Part 4 of the Commerce Act, to manage the risks of underinvestment in infrastructure.
6. With these concerns in mind, we have further considered the potential scale of investor returns for infrastructure sectors. This includes wider factors limiting monopoly rents for each infrastructure sector, as well as regulation of investor returns under Part 4 of the Commerce Act. This is further explained below.

*Electricity distribution sector*

7. Of the infrastructure sectors initially identified, only the electricity distribution sector is subject to prescriptive measures under Part 4 of the Commerce Act that regulate investor returns.
8. In the electricity distribution sector, the Commerce Commission adjusts regulated investor returns so they are marginally higher than the Commerce Commission's mid-point estimation of the cost of capital.
9. In establishing an appropriate rate of investor returns, the Commerce Commission takes into account the risks associated with underinvestment in infrastructure. If the regulatory return is set below the 'true' cost of capital (or below the hurdle rate used by the relevant investors in question), then investment will stop or be delayed. Given the nature of the assets (long planning and construction lead times, large capital costs, no ability to easily or profitably relocate, costly outages resulting from under-investment), the dynamic efficiency implications of underinvestment can be large. Adjusting regulated investor returns (so they are marginally higher than the Commerce Commission's mid-point estimation of the cost of capital) assists to mitigate this risk.
10. As the Commerce Commission has become more comfortable with the precision of its estimates, it has reduced the magnitude of the adjustment for the electricity distribution sector. As a result, the scale of investor returns above the estimated cost of capital is not considered to be substantial. Consequently, we do not consider that the scale of investor returns under Part 4 regulation should be a predominant driver for changes to the OIA.

*Other infrastructure sectors*

11. Price-quality regulation under Part 4 of the Commerce Act does not apply to the other infrastructure sectors identified. In those sectors, the potential for overseas investors extracting significant monopoly rents is limited. This is due to a combination of factors limiting overseas investment, and factors limiting monopoly rents. The table below sets out these factors (with further detail in Appendix One).

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*Limitations on monopoly rents associated with overseas investment in infrastructure*

| <b>Sector</b>                              | <b>Factors limiting overseas investment</b>   | <b>Factors limiting monopoly rents</b>  |
|--|---|---|
| Three-waters                               | Local Government Act restricts ownership to councils.   | As a backstop, Government can apply economic regulation under Part 4 of the Commerce Act.   |
| Railways and roads                         | Crown-owned.  | As a backstop, Government can apply economic regulation under Part 4 of the Commerce Act.   |
| Public hospitals and state schools         | Crown-owned.  | As a backstop, Government can apply economic regulation under Part 4 of the Commerce Act.   |
| Irrigation                                 | Irrigation schemes are generally farmer-controlled.   | Pricing under any future non-farmer owned scheme is expected to be contractually negotiated between farmers and investors.<br>As a backstop, Government can apply economic regulation under Part 4 of the Commerce Act.   |
| Seaports                                   | Generally council-owned (other than Port of Tauranga, which is 46% publicly-listed).  | Competition between ports exists.<br>As a backstop, Government can apply economic regulation under Part 4 of the Commerce Act.  |
| Airports                                   | Auckland, Wellington and Queenstown already involve overseas ownership.<br>Christchurch airport and regional airports are generally council-or council/Crown-owned.   | Auckland, Wellington and Christchurch airports subject to information disclosure to monitor pricing under Part 4 of the Commerce Act. The Government could also subject airports to negotiate/arbitrate or price-quality regulation under Part 4 of the Commerce Act. |
| Electricity distribution businesses (EDBs) | Generally owned by councils or consumer trusts (other than Wellington Electricity and Powerco). Auckland-based Vector is 75.4% owned by the Entrust Community Trust so is a New Zealand-controlled company. | All 29 EDBs are subject to information disclosure regulation under Part 4 of the Commerce Act. Seventeen EDBs that are deemed not to be consumer-owned are also subject to price-quality regulation.  |

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**Wider objectives and next steps**

12. s9(2)(f)(iv) [REDACTED]
13. [REDACTED]
- a. s9(2)(f)(iv) [REDACTED]
- b. [REDACTED]
- c. s6(a) s9(2)(f)(iv) [REDACTED]
- d. s9(2)(f)(iv) [REDACTED]
14. Before Christmas, we will provide a report with detailed recommendations for managing overseas investment in infrastructure. Recommendations will be assessed against these wider objectives.
15. We are available to discuss the contents of this aide memoire if you require any further information.

**Daniel Lawrey**, Senior Analyst, International s9(2)(k)  
**Thomas Parry**, Team Leader, International, [REDACTED]

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Appendix One

Further detail: Limitations on monopoly rents associated with overseas investment in infrastructure

| Sector   | Factors limiting overseas investment  | Factors limiting monopoly rents  |
|--|---|--|
| Three-waters   | <ul style="list-style-type: none"> <li>No private investment; local government own three-waters.</li> <li>Under the Local Government Act 2002, local authorities cannot divest ownership or other interest in a water service except to another local government organisation.</li> <li>Local authorities may enter into contracts for the operation of water services, however: <ul style="list-style-type: none"> <li>They cannot be for longer than 35 years</li> <li>The local authority must continue to be legally responsible for providing the water services; and</li> <li>The local authority must retain control over pricing and policy related to the delivery of water services.</li> </ul> </li> </ul> | <ul style="list-style-type: none"> <li>Government can apply economic regulation under Part 4 of the Commerce Act.</li> </ul> |
| Roads  | <ul style="list-style-type: none"> <li>Local government own and operate local roads.</li> <li>NZTA own and operate national highways.</li> <li>Private investment in roading is very low: there are two public-private partnerships (PPPs) worth \$850 million, and \$700 million. Both have New Zealand and international investors. PPP arrangements do not provide monopoly rents.</li> <li>Under PPPs, ownership of the assets remains in the public sector.</li> </ul>   | <ul style="list-style-type: none"> <li>Government can apply economic regulation under Part 4 of the Commerce Act.</li> </ul> |
| Rail   | <ul style="list-style-type: none"> <li>No private investment, owned by Crown.</li> <li>Infrastructure owned by KiwiRail, and owned by NZ Railways Corp (both state-owned enterprises).</li> </ul>   | <ul style="list-style-type: none"> <li>Government can apply economic regulation under Part 4 of the Commerce Act.</li> </ul> |
| Social infrastructure (public schools and hospitals) | <ul style="list-style-type: none"> <li>Owned by Crown.</li> <li>No examples of private investment in public hospitals.</li> <li>There are three school PPP contracts, representing 'bundles' of several schools, worth several hundred million. PPP arrangements do not provide monopoly rents.</li> <li>Under PPPs, ownership of the assets remains in the public sector.</li> </ul>   | <ul style="list-style-type: none"> <li>Government can apply economic regulation under Part 4 of the Commerce Act.</li> </ul> |

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| Sector                                     | Factors limiting overseas investment  | Factors limiting monopoly rents   |
|--|---|---|
| Seaports                                   | <ul style="list-style-type: none"> <li>Majority local council owned.</li> <li>Three biggest ports: <ul style="list-style-type: none"> <li>Port of Auckland is owned by Auckland Council.</li> <li>Lyttelton Port Company is owned by Christchurch City Council.</li> <li>Port of Tauranga is majority-owned by the regional council (46% publicly listed).</li> </ul> </li> </ul> | <ul style="list-style-type: none"> <li>Government can apply economic regulation under Part 4 of the Commerce Act. The Commerce Commission has looked at competition issues in the port sector from time to time, but has generally concluded there is currently sufficient regional competition between ports. In recent years, the Commission has looked into complaints about Eastland Port that has resulted in a change of behaviour, thereby negating the need for a formal inquiry under Part 4 of the Commerce Act.</li> </ul>   |
| Airports                                   | <ul style="list-style-type: none"> <li>Auckland and Queenstown are 40% overseas owned.</li> <li>Wellington is owned by council and Infratil (classified as overseas).</li> <li>Others are owned by councils or council-government joint ventures.</li> </ul>  | <ul style="list-style-type: none"> <li>Auckland, Christchurch and Wellington International Airports are currently subject to information disclosure regulation.</li> <li>The Commission reviews the airports' pricing decisions and provides a public report analysing and summarising the proposed prices.</li> <li>At any time, the Commission can initiate an inquiry into whether a stronger form of regulation such as negotiate/arbitrate regulation or price-quality regulation is warranted.</li> </ul>   |
| Electricity distribution businesses (EDBs) | <ul style="list-style-type: none"> <li>29 EDBs generally community owned councils or trusts).</li> <li>Wellington Electricity and Powerco are overseas owned.</li> <li>Vector is 24.6% overseas owned.</li> </ul>   | <ul style="list-style-type: none"> <li>All EDBs are subject to information disclosure regulation under Part 4 of the Commerce Act. This includes the Commission publishing regular reports analysing and summarising EDB performance.</li> <li>In addition, 17 EDBs that are not deemed to be consumer owned are subject to price-quality regulation that is designed to mimic the effects seen in competitive markets so that consumers benefit in the long term. The Commission sets a maximum allowable revenue that effectively regulates the rate of return that an EDB can earn.</li> </ul> |
| Irrigation                                 | <ul style="list-style-type: none"> <li>Predominantly farmer-owned.</li> <li>As a private asset, water price paid by farmers is dictated by contractual arrangements. Farmer ownership prevents monopoly rents.</li> </ul>   | <ul style="list-style-type: none"> <li>Government can apply economic regulation under Part 4 of the Commerce Act.</li> </ul>  |

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## Treasury Report: Overseas Investment Act 2005 Review - Pre CPTPP Policy Decisions

|       |                  |              |            |
|-------|------------------|--------------|------------|
| Date: | 15 December 2017 | Report No:   | T2017/2764 |
|       |                  | File Number: | IM-5-3     |

### Action Sought

|   | Action Sought   | Deadline         |
|---|---|------------------|
| Associate Minister of Finance<br>(Hon David Parker) | <p><b>Agree</b> that no changes to the OIA should be made before CPTPP in respect of infrastructure s9(2)(f)(iv)</p> <p><b>Direct</b> officials, if you decide to make any changes pre-CPTPP, to prepare drafting instructions for PCO.</p> <p><b>Discuss</b> the recommendations in this report at your meeting with officials at 8.00am on Tuesday 19 December.</p> | 19 December 2017 |

### Contact for Telephone Discussion (if required)

| Name          | Position                      | Telephone         | 1st Contact  |
|---------------|-------------------------------|-------------------|--------------|
| Daniel Lawrey | Senior Analyst, International | s9(2)(k)          | N/A<br>(mob) |
| Thomas Parry  | Team Leader, International    | s9(2)(a)<br>(mob) | ✓            |

### Actions for the Minister's Office Staff (if required)

**Return** the signed report to Treasury.

**Refer** a copy of report to Minister for Infrastructure, Minister for Land Information, and Minister of Transport.

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Note any  
feedback on  
the quality of  
the report

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**Enclosure:** No

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## Treasury Report: Overseas Investment Act 2005 Review - Pre CPTPP Policy Decisions

### Executive Summary

This report seeks your decisions on s9(2)(h) screening under the Overseas Investment Act 2005 (OIA). The scope of this report includes overseas investment in smaller firms with strategic economic value, infrastructure, and s9(2)(f)(iv). A separate report [T2017/2836] seeks decisions on how to manage forestry cutting rights under the OIA.

You have previously agreed that officials will undertake a wider OIA review in two phases:

- Phase One: Captures any changes to the OIA that need to be in place prior to the Comprehensive and Progressive Agreement for the Trans-Pacific Partnership (CPTPP). s9(2)(h)  
s9(2)(h)
- Phase Two: Captures other policy changes to the CPTPP which are not constrained by CPTPP timing. s9(2)(f)(iv)  
s9(2)(f)(iv)

We understand you have concerns about retaining benefits from New Zealand ownership of small firms, which may hold valuable intellectual property or international relationships. If CPTPP comes into force, the financial thresholds, which define significant business assets covered by the OIA, are fixed at \$200m for many countries. s6(a) and s9(2)(h)

s6(a) and s9(2)(h)

s6(a) and s9(2)(h)

s9(2)(f)(iv)

s9(2)(f)(iv)

For infrastructure, you have raised concerns about monopoly profits flowing offshore. You have also noted a risk that when capital is scarce, overseas owners may face reduced investment incentives, as compared to a domestic infrastructure owner. We have considered these concerns alongside the role that foreign capital plays in achieving economic growth and social wellbeing, particularly because New Zealand's domestic investment needs outstrip the national savings available for investment.

In general, significant overseas investment in infrastructure is already subject to screening under the OIA because it involves sensitive land or significant business assets. In this report, we have divided infrastructure sectors into three thematic groups:

- Group One – Sectors that could be addressed** s6(a), s9(2)(h) comprises railways, public roads, electricity transmission, social infrastructure (public hospitals and state schools), three-waters and irrigation. s9(2)(h)  
s9(2)(h)



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- **Group Two - Sectors the OIA covers currently:** comprises seaports, oil refining and telecommunications (fibre). Under the status quo, the OIA covers all existing firms in these sectors.
- **Group Three – Sectors the OIA partially covers:** comprises airports, electricity distribution businesses, and gas transmission and distribution. The OIA covers larger firms in these sectors (with assets over \$200m) and would cover smaller firms if they hold sensitive land. However, if you wish to ensure the OIA covers smaller firms in these sectors, s6(a) and s9(2)(h)

s6(a) and s9(2)(h)

s9(2)(f)(iv)

Although we do not recommend any changes for the sectors covered in this report, the s6(a) and s9(2)(h)

If you did wish to extend the coverage of the OIA by s9(2)(h) s9(2)(h) we have identified how the Government can take forward the necessary changes to the OIA regime. Specifically, we can prepare a paper for you to take to Cabinet in late January to enable the Government to introduce a Supplementary Order Paper during the select committee stage of the Overseas Investment Amendment Bill.

## Recommended Action

We recommend that you:

- a **note** you have previously agreed that officials will undertake a wider Overseas Investment Act (OIA) reform programme in two phases [T2017/2551 refers]:
  - i. Phase One: captures any changes to the OIA that need to be in place prior to the Comprehensive and Progressive Agreement for the Trans-Pacific Partnership (CPTPP)
  - ii. Phase Two: captures other policy changes to the OIA, not constrained by CPTPP timing
- b **note** we are providing a separate report on screening forestry rights under the OIA [T2017/2836]

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*Smaller firms with strategic economic value*

c **note** we understand you have concerns about retaining benefits from New Zealand ownership of small firms with strategic economic value, which may hold valuable intellectual property or international relationships

d s6(a) and s9(2)(h)

e **note** officials are undertaking work outside of the OIA to support smaller New Zealand firms to grow and leverage intellectual property

*Infrastructure*

f **note** we understand you have concerns about overseas investment in infrastructure, which relate to potential monopoly rents flowing offshore and potential reduced investment incentives when capital is scarce

g s9(2)(h)

s6(a)

h s9(2)(h)

i **note** the OIA covers all existing firms in the following sectors: seaports, oil refining, and local fibre companies providing ultrafast broadband

j **note** the OIA covers large firms with assets over \$200m, but may not cover smaller firms within the following sectors: airports, electricity distribution, and gas transmission and distribution

k **agree** that no changes to the OIA should be made to cover:

a. Airports

*Agree/ Disagree*

b. Electricity distribution

*Agree/ Disagree*

c. Gas transmission and distribution

*Agree/ Disagree*

s6(a), s9(2)(f)(iv), s9(2)(h)

l s6(a), s9(2)(f)(iv), s9(2)(h)

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n s6(a), s9(2)(f)(iv), s9(2)(h)

*Agree/ Disagree*

o s6(a), s9(2)(f)(iv), s9(2)(h)

*Agree/ Disagree*

p s6(a), s9(2)(f)(iv), s9(2)(h)

q **note** you are meeting with officials on 19 December to discuss the contents of this report and the separate report on screening forestry rights under the OIA

r **refer** this report to the Minister of Infrastructure, Minister of Land Information and Minister of Transport

*Referred/ Not Referred*

Thomas Parry  
**Team Leader, International**

Hon David Parker  
**Associate Minister of Finance**

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## Treasury Report: Overseas Investment Act 2005 Review - Pre CPTPP Policy Decisions

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### Purpose of report

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1. This report seeks your decisions s9(2)(h) investment screening under the Overseas Investment Act 2005 (OIA). These changes would be in addition to restrictions on overseas buyers purchasing residential land in New Zealand.
2. We understand there are concerns about overseas investors acquiring forestry 'cutting rights'. A separate report [T2017/2836] seeks decisions on how to manage cutting rights under the OIA.
3. This report covers the following:
  - a Smaller firms with strategic economic value
  - b Infrastructure
    - i Approach to assessing potential OIA changes
    - ii Assessment of potential OIA changes
    - iii Legislative implementation
  - c s6(a), s9(2)(f)(iv), s9(2)(h)
  - d Next steps

### Process for reform of the Overseas Investment Act 2005

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4. On 21 November, we provided a report to you covering the process for further reform of the OIA, beyond restrictions on overseas buyers purchasing residential land [T2017/2551 refers]. s9(2)(h)
5. In response to that report, you agreed that officials will undertake a wider OIA reform programme in two phases:
  - a Phase One: Captures any changes to the OIA needing to be in place prior to the CPTPP. s9(2)(h)
  - b Phase Two: Captures other policy changes to the OIA, not constrained by CPTPP timing. s9(2)(f)(iv)
6. This report seeks your decisions on any amendments to the categories of the OIA pre-CPTPP (Phase One).

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7. If you do wish to make further amendments to the OIA in response to this report, you have previously agreed that the legislative vehicle would be a Supplementary Order Paper included as part of the current Overseas Investment Amendment Bill.
8. s9(2)(f)(iv)

### Opportunity/Problem Definition

9. The purpose of the OIA is to acknowledge that it is a privilege for overseas persons to own or control sensitive New Zealand assets. It does so by requiring overseas investments in those assets to meet criteria for consent, and by imposing conditions on the overseas investment.
10. You have concerns that there may be gaps in New Zealand's investment screening regime that mean some sensitive New Zealand assets are not subject to screening through the OIA mechanisms. This report addresses potential changes to screen overseas investment in areas that have been highlighted above.
11. The following sections of this report outline more detail on problems and opportunities for each of these areas.

### Policy objectives

#### *Living Standards Framework*

12. In approaching potential changes to the OIA, we have considered the Treasury's Living Standards Framework. Under this framework, the overall goal is to support New Zealand's intergenerational wellbeing. Intergenerational wellbeing relies on the growth, distribution and sustainability of the Four Capitals: human, social, natural, and economic (financial/physical) capital. The capitals are interdependent and work together to support wellbeing.



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13. From an economic perspective that focuses on competition and free markets, there are benefits from minimising restrictions on overseas investment. Targeted restrictions may be appropriate to address specific economic risks.
14. From a wider social capital perspective, overseas investment may impact on our cultural identity (for example, Maori view water as a taonga), as well as connections between firms and individuals in New Zealand's society. s9(2)(f)(iv)

s9(2)(f)(iv)

*The role of foreign capital in the New Zealand economy*

15. Foreign capital plays a role in achieving economic growth and social wellbeing. It allows domestic investment to exceed domestic saving, which is highly important in New Zealand because our domestic investment needs persistently outstrip the national savings available for investment. In 2015, foreign investment was over \$100 billion (almost 30 percent of total investment).
16. Foreign equity (rather than debt) provides foreign owners with some control over the firm, which has been shown to have positive impacts like improved productivity and spill-over benefits. It can raise some issues though, such as 'home bias' effects, which shows that domestic saving and capital market development are also important.
17. In infrastructure, foreign capital only plays a significant role in a subset of sectors like gas, oil and public-private partnerships (PPPs), although it is likely to be increasingly important in irrigation.

*Policy objectives*

18. Within the context of the Living Standards Framework, we have identified four specific policy objectives for the wider overseas investment work. These objectives are designed to underpin any proposed changes across both Phase One (immediate pre-CPTPP changes) and Phase Two s9(2)(f)(iv) of the reform work.
19. Our policy objectives are that changes to the OIA should ensure that the regime:
  - a Protects against risk to New Zealand with particular consideration of economic and national security, and social capital (including culture and sovereignty)
  - b Facilitates an open business environment
  - c Is fit-for-purpose being robust, simple, and providing certainty to investors, and
  - d Is consistent with international obligations, including Free Trade Agreements and commitments at the World Trade Organisation.

Smaller firms with strategic economic value

*Concerns about smaller firms*

20. We understand you have concerns about overseas investment in smaller firms with strategic economic value to New Zealand. Some small firms may own strategically valuable intellectual property (IP) and create the potential for further spill-over economic activity. They may have also developed strategically valuable international relationships, enabling access to overseas markets, which may be difficult to replicate if the firm was acquired by overseas interests.

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21. While smaller firms have specific potential for the New Zealand economy, considering them within the context of New Zealand's long-term economic challenges is helpful. Large firms are under-represented in our economy. Larger firms tend to be more research and development intensive, more international, more productive, and due to their size, employ more people. One of our long-term objectives is to grow more of these firms.
22. Overseas investment plays an important role in meeting this objective. It provides capital and access to international management skills necessary for smaller firms to grow. Acquisition through overseas investment can provide capital (and free up other resources such as management and technical expertise) that can be recycled into further entrepreneurial activity. A challenge for New Zealand is enabling our entrepreneurs to reinvest and develop a new, larger business by drawing on their skills, experiences, and international relationships.
23. Moreover, the New Zealand economy may not have the necessary skills, international exposure and experience, and capital depth to fully-leverage small firms' strategic IP. In such cases, restricting access to overseas investment could lead to sub-optimal outcomes for the New Zealand, and global economies. In addition, there would also be risks from restricting overseas investment. For example, investment restrictions could stifle incentives for entrepreneurial activity to occur in New Zealand. It may also create barriers for emerging firms to internationalise.
24. The OIA does not cover investment in smaller start-up firms that may have strategic economic value for New Zealand, unless by investing in the start-up the overseas investor acquires an interest in sensitive land.
25. There would also be practical difficulties with the OIA defining firms with strategic economic value. Any definition would need to be flexible enough to capture firms of interest, but there would be a risk of creating uncertainty and potential regulatory burden for a broad range of firms.

*Restrictions under FTAs and opportunities outside the OIA*

26. s9(2)(h)  
s9(2)(h) If CPTPP comes into force, the financial thresholds defining significant business assets will be fixed at \$200 million for CPTPP countries as well as investors from Korea, Chinese Taipei, China and Hong Kong. The threshold is \$501 million for Australia. There are also existing thresholds ranging from \$10 million to \$50 million under other trade agreements. s6(a) and s9(2)(h)  
s6(a) and s9(2)(h)
27. s6(a) and s9(2)(h)
28. The New Zealand Government has a number of initiatives to support New Zealand businesses to grow and to fully-leverage their IP. Callaghan Innovation and New Zealand Trade and Enterprise are the Government's main vehicles to provide advice and support for firms to grow. These agencies provide intensive advice and assistance to our larger firms. Smaller firms tend to receive advice from Economic Development Agencies as part of their local government. s9(2)(f)(iv)  
s9(2)(f)(iv)

s6(a) and s9(2)(h)



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29. If you would like further advice about your levers to grow smaller firms, and how this effort could be aligned to meet your priorities, we would be happy to discuss with you, and your officials from the Ministry of Business, Innovation and Employment.

30. s9(2)(f)(iv)

## Infrastructure: Approach to assessing potential OIA changes

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### Opportunity/problem definition

31. You have asked for advice on two potential concerns with overseas investment in infrastructure:
- a Monopoly rents flowing offshore, and
  - b Reduced investment incentives when capital is scarce.
32. We have also considered potential risks of overseas control of critical infrastructure.

#### *Monopoly rents flowing offshore*

33. We have provided separate advice on concerns relating to overseas investment in monopoly infrastructure [T2017/2766 refers]. In response to this advice, you have indicated you would like to discuss monopoly rents further.
34. We understand that you have concerns about overseas investment in infrastructure with monopoly characteristics. You have noted that the Commerce Commission provides regulated utilities with incentives to invest in order to manage the risk of underinvestment.
35. Our previous advice concluded that monopoly rent considerations should not be a predominant driver for changes to the OIA's coverage of infrastructure sectors.

#### *Reduced investment incentives when capital is scarce*

36. We understand you have concerns overseas owners have lower investment incentives relative to domestic owners. You have suggested that investment incentives when capital is scarce are borne of social influence and trust, and these incentives are stronger if the owner is integrated with the local economy, as compared to an overseas investor.
37. This concern also has linkages with the economic concept of 'home country bias' whereby investors have a natural tendency to be most attracted to investments in their home market.
38. While social links may in some circumstances encourage investment, a range of commercial and reputational considerations should encourage offshore investors to provide ongoing support should a related entity in New Zealand experience distress and/or require additional capital. The Australian parent banks, for example, provided significant operational/liquidity support through the global financial crisis, lending significant sums and acquiring New Zealand mortgages to provide cash flow to their subsidiaries.



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39. Financial companies are highly geared and require ongoing access to markets. Within the time available, we have not been able to identify suitable evidence to assess the relative strength of incentives for overseas versus domestic investors in infrastructure. While reputational considerations incentivise support for financial subsidiaries, those incentives may differ for portfolio investors in infrastructure. Notwithstanding this, it seems reasonable to assume that all investors/owners face commercial incentives to either restructure debt or to provide additional support, should failing to do so present a risk of a larger financial loss or damage to their international brand and/or business reputation.
40. In the absence of specific evidence about the behaviour of overseas infrastructure investors when capital is scarce, we have not provided significant weight to this factor when assessing policy options.

*Risks of overseas control of critical infrastructure*

41. s9(2)(f)(iv) s9(2)(f)(iv) This report elaborates on this matter where it is relevant to a specific infrastructure sector. By definition, the most critical networks are large, and play a systemic role in the running of the economy and society. For instance, the electricity transmission network (currently managed by Transpower, a state-owned enterprise) provides electricity services throughout the country, and a system-wide event would have significant impacts on the national economy. Conversely, a small electricity distribution business providing distribution services to a sparsely populated region is not nationally critical, because an event would have a smaller, localised impact and could be reasonably managed. Our analysis focuses on mitigating the risks of foreign investment to critical (larger, systemic) networks.

s6(a) and s9(2)(h)

42. s6(a) and s9(2)(h)

**Critical infrastructure sectors for which overseas control may be of concern**

43. You have signalled that the relevant infrastructure sectors for which overseas investment is a concern are:
  - a Railways and public roads
  - b Social infrastructure (public hospitals and state schools)
  - c Three-waters (water storage or reticulation networks, and stormwater or sewage disposal networks)
  - d Electricity distribution businesses (EDBs)
  - e Airports
  - f Seaports, and
  - g Irrigation (water storage and reticulation).

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44. We also consider the following sectors share similar attributes, such as monopoly characteristics or a role as critical infrastructure for the national economy:
- a Electricity transmission
  - b Gas (transmission and distribution)
  - c Telecommunications (fibre), and
  - d Oil refining (including fuel transmission).

**Approach to assessing potential OIA changes for each sector**

45. The factors relevant for managing overseas investment in infrastructure differ for each sector. Restrictions on overseas investment would affect sectors in different ways. A one-size-fits-all approach would not adequately take into account these differences. Therefore, the assessment outlined below reflects thematic groupings for infrastructure sectors.

46. The following section sets out our assessment of potential OIA changes for each infrastructure sector. This assessment reflects the following four considerations:

- a *Existing OIA coverage: Does the OIA currently cover the relevant sector?*

Existing OIA settings require screening of an overseas investment if it involves acquiring an interest in sensitive land (Section 12) or a qualifying overseas investment in significant business assets (Section 13). We have set out below whether these OIA settings cover a sector (taking into account the expected \$200m significant business assets threshold). Appendix One also provides more information on whether a sector is currently covered by the OIA under the sensitive land category, significant business assets category, or both.

Generally, our view is that where a sector is already incidentally covered by the OIA there is no need to specifically amend the definition of sensitive land to include it.

- b *International commitments: Could the OIA cover the relevant sector in a way that is consistent with international commitments?*

s6(a) and s9(2)(h)

- c *Policy objectives: Should the OIA cover the relevant sector, taking into account policy objectives?*

As set out above, we have identified a set of relevant policy objectives to assess whether to screen overseas investment in each infrastructure sector. Table One provides greater detail on this assessment.

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- d *Timing drivers: When would the Government need to make changes to the OIA to cover the relevant sector, if that was your intention?*

s9(2)(h)

s9(2)(h)

s6(a) and s9(2)(h)

s6(a) and s9(2)(h)

**Free trade agreements restrict the policy space for infrastructure**

47.

s9(2)(h)

s6(a) and s9(2)(h)

**Groups of sectors based on interaction with international commitments**

48.

s6(a) and s9(2)(h)

49.

s6(a) and s9(2)(h)

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50. We have therefore divided infrastructure sectors into three thematic groups:
- a **Group One: Sectors that could be addressed** s9(2)(h) The Government could address overseas investment for these sectors s9(2)(h) s9(2)(h).
  - b **Group Two: Sectors the OIA covers currently.** The OIA currently covers these sectors. s9(2)(f)(iv) s9(2)(f)(iv)
  - c **Group Three: Sectors the OIA partially covers.** If you did wish to ensure the OIA covers these sectors comprehensively s9(2)(h) s9(2)(h) For reasons described below, we do not recommend doing so.
51. In undertaking this work, we have identified that most infrastructure investments within these sectors that might be of concern are already captured for screening by the OIA regime. Appendix One explains the coverage of the OIA for these sectors.

### Infrastructure: Assessment of potential OIA changes

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52. We **do not recommend** any changes pre-CPTPP to expand the scope of the OIA for infrastructure sectors. More specific detail for each infrastructure grouping is provided below.

#### Group One: Sectors that could be addressed post-CPTPP

53. Group One comprises railways, public roads, electricity transmission (Transpower New Zealand), social infrastructure (public hospitals and state schools), three-waters, and irrigation.

54. s6(a) and s9(2)(h)

55. Introducing any changes for these sectors through the compressed timeframes of the immediate Phase One legislative process could lead to risks to the quality of policy, legislative drafting and consultation process. If you did wish to take future measures to address overseas investment in these sectors, progressing measures on a slower timeframe could mitigate these risks.
56. In general, the OIA covers these sectors currently. In other cases, the Crown owns the asset so can control their sale, and legislation other than to amend the OIA could be an option.
57. Appendix One sets out more detail about the potential for overseas investment that would not be covered by the OIA.

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**Group Two: Sectors the OIA covers currently**

58. Group Two includes seaports, oil refining (including fuel transmission), and telecommunications fibre.
59. The OIA covers seaports because any land adjoining the foreshore is classed as sensitive land.
60. As we noted above, oil refining and fibre telecommunications were not on the list of infrastructure that you had concerns about. However, we considered these sectors as they potentially have monopoly characteristics or a role as critical infrastructure.
61. The OIA covers the Marsden Point Oil Refinery and 168-kilometre underground pipeline that connects the refinery to the Wiri Oil Terminal in Auckland under both the sensitive land category and significant business assets category.
62. The OIA also covers Chorus and the local fibre companies (LFCs) that provide ultrafast broadband (fibre), under the significant business assets category. Furthermore, separate to the OIA, Crown approval is required for any person to have an interest in 10% or more of the total voting shares of Chorus. Crown approval is also required for a non-New Zealand national to have an interest in more than 49.9% of the voting shares. There are also some restrictions for the LFCs relating to non-New Zealand nationals holding interests and for the transfer of network assets.
63. As these sectors are already subject to the OIA, as discussed above, s9(2)(f)(iv)
- s9(2)(f)(iv)

**Group Three: Sectors the OIA partially covers**

64. Group Three comprises airports, electricity distribution businesses and gas transmission and distribution.
65. Table One outlines our assessment of potential OIA changes against the policy objectives we have identified.
66. At present, the OIA covers larger firms in these sectors through the significant business assets category.
- s9(2)(h)
67. s6(a) and s9(2)(h)

<sup>4</sup> With the exception of the wholesale and retail trade of bottled water.

s6(a) and s9(2)(h)

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Table One: Costs and Benefits of Including Partially-Excluded Infrastructure Sectors in the OIA regime

Regional airports

| Protect against risk to the economy (economic, social, and security)                      |   | Facilitate an open business environment                           |  | Be robust, simple, predictable, and provide certainty to investors  |   |
|---|---|---|--|---|---|
| Cost (-) / Benefit (+)  | Impact  | Cost (-) / Benefit (+)  | Impact   | Cost (-) / Benefit (+)  | Impact  |
| + Reduce risks from overseas investor incentives when capital is scarce.                  | ↓ <b>Low (uncertain):</b> We have not identified good evidence to assess behaviour of overseas investors when capital is scarce. For airports, competitive pressures (e.g. road transport) drive incentives for investment. | - Perceived increased difficulty to invest in NZ aviation sector. | ↓ <b>Low:</b> Not expected to be a significant global appetite for investment in NZ regional airports. | - Increase screening requirements create more administrative hurdles (although design of regime could lower this risk). | ↓ <b>Low:</b> Expected levels of overseas investment are low. |
| + Protect against off-shoring monopoly profits.   | ↓ <b>Low:</b> Regional airports are not regulated as monopolies.  |   |  |   |   |
| + Limit security risks associated with ownership of strategic assets by overseas persons. | ↓ <b>Low:</b> Individuals and businesses would have alternative regional transport options if service reduced. Overall security risks associated with foreign investment in regional airports is likely to be low.          |   |  |   |   |
| + Reduce risk of 'hollowing out' of NZ intellectual property.                             | ↓ <b>Low:</b> Low intellectual property sector.   |   |  |   |   |
| - Reduce introduction of global innovation.   | ↓ <b>Low:</b> Expected levels of overseas investment are low.   |   |  |   |   |

Electricity Distribution Businesses (EDBs)

| Protect against risk to the economy (economic, social, and security)                      |  | Facilitate an open business environment                         |   | Be robust, simple, predictable, and provide certainty to investors   |   |
|---|--|---|---|--|---|
| Cost (-) / Benefit (+)  | Impact   | Cost (-) / Benefit (+)  | Impact  | Cost (-) / Benefit (+)   | Impact  |
| + Reduce risks from overseas investor incentives when capital is scarce.                  | ↓ <b>Low (uncertain):</b> We have not identified good evidence to assess behaviour of overseas investors when capital is scarce. For EDBs, monopoly conditions and Commerce Act regulation provide greater certainty of a return on capital investments. | - Perceived increased difficulty to invest in NZ energy sector. | ↓ <b>Low:</b> Not expected to be a significant global appetite for investment in NZ small EDBs. | - Increased screening requirements create more administrative hurdles (although design of regime could lower this risk). | • <b>Medium:</b> OIA amendments to class land used for electricity distribution as sensitive land may have consequential compliance and administration impacts for EDBs with existing overseas ownership. |
| + Protect against off-shoring monopoly profits.   | ↓ <b>Low:</b> We do not estimate there are significant monopoly profits.   |   |   |  |   |
| + Limit security risks associated with ownership of strategic assets by overseas persons. | • <b>Medium:</b> EDBs below \$200m are important to small economic centres (particularly the South Island), and cover large geographic areas. No evidence of threats.  |   |   |  |   |
| + Reduce risk of 'hollowing out' of NZ intellectual property.                             | ↓ <b>Low:</b> Low intellectual property sector.  |   |   |  |   |
| - Reduce introduction of global innovation.   | ↓ <b>Low:</b> Expected levels of overseas investment are low.  |   |   |  |   |

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## Gas (Transmission and Distribution)

| <i>Protect against risk to the economy (economic, social, and security)</i>               |  | <i>Facilitate an open business environment</i>                  |  | <i>Be robust, simple, predictable, and provide certainty to investors</i>   |  |
|---|--|---|--|---|--|
| Cost (-) / Benefit (+)  | Impact   | Cost (-) / Benefit (+)  | Impact   | Cost (-) / Benefit (+)  | Impact   |
| + Reduce risks from overseas investor incentives when capital is scarce.                  | ↓ <b>Low:</b> GasNet (the gas network for Whanganui) is the only relevant gas network not covered as a significant business asset under the OIA. Therefore, any changes are not expected to have a large impact. | - Perceived increased difficulty to invest in NZ energy sector. | ↓ <b>Low:</b> Not expected to be a significant global appetite for investment in portion of the sector that is not covered by the OIA currently. | - Increase screening requirements create more administrative hurdles (although design of regime could lower this risk). | <ul style="list-style-type: none"> <li>• <b>Medium:</b> OIA amendments to class land used for gas transmission or distribution as sensitive land may have consequential compliance and administration impacts for gas firms with existing overseas ownership.</li> </ul> |
| + Protect against off-shoring monopoly profits.   | ↓ <b>Low:</b> GasNet (the gas network for Whanganui) is the only relevant gas network not covered as a significant business asset under the OIA. Therefore, any changes are not expected to have a large impact. |   |  |   |  |
| + Limit security risks associated with ownership of strategic assets by overseas persons. | ↓ <b>Low:</b> GasNet (the gas network for Whanganui) is the only relevant gas network not covered as a significant business asset under the OIA. Therefore, any changes are not expected to have a large impact. |   |  |   |  |
| + Reduce risk of 'hollowing out' of NZ intellectual property.                             | ↓ <b>Low:</b> Low intellectual property sector.  |   |  |   |  |
| - Reduce global innovation.   | ↓ <b>Low:</b> Expected levels of overseas investment are low.  |   |  |   |  |

## Irrigation

| <i>Protect against risk to the economy (economic, social, and security)</i>               |   | <i>Facilitate an open business environment</i>                        |  | <i>Be robust, simple, predictable, and provide certainty to investors</i>   |  |
|---|---|---|--|---|--|
| Cost (-) / Benefit (+)  | Impact  | Cost (-) / Benefit (+)  | Impact   | Cost (-) / Benefit (+)  | Impact   |
| + Reduce risks from overseas investor incentives when capital is scarce.                  | ↓ <b>Low (uncertain):</b> We have not identified good evidence to assess behaviour of overseas investors when capital is scarce.                    | - Perceived increased difficulty to invest in NZ agricultural sector. | ↑ <b>High:</b> Although no immediate impact, as more irrigation schemes seek private capital, limiting foreign investment could reduce perception of openness. | - Increase screening requirements create more administrative hurdles (although design of regime could lower this risk). | <ul style="list-style-type: none"> <li>• s6(a) and s9(2)(h)</li> </ul> |
| + Protect against off-shoring of monopoly profits.  | ↓ <b>Low:</b> Monopoly profits expected to be limited from farmer ownership or farmers negotiating contractual prices when a scheme is established. |   |  |   |  |
| + Limit security risks associated with ownership of strategic assets by overseas persons. | ↓ <b>Low:</b> Catchment-only impacts: reduced service delivery would reduce water availability for farmer scheme members.                           |   |  |   |  |
| + Reduce risk of 'hollowing out' of NZ intellectual property.                             | ↓ <b>Low:</b> Low intellectual property sector.   |   |  |   |  |
| - Reduce availability of global capital.  | ↑ <b>High:</b> Future irrigation schemes highly likely to depend on private investment (including foreign).   |   |  |   |  |

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*Airports*

68. The OIA currently requires screening for investment in the largest five airports, as they involve significant business assets, sensitive land, or both. The OIA is also likely to capture many of the remaining airports because they require acquisition of sensitive land, usually being more than five hectares of non-urban land.


69. s6(a) and s9(2)(h)



*Network utilities: electricity distribution businesses and gas*


70. Of the 29 EDBs in New Zealand, the OIA may not cover 11 smaller EDBs that have assets worth less than the \$200m significant business assets threshold. The smaller EDBs below the threshold have a combined value of \$1 billion. In general, councils or consumer trusts own EDBs, which means there would need to be a process of privatisation before the potential for overseas investment.

s6(a) and s9(2)(h)




71. Of the four gas firms regulated by the Commerce Commission, the OIA covers three firms. The OIA may not cover GasNet, which owns Whanganui's gas distribution network and is worth less than \$200m.

72. s6(a) and s9(2)(h)




73. EDBs and gas distribution networks are likely to own or lease some land on which other network infrastructure is situated (for example, in the case of electricity distribution networks, substations).

s6(a) and s9(2)(h)



a s6(a) and s9(2)(h)





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- b Complexity of domestic drafting and undesirable consequential policy impacts
- The amendment would result in significantly different treatment of assets within the same network, depending on whether or not the assets happened to be on land owned or leased by the EDB or gas distributor. This will make the application of the regime to network infrastructure complex and risks unintended consequences (for example encouraging asset holding arrangements or transaction structures that avoid transfer of interests that fall within the OIA).


**Infrastructure: Legislative implementation**

74. In the previous section, we have outlined infrastructure sectors that could be addressed post-CPTPP and those that the OIA covers currently. For airports, electricity distribution businesses, and gas, the OIA covers larger firms (above \$200m), but may not cover smaller firms. For the reasons identified above, we do not recommend any changes for these sectors.
75. s6(a) and s9(2)(h)
76. The below table outlines detail on second order policy issues and legislative drafting necessary to give effect to any decisions s9(2)(h) to cover investments in airports, electricity distribution businesses and gas networks. Given the timeframes for the legislative process, we are providing this detail now to enable progress on legislative drafting in January, in the event you wish to make any changes. If you have specific views on detailed policy and legislative drafting, we would welcome any feedback.

| Sector  | Extent of coverage  | Proposed legislative drafting approach                               |
|---|---|--|
| Airports  | <p>s9(2)(h)</p> <p>the OIA would be extended to cover all land of airports with regular scheduled flights. This covers approximately 30 airports.</p> <p>The amendment would not extend coverage to acquisitions of land for future construction of an airport where no airport is on the land currently.</p>         | <p>s9(2)(h)</p>  |
| Electricity distribution businesses/ gas distributors | <p>s9(2)(h)</p> <p>the OIA would be extended to cover all land held by 29 EDBs and all gas distributors.</p> <p>The amendment would not extend coverage to acquisitions of land for future construction of gas or electricity infrastructure where no gas or electricity infrastructure is on the land currently.</p> | <p>The OIA would cover EDBs and gas distributors</p> <p>s9(2)(h)</p> |

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s6(a), s9(2)(f)(iv), and s9(2)(h)



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s6(a), s9(2)(f)(iv), and s9(2)(h)

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**Implementation**

90. Extending the scope of investments requiring screening under the OIA could have an impact on the Overseas Investment Office. This could include the number and complexity of applications under the OIA, and the scale of enforcement activities. This will be clearer once decisions are taken.

**Compliance and enforcement**

91. We do not propose any amendments for compliance and enforcement as we consider existing provisions are adequate to manage any amended requirements for screening of infrastructure or s6(a)

**Risks**

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s6(a) and s9(2)(h)

92. s6(a) and s9(2)(h)

**Open Business Environment**

93. Any changes to what is included in the OIA screening regime must be weighed against the importance of New Zealand being seen as an open business environment. The OECD provides a restrictiveness index based on a countries' foreign investment rules. New Zealand is currently at the restrictive end of the index, and is classified as more restrictive than Canada, Australia and the United States.

**Timing**

94. As you are aware, implementing any pre-CPTPP amendments to the OIA will need to be made on very tight timeframes which allow little or no room for slippage. This is detailed in the next steps section below.

**Consultation**

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95. The following agencies have been consulted in the development of this report: Ministry of Business, Innovation and Employment, Ministry for Primary Industries, Ministry of Transport, Ministry of Foreign Affairs and Trade, New Zealand Trade and Enterprise, Land Information New Zealand, Department of Internal Affairs, Te Puni Kōkiri and s6(a)

s6(a)

96. As noted in our separate report on forestry rights [T2017/2836], we consider consultation with Maori is required.

s9(2)(h)

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**Next Steps**

97. The table below summarises possible next steps:

| <b>Phase One: Overseas Investment Amendment Bill</b> |  |
|--|--|
| <b>2017</b>  |  |
| <b>Week 18 – 22 December 2017</b>                    | Decisions on TR – determine if SOP required  |
| <b>2018</b>  |  |
| <b>Early January</b>                                 | Draft the policy Cabinet paper for urgent policy changes                           |
| <b>First Cabinet of 2018 (Tues 23 Jan)</b>           | Cabinet agreement to policy and drafting SOP                                       |
| <b>Second Cabinet of 2018 (Tues 30 Jan)</b>          | Cabinet agreement to release SOP and to have it considered by the Select Committee |
| <b>Week 29 Jan – 2 Feb</b>                           | Select Committee likely meets – considers SOP and Bill                             |
| <b>Week 5 – 9 Feb</b>                                | Select Committee may meet<br>(note non-sitting week)                               |
| <b>Week 12 – 16 Feb</b>                              | Select Committee likely meets – considers SOP and Bill                             |
| <b>Tues 20 February</b>                              | Select Committee report due  |
| <b>From Thu 22 Feb to Thu 1 March</b>                | Second reading, Committee stage, third reading, royal assent                       |

s9(2)(f)(iv)

98. Any pre-CPTPP amendments to the definition of sensitive land you decide to make can be progressed by a Supplementary Order Paper (SOP) to the Overseas Investment Amendment Bill (the Bill). As you are aware, the Bill is on a particularly tight timeframe, with Select Committee report back expected on Tuesday 20 February.
99. PCO have indicated that they can start drafting the SOP based on decisions from this Treasury Report. Should you decide to make pre-CPTPP amendments, we will prepare a Cabinet paper to approve policy decisions for the first Cabinet meeting on Tuesday 23 January. The second Cabinet meeting on Tuesday 30 January will approve the release of the SOP, which will then be considered with the Bill at Select Committee.
100. There is no room for slippage in this proposed timeline. We expect that there will be at least two Select Committee meetings to consider the SOP before reporting back to the House on Tuesday 20 February. However, the Select Committee may decide to meet more often, including meeting more frequently in a sitting week or meeting in the non-sitting week in early February. It is expected the final stages for the Bill will be progressed by 1 March.

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Appendix One: Further detail on assessment of infrastructure

| Sector  | Current foreign investment   | Current limitations to foreign investment   | Current OIA screening   |
|---|--|---|---|
| <b>Rail</b>   | <ul style="list-style-type: none"> <li>• <b>No foreign investment.</b></li> <li>• The NZ Railways Corporation and KiwiRail are state-owned.</li> </ul>   | <ul style="list-style-type: none"> <li>• Foreign investment could only materialise if the Government of the day chose to privatise KiwiRail or the NZ Railways Corporation.</li> </ul>  | <ul style="list-style-type: none"> <li>• <b>Potential investment would be subject to OIA (SBA and sensitive land test).</b> Investment would likely be over \$200m and greater than 5ha of non-urban land.</li> </ul>   |
| <b>Roads</b>  | <ul style="list-style-type: none"> <li>• <b>Foreign investment is limited.</b></li> <li>• State highways owned by NZTA.</li> <li>• Local roads owned by local councils.</li> <li>• Only private investment is via two previous PPPs; financiers based in NZ, Australia, UK, and Spain.</li> </ul>  | <ul style="list-style-type: none"> <li>• Foreign investment could come from PPPs. Under a PPP arrangement, asset ownership remains in the public sector. Future road PPPs are highly likely to be worth over \$200m and captured by the OIA.</li> </ul>   | <ul style="list-style-type: none"> <li>• <b>PPP investment subject to OIA (SBA and sensitive land test).</b> PPPs worth over \$200m, or greater than 5ha of non-urban land, are subject to OIA provisions. We do not anticipate a future road PPP worth less than \$200m.</li> </ul>              |
| <b>Social infrastructure (public schools and hospitals)</b> | <ul style="list-style-type: none"> <li>• <b>Foreign investment is limited.</b></li> <li>• No private (including foreign) investment in hospitals.</li> <li>• Only private investment in schools via PPPs (e.g. ShapEd was selected as the preferred bidder for school PPP early this year; equity provider is New Zealand based).</li> </ul> | <ul style="list-style-type: none"> <li>• Foreign investment could come from PPPs. Under a PPP arrangement, asset ownership remains in the public sector. Future school PPPs are highly likely to be worth over \$200m and captured by the OIA.</li> </ul>   | <ul style="list-style-type: none"> <li>• <b>PPP investments mostly subject to OIA (SBA Test and some sensitive land).</b> Future PPPs are expected to be over \$200m and captured by the OIA. One previous PPP (school) was worth less than \$200m (but this was the first pilot PPP).</li> </ul> |
| <b>Three-waters</b>   | <ul style="list-style-type: none"> <li>• <b>No foreign investment.</b></li> <li>• All networks owned by local councils or council-controlled organisation.</li> </ul>  | <ul style="list-style-type: none"> <li>• Private (including foreign) investment is made difficult by restrictions in the Local Government Act, which generally restrict ownership of significant three waters infrastructure to local authorities or Council Controlled Organisations (subject to an exception that allows temporary divestment - for a maximum period of 35 years - for the purposes of a "joint arrangement" between a local authority and a private party to provide water services).</li> </ul> | <ul style="list-style-type: none"> <li>• <b>Potential investment would be at least partially subject to OIA (SBA Test).</b> Major three-waters networks are worth over \$200m. Smaller networks or a partial sale of a major network may not be covered.</li> </ul>                               |
| <b>Electricity transmission (Transpower)</b>                | <ul style="list-style-type: none"> <li>• <b>No private investment (including foreign).</b></li> <li>• Transpower is a state-owned enterprise</li> </ul>  | <ul style="list-style-type: none"> <li>• Foreign investment could only materialise if the Government of the day chose to privatise Transpower.</li> </ul>   | <ul style="list-style-type: none"> <li>• <b>Potential investment would be subject to OIA (SBA Test).</b> Over \$200m and greater than 5ha of non-urban land.</li> </ul>   |

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| Sector                                 | Current foreign investment   | Current limitations to foreign investment  | Current OIA screening  |
|--|--|--|--|
| <b>Electricity distribution (ELBs)</b> | <ul style="list-style-type: none"> <li>• <b>Foreign investment is limited.</b></li> <li>• Most ELBs are owned by consumer trusts.</li> <li>• Some are public listed companies. For example, Wellington Electricity Lines Limited, which is worth over \$500 million. It is owned by the Cheung Kong group listed on the Hong Kong Stock Exchange.</li> </ul>   | <ul style="list-style-type: none"> <li>• There are no limits on foreign investors, although 18 of the 29 ELBs would be subject to OIA screening.</li> </ul>  | <ul style="list-style-type: none"> <li>• <b>Partially subject to OIA (SBA Test).</b> Of the 29 ELBs, 11 have assets worth less than \$200m and would not trigger an OIA screen.</li> </ul>   |
| <b>Airports</b>                        | <ul style="list-style-type: none"> <li>• <b>Foreign investment is limited.</b></li> <li>• Of the three largest airports: <ul style="list-style-type: none"> <li>• Auckland is owned by Auckland International Airports Limited (AIAL), of which international shareholders hold about 40 percent of the shares.</li> <li>• Wellington is owned by Infratil (NZ-based) and Wellington City Council.</li> <li>• Christchurch is owned by the council and the national Government.</li> </ul> </li> </ul> | <ul style="list-style-type: none"> <li>• There are no limits on foreign investment, although all of the international airports and the majority of regional airports would be subject to OIA screening.</li> </ul> | <ul style="list-style-type: none"> <li>• <b>Partially subject to OIA (SBA and Sensitive Land).</b> Largest airports would be subject to OIA and others are likely to trigger OIA screening under sensitive land (greater than 5ha of non-urban land).</li> </ul> |
| <b>Seaports</b>                        | <ul style="list-style-type: none"> <li>• <b>Foreign investment is limited.</b></li> <li>• The largest ports in the country are majority-local council owned: <ul style="list-style-type: none"> <li>• Port of Auckland is owned by Auckland Council</li> <li>• Port of Tauranga is majority-owned by the local council and 46% publicly listed</li> <li>• Lyttelton Port Company is 100 percent owned by Christchurch City Council.</li> </ul> </li> </ul>   | <ul style="list-style-type: none"> <li>• There are no limits on foreign investment, although all ports would be subject to OIA screening.</li> </ul>   | <ul style="list-style-type: none"> <li>• <b>Subject to OIA (Sensitive Land).</b> Ports are categorised as on 'sensitive land' (adjacent to foreshore) triggering OIA screening.</li> </ul>   |
| <b>Irrigation</b>                      | <ul style="list-style-type: none"> <li>• <b>Foreign investment is limited, but likely to be important in the future.</b></li> <li>• The majority of irrigation schemes are owned and run by New Zealand-based farmer cooperatives, but future schemes are likely to be expensive and will require non-farmer (domestic or foreign) investments.</li> </ul>   | <ul style="list-style-type: none"> <li>• There are no limits on foreign investment. Several scheme investments would be subject to OIA screening.</li> </ul>   | <ul style="list-style-type: none"> <li>• <b>Partially subject to OIA (SBA Test).</b> Foreign investment in major schemes worth over \$200m would be captured by the OIA, but most future schemes are likely to fall below this threshold.</li> </ul>             |

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| Sector                                    | Current foreign investment   | Current limitations to foreign investment   | Current OIA screening  |
|---|--|---|--|
| <b>Gas transmission and distribution</b>  | <ul style="list-style-type: none"> <li>• <b>There is dependence on foreign investment.</b></li> <li>• Of the four gas suppliers: <ul style="list-style-type: none"> <li>• Vector is 75% consumer-trust owned</li> <li>• Gasnet is owned by Whanganui District Council</li> <li>• Powerco is owned by two Australian-based companies</li> <li>• First Gas is owned by an Australian-based company.</li> </ul> </li> </ul> | <ul style="list-style-type: none"> <li>• There are no limits on foreign investment, although three of the four gas suppliers would be subject to OIA screening.</li> </ul>  | <ul style="list-style-type: none"> <li>• <b>Mostly subject to OIA (SBA Test).</b> Three of the four regulated entities are worth more than \$200 million, triggering OIA. However, Gasnet has an asset base of about \$23 million and may not trigger the OIA.</li> </ul>  |
| <b>Telecommunications (Fibre)</b>         | <ul style="list-style-type: none"> <li>• <b>Some dependence on foreign investment:</b> <ul style="list-style-type: none"> <li>• Chorus is publicly listed</li> <li>• Enable is owned by Christchurch City Council</li> <li>• Ultrafast Fibre is consumer trust-owned</li> <li>• Northpower is consumer trust-owned</li> </ul> </li> </ul>  | <ul style="list-style-type: none"> <li>• Crown approval is required for any person to have an interest in 10% or more of total voting shares in Chorus, with any non-New Zealand nationals needing Crown consent to have an interest in more than 49.9% voting shares.</li> <li>• For LFCs there are some restrictions on non-New Zealand nationals having an interest in more than 10% of the voting rights and sale of network assets.</li> </ul> | <ul style="list-style-type: none"> <li>• <b>All subject to OIA (SBA Test).</b> Chorus and the LFCs have assets valued at over \$200m.</li> </ul>   |
| <b>Oil refining and fuel transmission</b> | <ul style="list-style-type: none"> <li>• <b>Marsden Point Oil Refinery has dependence on foreign investment.</b></li> <li>• It is owned by Refining NZ, a listed company.</li> </ul>   | <ul style="list-style-type: none"> <li>• Investment in Marsden Point would be captured by the OIA.</li> </ul>   | <ul style="list-style-type: none"> <li>• <b>Subject to OIA (SBA Test and Sensitive Land).</b> Marsden Point Oil Refinery is the only oil refinery in New Zealand. A 168-kilometre pipeline connects the refinery to the Wiri Oil Terminal in Auckland. It is worth more than \$200m (above SBA threshold), and sits adjacent to the foreshore (sensitive land).</li> </ul> |

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**Treasury Report:** Cabinet Paper – Overseas Investment Update and Next Steps

|              |                        |                     |          |
|--------------|------------------------|---------------------|----------|
| <b>Date:</b> | Friday 19 January 2018 | <b>Report No:</b>   | T2018/83 |
|              |                        | <b>File Number:</b> | IM-5-1-1 |

**Action Sought**

|   | <b>Action Sought</b>  | <b>Deadline</b>         |
|---|---|-------------------------|
| Associate Minister of Finance<br>(Hon David Parker) | <b>Agree</b> to the recommendations in this paper<br><br><b>Lodge</b> the attached Cabinet paper by 10:00 a.m. Thursday 25 January 2018 | Tuesday 23 January 2018 |

**Contact for Telephone Discussion (if required)**

| <b>Name</b>   | <b>Position</b>                  | <b>Telephone</b> | <b>1st Contact</b> |
|---------------|----------------------------------|------------------|--------------------|
| Jesse Corlett | Senior Policy Advisor            | N/A (wk)         | s9(2)(a) ✓         |
| Thomas Parry  | Team Leader, Overseas Investment | s9(2)(k)         |                    |

**Actions for the Minister's Office Staff**

**Return** the signed report to Treasury.

**Lodge** the attached Cabinet Paper by 10:00a.m. Thursday 25 January 2018.

Note any feedback on the quality of the report

**Enclosure:** Yes (attached)

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## Treasury Report: Cabinet Paper – Overseas Investment Update and Next Steps

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### Purpose

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1. This report attaches a draft Cabinet paper for your consideration. The draft paper:
  - a seeks Cabinet's agreement to undertake a review of the Overseas Investment Act 2005 (the Act) intended to simplify and streamline the regime, and to invite you to report back with a draft terms of reference.
  - b informs Cabinet of your decision not to proceed with further pre-CPTPP changes to the Overseas Investment Act 2005 relating to s9(2)(f)(iv)
  - c proposes that a group of Ministers<sup>1</sup> be delegated power to agree to policy changes to the Overseas Investment Amendment Bill implementing the ban on overseas buyers of existing homes so that these changes can be recommended in the Departmental Report to the Finance and Expenditure Select Committee (FEC) by Wednesday 7 February 2018.

### Timing

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2. The attached draft Cabinet paper is provided to enable you to approve it for ministerial consultation by your office (subject to finalising) during your absence in the week commencing Tuesday 23 January 2018.
3. The paper must then be lodged by **10.00am Thursday 25 January 2018** so that it can be considered by Cabinet on Tuesday 30 January 2018. Note there is no Cabinet scheduled for Monday 5 February 2018.
4. This tight timeframe is necessary because it is likely that a number of changes to the Bill will need to be made before it is implemented, including to address issues raised through submissions to FEC. Some of these may fall outside of previous decisions made by Cabinet. The Treasury's Departmental Report on the Bill, due on 7 February 2018, is the best vehicle to make these changes.
5. However, the truncated select committee process means that there is no opportunity for Cabinet to consider changes to the Bill before the Treasury's Departmental Report needs to be finalised.
6. This approach is proposed based on our current understanding regarding the likely signing and entry into force of the CPTPP. If it becomes clear that signing of the CPTPP will be delayed, the draft paper will be amended to remove the proposal for delegated authority and we will instead provide a separate Cabinet paper so you can seek Cabinet agreement to any necessary changes to the Bill.

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<sup>11</sup> Prime Minister, Deputy Prime Minister, Minister of Finance, Associate Minister of Finance Hon David Parker, Minister of Housing and Urban Development and the Minister of Land Information.  
T2018/83 : Cabinet Paper: Overseas Investment Update and Next Steps

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**Risks**

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7. There is currently no room for slippage in this timeline. The Treasury Departmental Report, the best vehicle for making changes to the Bill, is due to FEC on Wednesday 7 February. Ministers with Power to Act will be required to make decisions on any policy changes quickly before these can be recommended in the Department Report.
8. If there is a delay in the CPTPP entering into force, this risk will be mitigated because the select committee process can be extended and the necessary approval of Cabinet can be sought for policy changes to the Bill.

**Recommended Action**

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We recommend that you:

- a **agree** to consult with Ministers' offices on the attached Cabinet paper in the week commencing Tuesday 23 January 2018  
*Agree / Disagree*
- b **lodge** the attached Cabinet paper for Cabinet on Tuesday 30 January 2018  
*Agree / Disagree*
- c **note** there is no Cabinet meeting scheduled for Monday 5 February 2018
- d **note** the paper needs to be agreed by Cabinet on Tuesday 30 January 2018 to allow necessary changes to the Overseas Investment Amendment Bill to be agreed by a group of Ministers with Power to Act so they can be introduced in Treasury's Departmental Report to FEC due Wednesday 8 February 2018
- e **note** that while there is currently no room for slippage in this timeline, if the entry into force of the CPTPP is delayed any necessary changes to the Bill can be taken to Cabinet

Thomas Parry  
**Team Leader, Overseas Investment**

Hon David Parker  
**Associate Minister of Finance**