

**PROTOCOL ON INVESTMENT  
TO THE NEW ZEALAND – AUSTRALIA  
CLOSER ECONOMIC RELATIONS  
TRADE AGREEMENT**

**NATIONAL INTEREST ANALYSIS**

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## **INTRODUCTION**

This National Interest Analysis outlines the motivation for, and content and anticipated effects of, the proposed Protocol on Investment to the Closer Economic Relations (CER) Trade Agreement. Key New Zealand motivations are to ensure that New Zealand investors in Australia receive the most advantageous treatment available to any foreign investors in Australia, and to continue to strengthen our economic relationship with Australia through the addition of an investment treaty to CER.

A major outcome is an increase in the monetary thresholds at which inward investment requires regulatory approval – to A\$1.004 billion for New Zealand investment into Australian business assets and NZ\$477 million for Australian investment into New Zealand business assets. In addition the Protocol ensures that, with few exceptions, any superior benefits either party includes in future free trade agreements with other economies will also be available to investors of the other CER partner. The Protocol also includes a range of reservations and limitations designed to protect existing and future policy space without unduly compromising investor certainty.

## **EXECUTIVE SUMMARY**

### **i. Background**

Australia is New Zealand's closest international relationship – politically, militarily, and socially – and is our most significant trading partner in goods, services and foreign investment. The suite of agreements and arrangements which form the Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA or CER) are considered internationally to create the world's most comprehensive, effective, and mutually compatible free trade agreement. However, a chapter to enable and encourage foreign investment is not currently a part of CER, making it incomplete compared with the modern free trade agreements to which New Zealand is a party.

Negotiations towards a Protocol on Investment to the Australia-New Zealand Closer Economic Relations Trade Agreement ("the Protocol"), commenced in 2005 and were concluded in June 2010. Accompanying the Protocol, New Zealand and Australia have also concluded three exchanges of letters which form an integral part of the Protocol.

This National Interest Analysis (NIA) assesses the Protocol and accompanying exchanges of letters (henceforth, referred to together as "the Protocol") from the perspective of their impact on New Zealand and New Zealanders. The NIA does not seek to address the impact of any of these instruments upon Australia or other economies. The Protocol and accompanying letters are considered together in the same NIA as they were negotiated in tandem and form an integral part of the overall package of the Protocol.

### **ii. Reasons for New Zealand becoming a Party**

The Protocol is the latest development in a long-running strategy of economic integration between Australia and New Zealand. Following the successful conclusion of the CER negotiations in 1983, successive New Zealand governments judged it to be in New Zealand's national interest to further broaden and deepen New Zealand's economic relationship with Australia. Subsequent milestones include the acceleration of the initially proposed pace of tariff elimination, the negotiation of the CER Services Protocol in 1988, and the Trans-Tasman Mutual Recognition Arrangement (TTMRA) in 1998.

In the past, Australia argued that any potential trans-Tasman investment agreement leading to preferential treatment of New Zealand investment would need to be extended to their other partners, including Japan under the NARA treaty,<sup>1</sup> and that it did not want to do this. This put any preferential investment agreement on the back-burner. The successful conclusion in 2004 of the Australia-United States Free Trade Agreement (AUSFTA), which includes preferential market access for US investors, re-opened the possibility of an ambitious trans-Tasman investment agreement.

The original strategic judgement for concluding such an agreement, namely that increased economic integration with Australia was in New Zealand's national interest, and lower investment barriers are a key component of any such increased integration, was now supplemented by a judgement that the superior treatment of US investors in Australia was at odds with an ambition that CER be both

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<sup>1</sup> Basic Treaty of Friendship and Cooperation, signed at Tokyo on 16 June 1976. Also known as the Nippon-Australia Relations Agreement (NARA).

countries' highest quality free trade agreement. The AUSFTA outcome also raised the risk of the relative position of New Zealand investors in Australia deteriorating further over time, as Australia agreed further FTAs with other partners. That would cloud the position of CER as the most ambitious set of bilateral economic agreements of either party.

AUSFTA both provided the opportunity and strengthened the case to negotiate an investment agreement to supplement the existing suite of CER obligations. In February 2005, the New Zealand Minister of Finance and Australian Treasurer agreed to investigate the possibility of adding an investment component to the CER.

Aside from the strategic rationale, key reasons for New Zealand becoming a party to the Protocol is that it will:

- mean that capital can move more freely across the Tasman, as the other factors of production (labour, goods, services etc) currently do;
- facilitate investment, on which New Zealand is highly dependent, in New Zealand business assets by Australian investors – New Zealand's largest single foreign investment source. This will support domestic businesses' development and expansion;
- establish a preferential market access threshold for investments in significant business assets, reducing compliance costs and increasing certainty for investors on both sides of Tasman;
- provide additional protections for investors on both sides of the Tasman; and
- send a strong message that New Zealand has an open and welcoming stance towards foreign investment, and is prepared to enter ambitious investment agreements with similarly ambitious partners, reflecting the government's overall policy position.

Options other than a Protocol on Investment include unilateral increase of the threshold for prior consent stipulated in the Overseas Investment Act 2005 (OIA); other types of agreements such as an arrangement, a Bilateral Investment Treaty (BIT); or adding an investment chapter to the CER agreement. Overall, the Protocol was seen as the best vehicle as it achieved a treaty-level investment agreement with Australia. An arrangement would not have achieved a treaty-level investment agreement with Australia, placing investment on a different footing to the existing CER agreements on goods and services trade. A BIT would not have created strong links to existing CER agreements and adding an investment chapter to CER would have unnecessarily opened up the whole CER agreement for renegotiation.

A unilateral increase in the monetary threshold for inward investment was already being considered as part of a separate process in 2005 when it was agreed to go ahead with Protocol negotiations. These two processes were kept separate as the Protocol, as a reciprocal trans-Tasman investment agreement, has a range of goals beyond what can be achieved by unilateral changes to our inward investment regime.

### iii. Key Advantages and Disadvantages to New Zealand of the Protocol Actions

#### *Advantages*

The Protocol reduces compliance costs and improves certainty for investors by establishing preferential market access screening thresholds for investment in certain business assets. This will facilitate productive foreign investment in business assets in both countries. The Protocol does not alter the existing screening regime for sensitive land or fishing quota.

For New Zealand investors seeking to invest in Australian business assets, this threshold will be set at A\$1.004 billion,<sup>2</sup> the same threshold as United States investors benefit from under AUSFTA. This means that only investments representing a substantial interest in Australian businesses worth A\$1.004 billion and over will require the approval of Australia's Foreign Investment Review Board (FIRB).<sup>3</sup> Data suggests that very few New Zealand investments in non-sensitive business assets will require prior consent under the new threshold.

Australian investors seeking to invest in New Zealand significant business assets will benefit from an increased threshold as well – only investments where both the investor is buying 25% or more of a business and either the value of that share is over NZ\$477 million, or the assets of the target investment are more than NZ\$477 million will require prior approval by the Overseas Investment Office (OIO). The increased thresholds apply to investments in significant business assets only – the screening regime for sensitive land and fishing quota remains unchanged and applicable to Australian investors. Furthermore, if an overseas investor wishes to invest in a significant business asset that also includes sensitive land and/or fishing quota, the investment must meet the criteria for all of those categories of investment for consent to be granted.

The thresholds of both countries will be indexed annually on 1 January to gross domestic product, ensuring that the thresholds maintain their size in relation to the size of each economy.

The thresholds were agreed by Prime Ministers during their meeting in August 2009. The Australian threshold matches the threshold available to US investors under AUSFTA. The New Zealand threshold is less than half the Australian threshold, in part reflecting differences in the size of the two parties' economies.

In addition the Protocol secures for investors a comprehensive set of reciprocal provisions and protections, including:

- New Zealand investors and their investments in Australia will receive treatment no less favourable than that which Australia offers to its own investors (National Treatment);
- New Zealand investors and their investments in Australia will be treated no less favourably than investors from any third country with whom Australia might conclude an investment agreement in the future (Most-Favoured-Nation); and
- New Zealand investors and their investments cannot be subject to rules requiring investors to achieve mandated export, domestic content or technology transfer targets (Performance Requirements).

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<sup>2</sup> Other than in specified sensitive sectors.

<sup>3</sup> For this purpose, a substantial interest occurs when a single investor (and any associates) has 15% or more of the ownership or several investors (and any associates) have 40% or more in aggregate of the ownership of any corporation, business or trust. See [www.firb.gov.au](http://www.firb.gov.au).

New Zealand will also benefit from:

- continued application of the OIA screening regime for foreign investment involving sensitive land and fishing quota;
- preservation of space for the Government to legitimately regulate in certain circumstances, for example in a balance of payments crisis or to protect human, animal or plant life or health;
- an exchange of letters concerning Australia's reservation on non-conforming measures at the regional level of government. Australia will provide New Zealand with revised schedules to the Protocol incorporating all known non-conforming regional measures, giving New Zealand investors a higher level of transparency than Australia's current reservation on regional measures provides; and
- high-quality, negative list schedules of reservations, providing a high level of transparency for investors by listing only the sectors of the economy where the one or more of the core obligations<sup>4</sup> of the Protocol do not apply.

In addition, the Protocol provides important strategic and political benefits for New Zealand. It demonstrates New Zealand's level of commitment to the bilateral relationship with Australia and vice versa, as well as maintaining CER's position as the most comprehensive trade agreement in the world. Furthermore, the Protocol also serves as a high water mark for future agreements, demonstrating the quality that can be reached when high levels of ambition and integration are already present in the relationship.

#### ***Disadvantages***

The higher threshold for Australian investors offered in the Protocol will require the OIO to monitor Australian investors utilising the higher threshold to ensure that the investors do qualify as Australian investors. The OIO already monitors foreign investment activity to help ensure that foreign investors comply with their obligations under the OIA. It is anticipated that this monitoring will be able to effectively enforce the application of the higher threshold to only Australian investors.

The OIO periodically evaluates the effectiveness of its monitoring systems. Future evaluations will include consideration of the effectiveness of monitoring of investor compliance with the higher monetary thresholds available to Australian investors.

There is also some risk that Australian investments falling between the NZ\$100 million and NZ\$477 million thresholds, which might otherwise have been declined by the OIO, will proceed as they will not require prior approval. This is not viewed as a significant risk, as no applications to invest in New Zealand business assets from any foreign investor have been declined in the last 25 years.

The OIA is specified in New Zealand's reservations. This specification means that New Zealand is unable to extend the categories of investment which require prior consent (i.e. sensitive land, significant business assets and fishing quota). However, the government retains flexibility regarding the type of tests which these categories of investment can be subject to, allowing future policy flexibility.

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<sup>4</sup> "Core obligations" refers to the four core obligations of the Protocol – National Treatment, Most-Favoured-Nation, Performance Requirements, and Senior Management and Boards of Directors. Unless specifically reserved against in the schedules of reservations or referred to in the text of the Protocol, the Protocol is considered to apply, in general, to all other sectors of the economy.

**iv. Legal Obligations imposed on New Zealand by the Protocol**

The key legal obligations imposed by the Protocol include:

National Treatment	Most-Favoured-Nation
Performance Requirements	Senior Management and Boards of Directors
Transfers	Minimum Standard of Treatment
Compensation for Losses	Expropriation
Transparency	Subrogation
Denial of Benefits	

Legislation, in the form of amendments to the Overseas Investment Regulations 2005 and/or the OIA, will be required in order to implement the market access obligations of the Protocol:

LEGISLATIVE PROVISION	DESCRIPTION
<b>Identify an Australian investor</b>	Provisions to distinguish between Australian and other foreign investors, including both natural persons and enterprises.
<b>Identify an Australian government investor</b>	Provisions to distinguish between Australian government investors (for example state owned enterprises) and other Australian investors. This is necessary as the preferential screening threshold for Australian investors does not apply to government investors.
<b>Screening thresholds for Australian investors</b>	Provisions to apply the preferential screening threshold for an Australian investor that is not a government investor to invest in New Zealand significant business assets up to the level agreed in the Protocol, and to provide for annual GDP-indexation of the thresholds applicable to Australian private and government investors.
<b>Australian substantive business operations</b>	Provisions to allow New Zealand to deny the benefits of the Protocol to enterprises that would otherwise be considered Australian investors, if they do not have substantive business operations in Australia and non-Australians own or control the enterprise.

The OIO will need to give effect to these legislative changes from the time at which the relevant Act and/or Regulations come into force.

All exchanges of letters negotiated between Australia and New Zealand relating to the Protocol form an integral part of the Protocol. The exchanges of letters are:

- *Exchange of Letters on Australian Non-Conforming Measures at Regional Level of Government* – Australia agrees to provide New Zealand with revised schedules specifying all non-conforming measures in place at the regional level of government;
- *Exchange of Letters on New Zealand Most-Favoured-Nation Reservation* – clarifies that if New Zealand extends preferential treatment to another economy as part of wider process of economic integration, Australian investors and investments will have no less favourable treatment extended to them; and
- *Exchange of Letters on New Zealand Reservation with Respect to Water* – New Zealand agrees to review our reservation on water rights allocation, and to further reviews if the reservation remains in place following the initial review.

#### **v. Economic, Social, Cultural and Environmental Effects of the Protocol**

##### ***Economic Effects***

Overall, the Protocol is expected to have positive economic effects on the New Zealand economy. This is largely through the benefits of increased ease of foreign investment for Australian investors, New Zealand's largest single source of foreign capital. The benefits of foreign investment can be significant, including:

- financial support for the growth and expansion of New Zealand firms;
- productivity improvements for New Zealand firms through technology, process and product transfer, and also through a "demonstration effect" for other domestic firms;
- greater access to foreign networks which can facilitate export opportunities for New Zealand firms; and
- new or innovative financial, business or management expertise and skills often come along with foreign investment and can benefit broader parts of the economy.

While it is expected that the overall effect of the Protocol will be positive, it is not expected that trans-Tasman investment flows will increase significantly. Trans-Tasman investment flows are already at very high levels and the existing Australian and New Zealand investment screening regimes do little to impede business investment. The Protocol will, however, support the existing high levels of investment by creating greater certainty and lowering compliance costs for investors on both sides of the Tasman.

Specific modelling of the effects of the Protocol has not been undertaken given the considerable difficulty in accurately estimating for modeling purposes the magnitude of any reductions in risk as a result of the Protocol.

##### ***Social Effects***

The Protocol is not expected to have any significant negative social effects in New Zealand. While there is some public concern around sales of large tracts of land to foreign investors, the Protocol does not change domestic policy settings on screening requirements for these types of purchases. The Protocol strikes a balance between protecting particularly sensitive New Zealand assets, such as sensitive land, fishing quota, and significant business assets, and facilitating Australian investment in New Zealand business assets generally.

### ***Cultural Effects***

The Protocol contains safeguards to ensure that there are no adverse effects on New Zealand cultural values, including Māori interests (see section 4.7 of this NIA).

### ***Environmental Effects***

The Protocol is not expected to have any negative environmental effects and will not restrict New Zealand from applying existing or future environmental laws, policies and regulations, provided that they are applied to meet a legitimate objective and are not implemented in a discriminatory fashion. There are a number of provisions in the Protocol which provide for environmental protection and sustainable development (see section 4.7 of this NIA).

### **vi. Costs**

Overall, the OIO's costs are expected to decrease as they will receive fewer applications from Australian investors. Where any additional investigation is necessary under the notification regime, it is expected that these costs would be managed within existing baselines.

It is not expected that businesses will face any additional costs as a result of the Protocol. In fact, costs to business will be reduced as fewer investments will require approval.

### **vii. Subsequent Protocols and/or Amendments to the Protocol**

The Protocol provides for consultations and regular review. These may lead to suggestions for amendment; which would be subject to New Zealand's normal domestic approvals and procedures. Two of the exchanges of letters which accompany the Protocol also provide for amendment:

- The Protocol will need to be amended to take into account Australia's revised schedules of reservations specifying their non-conforming regional measures; and
- If New Zealand agrees to modify or remove the reservation on water rights, the Protocol will need to be amended to reflect this alteration.

### **viii. Implementation**

Legislation, in the form of amendments to the Overseas Investment Regulations 2005 and/or the OIA, will be required in order to implement the Protocol. Once the Protocol is signed and the Parliamentary Treaty Examination process is completed, the applicable legislative process will commence to make these amendments.

### **ix. Consultation**

Negotiations have been a matter of public information since before their commencement in 2005, and have been the subject of public discussion on a number of occasions. The market access elements of the negotiations were also publically announced by the Prime Minister in August 2009. In developing the schedules of reservations to the Protocol, a comprehensive interdepartmental consultation process was undertaken where all agencies were asked to review the reservations and provide information on whether reservations needed to be retained, adjusted/updated or removed.

The public will have an opportunity to make submissions during examination of the Protocol by Parliament's Foreign Affairs, Defence and Trade Committee and if any amendments to the OIA are required.

## **1 NATURE AND TIMING OF PROPOSED TREATY ACTION**

The Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA or CER) was signed by New Zealand on 28 March 1983. The Protocol on Investment to the ANZCERTA ("the Protocol") completes the suite of agreements under CER facilitating the movement of the vast majority of trade, people, ideas and now capital. Alongside the Protocol, three accompanying exchanges of letters were also agreed and will also be signed at the same time as the Protocol:

- i. Exchange of Letters on Australian Non-Conforming Measures at Regional Level of Government;
- ii. Exchange of Letters on New Zealand Most-Favoured-Nation Reservation; and
- iii. Exchange of Letters on New Zealand Reservation with Respect to Water.

Entry into force of the Protocol and accompanying exchanges of letters<sup>5</sup> is subject to the domestic legal procedures of both parties and will occur 30 days, or other such period as the parties may agree, after the parties exchange written notification that procedures have been completed, pursuant to Article 29 of the Protocol. Both parties are aiming for the Protocol and accompanying exchanges of letters to enter into force as soon as possible (likely to be late 2011 at the earliest).

As the Protocol does not apply to the Cook Islands, Niue or Tokelau, consultation with these countries is not required.

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<sup>5</sup> Where this document refers to "the Protocol" it should be taken as read that this includes both the text of the Protocol, the schedules of reservation and the accompanying exchanges of letters which form an integral part of the Protocol.

## **2 REASONS FOR NEW ZEALAND BECOMING A PARTY TO THE PROTOCOL**

### **2.1 Background to the Protocol**

Australia is New Zealand's largest trading partner in goods and services, as well as our largest source of foreign investment. Australia is also one of our closest international relationships politically, militarily, socially and in many other ways. The suite of agreements and arrangements which underpin this strong relationship have been developing since before the signature of CER in 1983.

CER is regarded internationally as the world's most comprehensive, effective, and mutually compatible free trade agreement (FTA). However CER does not include an investment chapter, making it incomplete compared to a modern FTA and inconsistent with Australia's position as New Zealand's largest source of foreign investment.

A protocol facilitating investment between the two countries has been a long-held objective of successive New Zealand and Australian governments. The conclusion in 2005 of the Australia-United States Free Trade Agreement (AUSFTA) opened the way to negotiating a preferential investment agreement between New Zealand and Australia. Since that time, United States investors investing in Australian businesses or assets other than specified sensitive sectors have enjoyed a significantly higher screening threshold than that available to other foreign investors.

Currently the screening threshold for US investors in these non-sensitive sectors is A\$1.004 billion, compared to A\$231 million for investors from other economies, including New Zealand. The fact that New Zealand investors are currently treated less favourably in Australia than investors from another country is not reflective of the close relationship and high levels of economic and social integration between Australia and New Zealand. The Protocol aims to remedy this situation.

Almost all other factors of production are able to move without significant barriers across the Tasman, leaving investment the most significant factor remaining subject to domestic unilateral investment screening mechanisms. The conclusion of the Protocol and accompanying exchanges of letters will facilitate the movement of capital as well as ensure that CER remains the highest-quality trade and economic integration agreement in which either country participates.

New Zealand does not, as yet, have a preferential investment agreement with any country. However, as discussed above, Australia is New Zealand's largest single source of foreign investment, and also the largest destination for New Zealand direct investment overseas. It is therefore consistent with Australia's position as New Zealand's largest trading partner, largest investor and largest investment destination that New Zealand should seek to conclude a preferential investment agreement with Australia that is consistent with the high level of ambition of existing CER instruments.

The Protocol also includes three binding exchanges of letters which form an integral part of the Protocol: a letter on non-conforming measures at the Australian regional level of government; a letter clarifying the treatment New Zealand intends to extend to Australia under the MFN obligation; and a letter committing New Zealand to a review of its reservation on water.

## **2.2 Other Mechanisms Considered**

There are a number of other mechanisms which could have achieved a similar outcome to a Protocol on Investment. An arrangement would have been one option but is an instrument of less legal force than a Treaty level agreement. Therefore a Protocol is preferable as it places investment on the same footing as the existing CER agreements regarding trade in goods and services.

A second option would have been to negotiate a Bilateral Investment Treaty (BIT). However a BIT is a stand-alone agreement. A protocol was considered more appropriate as it has strong links to the underlying CER agreement, therefore better reflecting the nature of this agreement as an extension of CER.

A third option would have been to add an investment chapter to the CER agreement itself. It is well-settled treaty practice that this would re-open the entire CER agreement for re-negotiation, which was considered unnecessary and unduly complex when the same effect could be achieved by negotiating a separate protocol on investment.

On balance a protocol on investment is considered the most practical solution to the requirements for a preferential investment agreement between New Zealand and Australia.

## **2.3 Unilateral Liberalisation**

Aside from a dedicated protocol on investment, another option would have been to unilaterally reduce or remove the need for prior approval set out in the OIA. At the time that Ministers took the decision to negotiate the protocol, a separate review of inward investment was underway. This culminated in the current (2005) Act. Along with other changes, the 2005 Act increased the threshold for prior approval for foreign investment in New Zealand significant business assets from NZ\$50 million to NZ\$100 million.

These two processes remained separate however, as the Protocol with Australia was intended to go further in recognition of New Zealand's close and highly integrated relationship with Australia, and expected to also benefit trans-Tasman investment. Furthermore, unilateral reduction or removal of the need for prior approval would not have provided the range of protections and other benefits offered by a Protocol. Meanwhile, the threshold of NZ\$100 million in the OIA reflects the desire of the Government to balance the benefits of foreign investment in significant business assets against recognition that it is a privilege for overseas persons to own or control sensitive New Zealand assets.

### **3 ADVANTAGES AND DISADVANTAGES TO NEW ZEALAND OF THE PROTOCOL ENTERING INTO FORCE**

#### **3.1 Advantages**

Advantages of the Protocol include:

- Conclusion of the Protocol increases certainty for investors on both sides of the Tasman about what they can expect when making investments in the other country. Not only is the current level of treatment protected, but in some areas there is also a guarantee that treatment can only get better in the future through the most-favoured-nation and roll-back provisions of the Protocol.
- New Zealand investors are placed on an even footing with those who currently receive preferential treatment (largely United States investors under AUSFTA).
- CER's position as the most comprehensive FTA in the world is maintained.
- The Protocol also serves as a high water mark for future agreements, demonstrating the quality that can be reached when high levels of integration are present in the relationship.
- The Protocol demonstrates New Zealand's level of commitment to the bilateral relationship with Australia and vice versa.
- The Protocol both reinforces and extends the current commitments New Zealand has made in the WTO General Agreement on Trade in Services. It also contributes to the body of FTAs New Zealand has negotiated. These both demonstrate our ongoing commitment to trade openness.

##### **3.1.1 Comprehensive Provisions and Protections**

The Protocol secures for investors of both countries a comprehensive set of reciprocal provisions and protections. It commits both countries to treat each other's investors no less favourably than they do their own, with only limited exceptions. It ensures that they will always be provided the best level of treatment given to any other foreign investor in any future agreement.

The Protocol also restricts the ability of the Australian and New Zealand governments to impose burdensome or distortionary requirements on the other's investors. Further, investors from both countries and their investments will be protected by the Protocol's codification of certain customary international law standards of treatment of investors, including on expropriation and fair and equitable treatment.

Importantly, the Protocol preserves New Zealand's right to regulate in a number of areas of policy importance or sensitivity. For example, the Crown retains the ability to screen foreign investments in sensitive land and fishing quota, as defined in the Overseas Investment Act (2005) (OIA). The Crown also retains the ability to modify the assessment criteria applied to investments still requiring prior approval under the OIA. Similarly, the government's ability to give more favourable treatment to Māori when necessary to fulfil its obligations under the Treaty of Waitangi is preserved (discussed in section 4.7 of this NIA). The Protocol will also allow the government to take non-discriminatory regulatory actions, where necessary, to achieve legitimate public welfare objectives, including protecting the environment. These are discussed in more detail in sections 4.7 and 4.8, respectively, of the NIA.

### 3.1.2 Market Access

The Protocol establishes a higher and preferential monetary screening threshold for New Zealanders seeking to invest in Australian business assets other than in certain specified sensitive sectors.<sup>6</sup> Only investments representing a substantial interest in Australian businesses worth A\$1.004 billion and over will require the approval of Australia's Foreign Investment Review Board (FIRB) under its Foreign Acquisitions and Takeovers Act (2010).<sup>7</sup> This threshold is indexed to GDP annually on 1 January, and will mean that very few New Zealand investments in Australia will require prior consent.

In addition, Australia makes a binding commitment in the Protocol not to screen New Zealand "greenfields" investment – where a New Zealand parent company starts a new venture in Australia by constructing new operational facilities from the ground up. While this reflects current Australian practice, New Zealanders will have the certainty that such greenfields investment will not be subject to screening in future should Australia amend its regime.

Australia has reserved the right to continue to screen all investment by New Zealand government entities, as it does for government investment from any economy. As this reservation is subject to the standstill and "no roll-back" obligations, Australia will not be able to make the current level of screening more restrictive than it exists today.

Both parties agreed that liberalising market access would focus on the monetary investment thresholds, with both countries' current rules regarding investments in land being unchanged.

In New Zealand, prior approval will be required for investments above a monetary threshold of NZ\$477 million by Australian investors in significant business assets on non-sensitive land. This means that investments in such significant business assets by Australian investors will only require prior approval where the investor is buying 25% or more of a business and either the value of that share is over NZ\$477 million, or the assets of the target investment are more than NZ\$477 million. This threshold will also be indexed to GDP annually on 1 January, once the Protocol has come into force.

New Zealand has retained a screening threshold for Australian government investment in New Zealand business assets of NZ\$100 million, indexed annually to GDP. The indexation will preserve its relationship with the NZ\$477 million threshold. The commitments by New Zealand and Australia reflect our respective current thresholds at which investment by government entities requires approval.

Both the New Zealand and Australian preferential thresholds for investment in specified business assets will reduce compliance costs and increase certainty for investors on both sides of the Tasman, supporting growth in both economies. The workload of the Overseas Investment Office (OIO), which administers the OIA, will also be reduced somewhat given that Australia is New Zealand's largest source of foreign investment and that fewer investments by Australian investors will require approval.

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6 The preferential threshold for New Zealanders investing in Australian businesses does not apply to investments in financial sector companies, nor to the telecommunications sector; the transport sector; the supply of training or human resources or the manufacture or supply of military goods, equipment or technology to Australian or other defence forces or able to be used for a military purpose; services relating to encryption and security technologies and communication systems; and the extraction of or rights to extract uranium or plutonium, or the operation of nuclear facilities.

7 For this purpose, a substantial interest occurs when a single investor (and any associates) has 15% or more of the ownership or several investors (and any associates) have 40% or more in aggregate of the ownership of any corporation, business or trust. See [www.firb.gov.au](http://www.firb.gov.au).

As previously discussed, both countries' thresholds will be indexed to GDP. This means that as GDP rises, so will the market access threshold. This provides a level of future-proofing to the Protocol, reflecting the future growth of both economies.

### **3.1.3 Direct Economic Benefits of the Protocol**

Foreign investment bridges the gap between levels of domestic savings and business investment requirements. As such, it allows for higher rates of economic activity and employment as businesses are able to expand their operations, increasing production and employment. This leads to higher national output, although the interest costs of borrowing or dividend costs of investment need to be removed from these higher levels of output in order to obtain an accurate picture of the benefit.

In this context, investment agreements which facilitate investment in the New Zealand economy usefully contribute to economic development and growth as they allow for capital to flow more easily into New Zealand. Enhancing the investment environment, even modestly, may also have longer-term spillover benefits, especially when located within a broader programme of economic integration, such as the existing suite of CER and associated instruments. These benefits include the likelihood of foreign investment bringing into New Zealand new technology, skills, practices or network contacts from offshore which improve domestic processes and efficiency. This could ultimately produce some dynamic productivity gains.<sup>8</sup> In the medium to long term, more investment may also encourage even greater trade flows between Australia and New Zealand as businesses produce their goods and services more efficiently making them more attractive to consumers.

The Protocol will sit alongside existing CER instruments with the aim of encouraging and enabling investment in both countries. Two-way investment flows between Australia and New Zealand are already relatively high. Statistics New Zealand estimated that in 2009 total two-way investment flows reached just over NZ\$5 billion.<sup>9</sup>

The screening regimes for foreign investment under the Foreign Acquisitions and Takeovers Act (2010) in Australia and the OIA in New Zealand could be seen as creating some additional compliance costs for New Zealand and Australian investors in each other's markets. These compliance costs may potentially discourage trans-Tasman investment, particularly for Australia as it is both the largest destination for New Zealand foreign investment and by far the largest foreign investor in New Zealand.

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<sup>8</sup> "Dynamic productivity gains" refers to improvements to productivity in terms of efficiency as a consequence of improved work practices, as opposed to resource re-allocation.

<sup>9</sup> Statistics New Zealand "Flows of Total Investment by Country", published in March 2009. See [www.stats.govt.nz/browse\\_for\\_stats/economic\\_indicators/balance\\_of\\_payments/investment-by-country.aspx](http://www.stats.govt.nz/browse_for_stats/economic_indicators/balance_of_payments/investment-by-country.aspx).

Due to the already significant flows of investment between New Zealand and Australia, it is not expected that the Protocol will have a major *direct* impact on investment flows. However, investors will benefit from an enhanced investment environment including but not restricted to:

- market access screening thresholds for investments in specified business assets are significantly increased and bound in at the increased level, creating greater levels of certainty for investors;
- a reduction in the compliance costs for investors making trans-Tasman investments;
- a reduction in the number of Australian investments requiring prior approval under the regime which will free up resources at the OIO, potentially reducing the amount of time it will take for other processing of other investment applications;
- additional protections provided for investors; and
- the Protocol's commitments being listed in a high quality "negative list" approach, improving certainty and transparency for investors.

Conclusion of the Protocol may also provide a positive demonstration effect in highlighting the investment opportunities in both countries and encouraging New Zealand businesses to think about investing in Australia.

#### **3.1.4 Broader Strategic Benefits of the Protocol**

The Protocol would represent another significant step towards a trans-Tasman single economic market – one aim of which is free movement across the Tasman for all factors of production. It fills what has emerged as a gap in the suite of CER instruments, compared to the coverage of modern FTA agreements. Addressing this will affirm the primacy of CER as our most ambitious set of trade agreements. It will also go some way towards redressing any imbalances that have emerged between the treatment of New Zealand and US investors in Australia as a result of AUSFTA.

Conclusion of the Protocol sends a strong message that New Zealand has an open and welcoming stance towards foreign investment, and is prepared to enter ambitious investment agreements with similarly ambitious partners, reflecting the government's overall policy position. This is helpful in the current economic environment, where New Zealand is competing more than ever for overseas capital.

## **3.2 Disadvantages**

### **3.2.1 Reduction in Screening of Australian Business Investment**

Currently, all Australian investments (as well as all foreign investments) in significant business assets require consent under the OIA if they are:

- in an *existing business*, where *both* (i) the share is 25% or more and (ii) *either* the value of that share is over NZ\$100 million, or the assets of the target investment are more than NZ\$100 million;
- in a *new business*, where the value of the new business is over NZ\$100 million; or
- in *property used for business*, where the value of the property is over NZ\$100 million.

The Protocol will raise the applied threshold for Australian investors to NZ\$477 million in each instance. The higher threshold for Australian investors offered in the Protocol will therefore reduce the monitoring of foreign investment by Australian investors in New Zealand business assets.

There is also some risk that Australian investments falling between the NZ\$100 million and NZ\$477 million thresholds, which might otherwise have been declined by the OIO, will proceed as they will not require prior approval. This is not viewed as a significant risk as the Protocol only applies to Australian investments in New Zealand significant business assets and no applications to invest in significant business assets from any foreign investor have been declined in the last 25 years. Therefore it is unlikely that any future investments by Australian investors will be of concern to the point where they would be declined.

The OIO already actively monitors inwards investment. This will act to mitigate the effects of lower visibility of investments under the Protocol. This is discussed further in section 5.2 below.

### **3.2.2 Transparency of Australian Non-Conforming Measures**

Under the exchange of letters on non-conforming measures at the Australian regional level of government, New Zealand will not enjoy full transparency around Australian regional measures until the review period when Australia will revise its commitment and provide the detail of the regional measures in its schedules of reservations.

## 4 LEGAL OBLIGATIONS WHICH WOULD BE IMPOSED ON NEW ZEALAND BY THE PROTOCOL, AND AN OUTLINE OF THE DISPUTE SETTLEMENT MECHANISMS

### 4.1 Core Obligations

The Protocol provides for the liberalisation of investment between New Zealand and Australia. The core obligations arising from the Protocol are set out below.

CORE OBLIGATIONS	
<b>National Treatment (NT)</b> (Article 5)	New Zealand must treat Australian investors and their investments no less favourably than our own investors and investments, and vice versa.
<b>Most-favoured-nation treatment (MFN)</b> (Article 6)	New Zealand must treat Australian investors and their investments no less favourably than investors from any other country, e.g. if in a future agreement New Zealand gives better treatment to another country's investors than it has extended to Australia under the Protocol, Australian investors are also entitled to receive that better treatment, and vice versa.
<b>Performance Requirements (PR)</b> (Article 7)	New Zealand may not impose rules requiring any investor to achieve mandated export, domestic content or technology transfer targets or offer 'advantages' such as tax incentives in return for those requirements being met. The Protocol has multilateralised New Zealand's commitments on performance requirements, meaning that this treatment is extended not only to Australian investors but to investors of all other countries as well. <sup>10</sup>
<b>Senior Management and Boards of Directors (SMBD)</b> (Article 8)	New Zealand may not require that an Australian-owned investment appoint any particular nationality to senior management, or persons of any particular nationality or residency to the majority of the board of directors. Nationality or residency requirements may only be placed on a minority of board members where this would not materially impair the ability of the investor to exercise control over its investment. Australia has the same obligations with regard to New Zealand-owned investments in Australia.

<sup>10</sup> Australia had already made this commitment multilaterally through AUSFTA, so the Investment Protocol has made no difference to Australian obligations on this point.

Core obligations can be reserved against in the schedules of reservations to the Protocol where each country is able to specify particular measures<sup>11</sup> and policy spheres where one or more of the four core obligations above do not apply. The schedules of reservations and the policy areas specified in them are discussed in more detail in the “Schedules of Reservations” section below.

**4.2 Other Obligations**

As well as the four core obligations, the table below outlines the other obligations adopted by New Zealand and Australia.

<b>OTHER OBLIGATIONS</b>	
<b>Transfers</b>	Guaranteeing the free transfer of investors’ funds and gains made on those funds in and out of the country.
<b>Minimum Standard of Treatment</b>	Treating each other’s investments in accordance with the minimum standard provided under customary international law.
<b>Compensation for Losses</b>	Provides for non-discriminatory treatment when the government reacts to situations of armed conflict or civil strife and further provides for restitution, compensation or both where an investment is lost, requisitioned or destroyed as a result of the actions of a Party in these situations.
<b>Expropriation</b>	Any expropriation must be non-discriminatory, for a public purpose and subject to prompt, adequate and effective compensation.
<b>Transparency</b>	Ensuring that law, regulations and other information relevant to investors is easily available to investors.
<b>Subrogation</b>	Transfers of rights or titles to guarantees, insurance or other forms of indemnity will be recognised under the Protocol.

Both the core obligations and the other obligations are subject to the exceptions outlined in the text of the Protocol. A range of exceptions are included in the Protocol and are discussed in more detail in the “Exceptions” section below.

Other than those policy areas listed in the two countries’ schedules of reservations, and subject to the General Exceptions of the Protocol, the obligations of the Protocol apply to all other areas of central and local government policy.

**4.3 Definition of Investment and Investor**

A broad definition of investment is included in the Protocol to cover all types of investment. The broad scope created by this means that the greatest possible range of trans-Tasman investment will come within the coverage of the Protocol and that the facilitation and protections offered by the Protocol therefore apply to the greatest number of investments.

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<sup>11</sup> “Measure” is defined in the Protocol as “law, regulation, rule, procedure, decision, administrative action, practice, or any other form”.

The Protocol defines an Australian investor as any Australian citizen or permanent resident or enterprise that seeks to make, is making or has made a qualifying “investment” in New Zealand.

The OIO will need to determine that investors actually meet the definition of an “Australian investor” to enjoy the Protocol’s preferential treatment. The scale of the investment needed before reaching the preferential monetary screening thresholds of the Protocol – at a minimum NZ\$25 million<sup>12</sup> – is likely to exclude direct investments by natural persons so the likely focus will be on determining that Australian-based enterprises are either Australian-owned or, if foreign-owned, have a substantive business operation in Australia. The OIO will establish mechanisms for doing this.

#### **4.4 Denial of Benefits**

Article 18 allows New Zealand to deny the benefits of the Protocol to enterprises owned or controlled by non-Australian persons who do not have “substantive business operations” in Australia, and vice versa. This mitigates the risk of an investor from another country setting up a shell operation in Australia or New Zealand in order to take advantage of the benefits offered by the Protocol. This will help to ensure that only legitimate New Zealand and Australian-based investors benefit from the Protocol.

However, bona-fide foreign-owned businesses will be able to access the benefits of the Protocol. For instance if a 100% foreign-owned manufacturing company with substantive business operations in New Zealand buys an Australian company, it will qualify as a New Zealand investor under the Protocol. The same is true for foreign-owned bona-fide Australian businesses investing in New Zealand.

#### **4.5 Relationship to Services Protocol**

Article 4 of the Protocol (Relationship to Services Protocol) ensures that the treatment services providers enjoy under the Protocol on Trade in Services to CER (“the Services Protocol”) will not inadvertently be undermined by the conclusion of the Protocol. Where an inconsistency arises between the treatment offered in the Protocol compared to that offered in the Services Protocol, the Protocol that provides better treatment will prevail.

#### **4.6 Schedules of Reservations**

In general, the core obligations of the Protocol apply to all sectors and activities of the New Zealand economy except for those specifically referred to in the text of the Protocol or listed in the schedules of reservations.

All government actions other than those listed in Australia’s and New Zealand’s respective schedules are required to comply with the obligations of the Protocol. This is consistent with the high level of integration present in New Zealand’s relationship with Australia.

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<sup>12</sup> The minimum threshold of NZ\$25 million represents 25% of the NZ\$100 million screening threshold, so is the theoretical minimum investment where the OIA significant business assets screening regime kicks in.

The schedules record the sectors and activities where governmental measures are or will be technically in breach of the Protocol's four core obligations (National Treatment, MFN, SMD and Performance Requirements). Individual reservations describe how the reservation applies, which of the obligations are involved, and the manner in which the governmental measure might cut across the obligation of the Protocol. Again, this provides a high level of transparency for investors about how and where the Protocol does and does not apply.

Annex I of the schedules records existing non-conforming measures that limit or restrict foreign investors in a way that infringes one or more of the core obligations of the Protocol. The reservations listed in Annex I are subject to standstill and "no roll-back" mechanisms.

The standstill mechanism means that once the Protocol enters into force, Australian investors must always be treated at least as well as specified in Annex I reservations. The "no roll-back" mechanism means that if New Zealand makes any further unilateral liberalisations to the measures listed in Annex I, the better treatment is automatically imported into the Protocol. Once imported into the Protocol, the standstill and no roll-back mechanism also applies to this more liberal treatment.

Annex II reservations set out spheres of government activity generally, or in relation to listed sectors, which are not subject to one or more of the core obligations of the Protocol. In each of these listed spheres of activity, governments can introduce new measures which might, for example, breach the obligations reserved against by the reservation.

The OIA is recorded in both Annex I and Annex II of New Zealand's schedules. This specification means that New Zealand is unable to extend the categories of investment which require prior approval (i.e. sensitive land, significant business assets and fishing quota) but allows flexibility to change the type of tests which are applied to the categories of investment requiring such approval under the OIA. This gives the government flexibility to be able to alter the tests to make them more or less stringent, depending on government policy. For instance the changes to the screening criteria for sensitive land announced on 27 September 2010 would be permitted under the Protocol.

Overall, Australia's schedules of reservations to the Protocol represent the best offer that they have made to any trading partner. Compared to the schedules of reservations which Australia has agreed with other FTA partners, a number of reservations have been removed as they did not reflect the existing state of affairs with New Zealand. This means that with one exception,<sup>13</sup> New Zealand investors will have an even greater level of access than other investors, even those of the United States and Chile, as there is less potential for restrictions to be applied. In addition, Australia has removed the MFN obligation from a number of its remaining reservations, representing a commitment that New Zealand will always receive treatment at least as good as that which Australia agrees with any third party.

Summary tables of the areas included in both New Zealand's and Australia's schedules of reservations are attached as appendices 2 and 3 of this NIA.

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<sup>13</sup> One Australian reservation (Government asset sales and devolution; II-Aus-14) is not included in its FTA with the US. The reservation is similar to New Zealand's II-NZ-3 and II-NZ-4.

## 4.7 Exceptions

In addition to the specific reservations in the schedules, the Government retains space to regulate through the following provisions or articles, set out below. Aside from the Treaty of Waitangi exception, these exceptions have their origins in WTO Agreements such as the Global Agreement on Trade in Services (GATS). These exceptions acknowledge the regulatory right of the Parties to adopt or enforce measures to deal with a domestic crisis or to achieve certain priority policy outcomes, even if these measures may affect their Protocol obligations. The exceptions provide that the measures may only be applied where necessary and may not be a means of arbitrary or unjustifiable discrimination or a disguised restriction on investment. This means that the threshold required to act under these exceptions would be high.

- Article 11 – Measures to Safeguard the Balance of Payments  
The government is able to adopt or maintain measures to restrict transfers out of the country in case of serious balance of payments or external financial difficulties.
- Article 19 – Exceptions  
This permits the government to adopt or enforce measures:
  - necessary to protect public morals or to maintain public order;
  - necessary to protect human, animal or plant life or health;
  - necessary to protect national works or specific sites of artistic, historical or archaeological value; and
  - relating to the conservation of living or non-living exhaustible natural resources.
- Article 20 – Security Exceptions  
This allows the government to adopt or maintain measures necessary for the protection of essential security interests, for example relating to nuclear material or in times of war.
- Article 21 – Taxation Measures  
This excludes tax measures from being bound by the obligations of the Protocol, with the exceptions of obligations under the WTO agreement, the Expropriation article and the Performance Requirements article of the Protocol.
- Article 22 – Prudential Measures  
This allows the government to put in place measures relating to the financial services sector. This includes for the protection of investors, depositors, policy holders or persons owed a fiduciary duty by a financial services supplier, or to ensure the integrity and stability of the financial system.
- Article 23 – Treaty of Waitangi  
This allows the government to act as it deems necessary to fulfil its obligations to Māori, including under the Treaty of Waitangi. This exception also ensures that the interpretation of the Treaty of Waitangi itself will not be the subject of consultations, but will remain exclusively an issue to be resolved within New Zealand’s domestic settings.

#### **4.8 Investment and Environment**

Article 24 of the Protocol clarifies that nothing in the Protocol prevents the government taking measures to ensure that investment activity in New Zealand is undertaken in a manner sensitive to environmental concerns, provided that they are consistent with the Protocol's provisions. This is consistent with the approach New Zealand takes in FTAs and reinforces the emphasis placed on sustainable growth in New Zealand.

#### **4.9 Review Mechanism**

The Protocol provides for Australia and New Zealand to meet after the first year of entry into force of the Protocol, and regularly thereafter, to review the operation of the Protocol. This provides a regular opportunity to discuss and address any issues which may arise in the application of the Protocol.

In the exchange of letters on water allocation rights, New Zealand has also agreed to a specific review of the future policy space the reservation preserves (see the "Exchanges of Letters" section below for further details). If the reservation remains in the schedules of reservations after the initial review, New Zealand agrees to further reviews.

#### **4.10 Dispute Settlement Mechanisms**

Provision for consultations has been included in the Protocol. This provides for discussions to be sought where one Party does not consider that the obligations of the Protocol are being met or where the Protocol's intent is being frustrated by the other Party. In these circumstances, both Australia and New Zealand have committed to seek an early, equitable and mutually satisfactory solution.

A further specific consultation provision is also included in the exchange of letters on water allocation rights in New Zealand (see the "Exchanges of Letters" section below for further details).

Consistent with our practice in other CER instruments, the Protocol does not include a formal dispute settlement mechanism for resolving disputes between states or between investors and states.

This reflects the strong and unique nature of the CER relationship, including the all-encompassing arrangements under the TTMRA, and the high level of dialogue between Ministers and officials on both sides of the Tasman. Therefore disputes between the parties are more likely to be satisfactorily resolved by consultations than by formal arbitration. Similarly, the absence of any compulsory investor-state dispute settlement provisions<sup>14</sup> in the Protocol is also reflective of the unique and longstanding nature of the CER relationship and the high level of mutual recognition of each other's well established judicial systems.

#### **4.11 Exchanges of Letters**

All exchanges of letters negotiated between Australia and New Zealand relating to the Protocol form an integral part of the Protocol.

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<sup>14</sup> Compulsory investor-state dispute settlement provisions automatically enable an investor to take a government to international arbitration without requiring any further consent by the government.

#### **4.11.1 Australian Non-Conforming Measures at Regional Level of Government**

Australia's schedules of reservations include a generic reservation (Annex I page 1) that protects any existing non-conforming regional (i.e. state and territory) government measures. In an exchange of letters to the Protocol, Australia has committed to improving the transparency of this particular reservation. In time for the first meeting of Parties, Australia will revise its schedules to specify all non-conforming measures at the central and regional government levels.

The new reservations will be confirmed as part of the Protocol by an exchange of letters. The overall effect of this is that New Zealand will receive more transparent treatment than United States investors under AUSFTA and the same level of transparency as Chilean investors under Australia's FTA with Chile. This will further increase certainty for New Zealand investors and support trans-Tasman investment flows.

#### **4.11.2 Exchange of Letters on New Zealand Most-Favoured-Nation Reservation**

In the context of our close and longstanding relationship with Australia, New Zealand has, through an exchange of letters, clarified the interpretation of our standard reservation on MFN treatment (listed as II-NZ-6 in the schedules of reservations to the Protocol).

This exchange of letters states that if New Zealand extends preferential treatment to another economy as part of a wider process of economic integration under an existing agreement, then that preferential treatment will also be extended to Australian investors and investments. This commitment is consistent with and supports the high level of integration between Australia and New Zealand under the CER and single economic market processes.

#### **4.11.3 Exchange of Letters on New Zealand Reservation with Respect to Water**

Australia and New Zealand have agreed an exchange of letters to the Protocol concerning New Zealand's reservation on water (listed as II-NZ-2 in Annex II of the schedules of reservations to the Protocol). This reservation provides policy space for the development of a regime for the primary allocation of water.

This exchange of letters commits New Zealand to a review of the reservation within five years of the entry into force of the Protocol. This review will take place in light of any policy developments in the area of water allocation. If the reservation remains in the schedules of reservations after the initial review, New Zealand commits to further reviews.

New Zealand also agrees that Australia may request consultations in the situation where a policy adopted or proposed by New Zealand is inconsistent with our obligations under the Protocol. This provides Australia with a level of certainty that any concerns it has around policy developments on water allocation in New Zealand will be addressed.

## 5 MEASURES WHICH THE GOVERNMENT SHOULD ADOPT TO IMPLEMENT THE PROTOCOL

### 5.1 Current Legislative Settings

Prior approval is required before an overseas investor may take an ownership or control interest in sensitive New Zealand assets. The OIA requires that investors must go through a screening process before completing such an investment. The OIA requires that overseas persons obtain consent for investment in:

- *sensitive land* (for example non-urban land over 5 hectares, certain specified islands, foreshore or seabed, reserves and historic areas);
- *significant business assets* (assets exceeding NZ\$100 million or a share of 25% or more in such assets); and
- *fishing quota*.

### 5.2 Amendments Required

Legislation, in the form of amendments to the Overseas Investment Regulations 2005 and/or the OIA, will be required in order to implement the following obligations under the Protocol:

LEGISLATIVE PROVISION	DESCRIPTION
<b>Identify an Australian investor</b>	Provisions to distinguish between Australian and other foreign investors, including both natural persons and enterprises.
<b>Identify an Australian government investor</b>	Provisions to distinguish between Australian government investors (for example state owned enterprises) and other Australian investors. This is necessary as the preferential screening threshold for Australian investors does not apply to government investors.
<b>Screening thresholds for Australian investors</b>	Provisions to apply the preferential screening threshold for an Australian investor that is not a government investor to invest in New Zealand significant business assets up to the level agreed in the Protocol, and to provide for annual GDP-indexation of the screening thresholds faced by Australian private and government investors.
<b>Australian substantive business operations</b>	Provisions to allow New Zealand to deny the benefits of the Protocol to enterprises that would otherwise be considered Australian investors, if they do not have substantive business operations in Australia and non-Australians own or control the enterprise.

Even once the Protocol is in place the following foreign investments will still require prior approval for all investors, including Australian investors, under the OIA:

- all investments by any foreign investor in sensitive land, as defined by the OIA; and
- all investments by any foreign investor in fishing quota.

In addition:

- all investments by any non-Australian foreign investor, which does not have substantial business operations in Australia, in significant business assets will continue to be subject to the current NZ\$100 million screening threshold; and
- any Australian investment in significant business assets above the NZ\$477 million threshold will require prior approval.

A bid to include any amendments to the OIA that may be necessary to implement the Protocol has been made in the 2011 Legislation Programme.

### **5.3 Monitoring of Foreign Investment**

The OIO already actively monitors inward investment to identify investments that potentially require OIO approval and to ensure that, where necessary, appropriate investor applications are made. These systems are expected to be sufficient to distinguish between Australian and non-Australian investors so that the appropriate monetary thresholds can be applied. The exercise of this new function by the OIO does not have any substantive implications for current investor monitoring systems.

When the OIO identifies a particular investment that potentially requires OIO approval it has a range of options available, including requiring investors who have not made an application to provide any information the OIO requests.<sup>15</sup>

The OIO periodically evaluates the effectiveness of its monitoring systems. Future evaluations will include consideration of the effectiveness of monitoring of investor compliance with the higher monetary thresholds available to Australian investors.

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<sup>15</sup> Section 39 of the Overseas Investment Act (2005) reads in part "The regulator may, by notice in writing, require any person with information relevant to overseas investments in sensitive New Zealand assets to provide the regulator with the information specified in the notice...".

## 6 ECONOMIC, SOCIAL, CULTURAL AND ENVIRONMENTAL COSTS AND EFFECTS OF THE PROTOCOL

### 6.1 Economic Effects

#### 6.1.1 General Economic Benefits of the Protocol

As previously discussed in the “Advantages” section, New Zealand relies on overseas investment to provide local businesses with capital to expand, and to bring in new technology and skills from offshore.

Foreign investment or ownership provides productivity benefits to individual firms, with the evidence showing that firms with foreign ownership are more productive. Foreign investment can also open up access to substantial foreign networks which can increase the ability of New Zealand companies to export or improve efficiencies. These effects can combine to improve overall economic efficiency by ensuring that productive firms prosper while resources from inefficient firms are reallocated into other areas.

Foreign investment also has productive spillovers for the economy, as a result of factors such as financial, business or management expertise and skills which come along with investment. As well, domestic firms may experience productivity improvements due to the “demonstration effect” provided by foreign owned companies introducing more efficient processes and practices. All of these effects support GDP and employment growth in New Zealand, contributing to a stronger and more resilient economy.

The total foreign direct investment (FDI) stock in New Zealand totalled NZ\$92.8 billion in the year ended March 2009. Australian investment accounts for just under 50% of the total stock of FDI; NZ\$46.1 billion in the year ended March 2009. The table below outlines the five largest investors in New Zealand, by stock.

STOCK OF DIRECT INVESTMENT IN NEW ZEALAND AS AT 31 MARCH 2009 NZ\$M					
Investor	2005	2006	2007	2008	2009
Australia	34,273	39,561	44,157	47,370	46,110
United States	9,397	8,727	10,540	10,750	11,469
Netherlands	4,230	3,641	4,303	4,805	4,614
United Kingdom	4,542	4,988	4,075	4,138	3,247
Japan	1,700	1,652	1,819	2,006	3,196

New Zealanders are also significant investors in Australia. Australia is our single largest investment destination with around 50% of our stock of overseas investment (just over NZ\$12 billion).<sup>16</sup>

<sup>16</sup> Statistics New Zealand, Global New Zealand – International Trade, Investment and Travel Profile, Year ended December 2009.

Taking New Zealand's foreign investment requirements and our already strong investment relationship with Australia into account, concluding the Protocol will provide support for flows of capital to and from our most significant investor. Given the evidence that foreign investment supports economic growth, the Protocol can be viewed as an instrument which can contribute towards enhancing the economy.

New Zealand investors will also be able to invest more quickly and easily in Australia, New Zealand's most significant destination for outward direct investment (ODI). New Zealand's ODI is currently among the lowest in the OECD (Organisation for Economic Co-operation and Development). Small countries such as New Zealand may be able to benefit from increased economies of scale through foreign investment.

The economic benefits to be expected from the Protocol should not be overstated. While we expect the Protocol to support the existing high levels of investment between Australia and New Zealand, we do not expect the Protocol to create a significant increase in investment flows either into or out of New Zealand, given that flows are already fairly high. The Protocol will create an environment of greater certainty and lower compliance costs for investors on both sides of the Tasman, therefore generally contributing to a sound environment in which flows of investment in business assets can occur unimpeded.

### 6.1.2 Benefits of Changes in Market Access Screening Thresholds

The following table compares the current foreign investment screening thresholds of Australia and New Zealand with the thresholds that both countries have committed to under the Protocol. All of the thresholds agreed in the Protocol are indexed annually to GDP.

Form of investment	AUSTRALIA		NEW ZEALAND	
	Current threshold	Threshold under the Protocol	Current threshold	Threshold under the Protocol
<b>Non-sensitive business assets<sup>17</sup></b>	A\$231 million	A\$1.004 billion	NZ\$100 million	NZ\$477million
<b>Sensitive sectors<sup>18</sup></b>	A\$100 million	A\$110 million (or A\$231 million in the case of offshore takeovers)		
<b>Greenfields</b>	A\$10 million	No screening		
<b>FDI by governments</b>	All investments require approval	No change		NZ\$100 million GDP-indexed
<b>Residential Real Estate Purchase</b>	No approval required for New Zealanders	No change	No special approvals required, unless the land is or adjoins sensitive land	No change
<b>Other screening regime elements (e.g. sensitive land, fish)</b>	Vacant non-residential land	No change	Sensitive land and fishing quota	No change

<sup>17</sup> Indexed annually against GDP in both the Australian and New Zealand commitments.

<sup>18</sup> Australia has particular provisions around investment in telecommunications, defence and the uranium industries for example.

Practically speaking, implementation of the Protocol will reduce compliance costs for Australian investors by reducing the number of applications they will need to make to the OIO. Using figures from the OIO over the period of negotiations of the Protocol from 2005 to 2010, we can estimate that at least 90 Australian investment applications would not have been required had the Protocol been in place. The following table describes how the business investment applications that were received by the OIO from Australian investors during 2006-2010 would have been treated if the threshold being introduced by the Protocol, adjusted to reflect GDP in those years, had applied:

Year	Protocol threshold (GDP adjusted)	Total number of business investment applications	Number of those investments that:		
			would still have required approval, because they exceeded the Protocol threshold	would not have required approval, because they fell below the Protocol threshold	fell below the Protocol threshold, but would still have required approval due to other factors
2006	NZ\$400 m	25	5	16	4
2007	NZ\$419 m	29	5	22	2
2008	NZ\$449 m	29	3	19	7
2009	NZ\$463 m	40	4	23	13
2010 (to 31 June)	NZ\$469 m	17	2	10	5
<b>Total</b>		140	19	90	31

This data suggests that once the Protocol is in force, applications to invest in business assets from Australian investors would reduce by around two-thirds. This reduction will allow the OIO to focus its resources on other applications and aspects of its operations.

Australia's Foreign Investment Review Board (FIRB; Australia's equivalent to the OIO) has advised that between 2007 and 2009 no New Zealand investments exceeded the headline AUSFTA screening threshold of around A\$800-A\$1,000 million. Some investments did exceed the lower thresholds applicable to investments in sensitive sectors or investments by governments. Overall, the data strongly indicates that following implementation of the Protocol very few New Zealand investments in Australian business assets will require screening.

It should be noted that, due to data limitations, the figures from FIRB represent the *value of the consideration paid* for an investment as opposed to the *total value* of the asset which was being purchased. This means that there may have been some investments where the amount paid was less than the threshold established in the Protocol but would have triggered a need for screening as it exceeded the 15% screening test applied by the FIRB. Therefore the data above cannot be interpreted to mean that if the higher screening threshold applied since 2007 no New Zealand investors in significant business assets would have required screening. However, in the context of an almost 5-fold increase from the existing screening threshold it does suggest that very few New Zealand investments will continue to be screened.

Specific modelling of the effects of the Protocol has not been undertaken given the considerable difficulty in accurately estimating the impact on investment stocks and flows of Australia's and New Zealand's existing investment screening regimes.

A standard modelling approach would assume the changes were removing some sort of restriction much in the same way as tariff liberalisation is modelled. That is, the liberalisation sees investment sourced from the partner country being lower cost because investors will invest at a lower required rate of return, i.e. country risk premia reduce. This results in the source country directing more investment to the host country as it now requires a lower rate of return to compensate for the risks of investing there. This increases investment and the overall capital stock in the host country. The higher investment levels would then trigger investment-induced dynamic productivity gains leading to higher economic welfare.

In the New Zealand and Australian contexts it is difficult to argue that the Protocol will materially reduce country risk premia – the two economies have similar business and legal systems and are already highly integrated; there is already free trade in goods and services and largely unimpeded people flows, and the approval regimes for significant business investment (i.e. not including land) do not appear to be perceived as a source of risk by investors. Therefore the initial assumption in the modelling chain is not met.

The difficulty in modelling the economic effects does not mean those effects do not exist. As discussed earlier, while the economic effects are expected to be positive, the Protocol is unlikely to have significant effects on the size of investment flows between Australia and New Zealand. The size of any increase in investment flows, and resulting economic welfare gains, will depend on factors very difficult to estimate empirically such as the signalling effects of this significant addition to the CER suite of agreements and arrangements. However, these effects cannot be modelled with any confidence.

### **6.1.3 Effects of the Accompanying Letters**

There are no specific economic effects of any of the three exchanges of letters accompanying the Protocol. These relate to clarifications or agreed future modifications of the Protocol, as discussed in earlier sections, that will not affect the Protocol's overall economic effects.

## **6.2 Social Effects**

### **6.2.1 Attitudes Toward Foreign Investment**

Recent public debate reveals that there are a number of concerns about the impact of FDI on New Zealand. Broadly these can be summarised as concerns regarding:

- *national sovereignty and ownership value* – New Zealanders may have a particular attachment to some types of domestic assets, and simply knowing those assets are in overseas ownership may reduce wellbeing;
- *investor behaviour* – New Zealanders may be concerned that overseas investors may behave in a manner that is inconsistent with domestic behavioural norms, and that may have an undesirable impact on economic, political, and cultural life; and
- *deep pockets* – New Zealanders may be concerned that overseas investors are willing to pay more for assets than New Zealanders are, resulting in a growing share of wealth-generating sectors shifting to overseas ownership.

These concerns seem to centre particularly around issues that involve land purchases, which is partly why the most stringent screening is applied to these investments under the OIA. As noted in the table above, investments by Australians which involve sensitive land (attached as appendix 1 of this NIA) or fishing quota will still require prior approval at the same level of investment as investors from other economies. The Protocol strikes a balance between protecting particularly sensitive New Zealand assets and facilitating Australian investment in New Zealand significant business assets through a preferential arrangement.

### **6.2.2 Effects of the Accompanying Letters**

There are no specific social effects of any of the three exchanges of letters accompanying the Protocol. These relate to clarifications or agreed future modifications of the Protocol, as discussed in earlier sections, that will not affect the Protocol's overall social effects.

## **6.3 Cultural Effects**

### **6.3.1 General Cultural Effects of the Protocol**

The Protocol is not expected to have any negative cultural effects. The Protocol retains existing protections around the purchase of sensitive land and fishing quota under the OIA. It also includes certain safeguards that ensure that New Zealand preserves the ability to pursue certain cultural objectives, such as supporting the creative arts and taking measures in relation to Māori, including in fulfilment of the Treaty of Waitangi. Therefore the Protocol does not create adverse effects on New Zealand cultural values, via the following articles:

- Article 19 of the Protocol (Exceptions) provides New Zealand with the ability to adopt measures necessary to protect public morals or to maintain public order or necessary to protect national works or specific sites of artistic, historic or archaeological value. Such measures do not have to comply with the four core obligations and may be adopted provided that they are not arbitrary, unjustified or a disguised trade restriction.
- Article 23 of the Protocol (Treaty of Waitangi) provides that nothing in the Protocol prevents the New Zealand government from adopting measures it deems necessary to fulfil its obligations under the Treaty of Waitangi, provided that such any such measures are not arbitrary, unjustified or a disguised trade restriction.

The schedules of reservations list a number of New Zealand's existing measures protecting cultural elements. In Annex I, where scheduled existing measures cannot be made more restrictive over time and a "no roll-back clause" applies, the following reservation is listed:

- restrictions on acquisition of radio frequency spectrum licenses and management rights.

In Annex II, the following policy areas are listed meaning that the government is able to introduce new measures which might otherwise breach the obligations reserved against by the reservation:

- film co-production agreements;
- local content requirements for public television and radio broadcasting;
- gambling, betting and prostitution services; and
- cultural, public archives, library and museum services, and the preservation of historical or sacred sites or buildings.

Additionally, any investments made in New Zealand will under the Protocol still need to comply with existing legislation such as the Historic Places Act, and the Resource Management Act. This type of legislation ensures that investment activities are not contrary to generally accepted New Zealand cultural norms.

### **6.3.2 *Effects of the Accompanying Letters***

There are no specific cultural effects of any of the three exchanges of letters accompanying the Protocol. These relate to clarifications or agreed future modifications of the Protocol, as discussed in earlier sections, that will not affect the Protocol's overall cultural effects.

## **6.4 Environmental Effects**

### **6.4.1 *Environmental Effects of the Protocol***

The Protocol is not expected to have any negative environmental effects and will not restrict New Zealand from applying existing or future environmental laws, policies and regulations, provided that they are applied to meet a legitimate objective and are not implemented in a discriminatory fashion.

There are a number of provisions in the Protocol which provide for environmental protection and sustainable development:

- the Preamble of the Protocol mentions the Protocol's ability to assist in promoting standards on sustainable development and environmental protection;
- Article 24 of the Protocol (Investment and Environment) provides Parties with the ability to adopt or maintain any measure otherwise consistent with the Protocol to ensure that investment activity is undertaken in a manner which is sensitive to environmental concerns; and
- Article 19 of the Protocol (Exceptions) provides for New Zealand to adopt measures necessary to protect human, animal or plant life or health (including environmental measures necessary to do this) and for the purposes of conserving living or non-living exhaustible resources, provided that any measures adopted are not arbitrary, unjustifiable or a disguised trade restriction.

The schedules of reservations also list a number of existing measures relating to the environment where the government will retain some ability to regulate. These reservations are listed in Annex II meaning that the government is able to introduce new measures which might, for example, otherwise breach the obligations reserved against in the reservation. The reservations cover:

- water allocation;
- the OIA (which regulates investment in sensitive land and fishing quota);
- international agreements on aviation, fisheries or maritime matters;
- management or use of protected areas/species owned or protected by the Crown;
- animal welfare and preservation of plant, animal and human life and health;
- foreshore and seabed;
- controlling the activities of foreign fishing; and
- production, use, retail and distribution of nuclear energy.

In addition, any investments made in New Zealand must comply with existing domestic legislation which provides for protection of the environment such as the Resource Management Act (2009), provided that this legislation does not discriminate against foreign or Australian investors.

#### **6.4.2 Effects of the Accompanying Letters**

There are no specific cultural effects of any of the three exchanges of letters accompanying the Protocol. These relate to clarifications or agreed future modifications of the Protocol, as discussed in earlier sections, that will not affect the Protocol's overall environmental effects.

## **7 COSTS TO NEW ZEALAND OF COMPLIANCE WITH THE PROTOCOL**

### **7.1 Costs to Government of Complying with the Protocol**

The organisation most greatly affected by the Protocol is the OIO. Overall and in the long-term, the Protocol should help to reduce costs for the OIO, as there will be fewer applications from Australian investors to process. However, administration of the Protocol may create some additional costs for the OIO in specific areas, such as verifying that an investor qualifies to receive the benefits of the Protocol. While this will be an ongoing cost, it is likely to be small and manageable within the existing baselines of the OIO.

### **7.2 Publicity Costs**

There will be some costs associated with the production of publicity material promoting the Protocol, such as a key outcomes document and website material on the Protocol. Any publicity costs associated with producing this type of material will be met from within the existing baselines of the Trade Negotiations Fund administered by the Ministry of Foreign Affairs and Trade.

### **7.3 Costs to Business of Complying with the Protocol**

As discussed in earlier sections, the major effect of the Protocol will be to reduce compliance costs and increase certainty for businesses seeking to invest in Australian business assets. New Zealand businesses will also enjoy additional protections provided under the Protocol, making investing in Australia a more attractive proposition. The same logic applies for Australians investing in New Zealand – compliance costs will be lower and protections will be greater, supporting flows of investment into New Zealand. Therefore it is not expected that business will face any additional costs as a result of the Protocol.

### **7.4 Costs of the Exchanges of Letters to the Protocol**

There may be some additional costs, in the form of officials' time, associated with the review provided for in the exchange of letters on New Zealand's reservation regarding water. The first such review will take place within five years of the Protocol's entry into force, and then regularly after that if the water reservation remains following that review. There may also be further costs associated with amending the Protocol if New Zealand agreed to remove its water reservation following any one of those reviews. Both the cost of the reviews themselves and any amendment to the Protocol as a result of the reviews are likely to be small and manageable within existing baselines of relevant departments.

Similarly, there will likely be some minor costs, easily managed within existing baselines, associated with further work required by officials to amend the Protocol once New Zealand has accepted the revised Australian schedules under the Australian exchange of letters regarding its reservation on regional non-conforming measures.

## **8 COMPLETED OR PROPOSED CONSULTATION WITH THE COMMUNITY AND PARTIES INTERESTED IN THE PROTOCOL**

### **8.1 Interdepartmental Consultation Process**

The negotiation of the Protocol was conducted by a team led by the Treasury, which included legal and investment experts from the Ministry of Foreign Affairs and Trade. A prudential and financial regulation specialist from the Reserve Bank of New Zealand also joined the team for one of the negotiating rounds. Throughout the negotiating process experts in various policy areas were consulted including from the Ministry of Economic Development, Inland Revenue, Te Puni Kokiri, the Ministry for Culture and Heritage, the Ministry for the Environment and the Department of Conservation.

In developing the schedules of reservations to the Protocol, a comprehensive interdepartmental consultation process was undertaken where all agencies were asked to review the reservations and provide information on whether reservations needed to be retained, adjusted/updated or removed. This involved significant input from Ministry of Education, Ministry of Justice, Ministry of Agriculture, Ministry of Health, Ministry of Transport, Department of Labour, Ministry for the Environment and Department of Conservation in particular. Responses were received from all core government agencies, and the final outcome reflects the results of those consultations.

Consultation was also undertaken with Local Government New Zealand with respect to the application of the Protocol's obligations at sub-national levels of government and with Universities New Zealand (formerly the New Zealand Vice Chancellor's Committee) to discuss how issues relevant to the tertiary education sector would be addressed in the Protocol.

The Department of the Prime Minister and Cabinet was consulted and updated throughout negotiations, where appropriate.

### **8.2 Public Consultation Process**

The Single Economic Market strategy of increased economic integration with Australia has been publicly discussed and debated for several years. The Protocol is part of that strategy and adds to the existing suite of long-standing CER agreements by reflecting contemporary practice for the investment chapters of high-quality FTAs. Protocol negotiations have been ongoing and known to the public since 2005.

Major fora such as the Australia New Zealand Leadership Forum (ANZLF) have consistently endorsed the addition of an Investment Protocol to CER in the context of a broader strategy of closer trans-Tasman integration. The ANZLF welcomed the Prime Minister's announcement in August 2009 of the preferential screening threshold levels agreed with Australia.

Public notices have also been published in the Ministry of Foreign Affairs and Trade's Business Link publication, and an email contact point provided for public inquiries, to which a small number of questions have been directed. These inquiries have not expressed a view about the utility or otherwise of the Protocol. In addition, with the exception of the higher screening thresholds, the content is consistent with New Zealand's usual approach to investment chapters in FTAs.

Consultation with business has also been undertaken on an individual basis according to issues of likely interest. The consultation raised no concerns with the approach being taken in the Protocol and was supportive of the conclusion of the Protocol.

The public will also have an opportunity to make submissions during examination of the Protocol by Parliament's Foreign Affairs, Defence and Trade Committee and if any amendments to the OIA are required.

## **9 SUBSEQUENT AMENDMENTS TO THE PROTOCOL AND THEIR LIKELY EFFECTS**

The Protocol includes general provisions for consultation (Article 25) and regular review (Article 26). The consultation and regular reviews may lead to proposals for amendments to the Protocol. Any such amendments would need to be mutually agreed between the parties, and New Zealand would consider any amendments to the Protocol on a case by case basis. Any decision to accept an amendment would be subject to the usual domestic approvals and processes.

Australia's exchange of letters to the Protocol concerning clarification of Australian non-conforming measures at the regional level of government provides for the Protocol to be amended once New Zealand has confirmed its acceptance of Australia's revised schedules of reservations. The Protocol will be amended to incorporate the revised schedules through an exchange of letters by the parties.

New Zealand's exchange of letters to the Protocol with respect to the reservation on water rights provides that within five years of the entry into force of the Protocol, New Zealand will review the water rights reservation. A regular review will occur if the reservation remains a part of New Zealand's schedules. As with any amendment to the Protocol, if this reservation were to be removed at some point in the future, the amendment would be subject to Cabinet approval and the usual Parliamentary treaty examination process.

## **10 WITHDRAWAL OR DENUNCIATION**

There are no provisions for withdrawal or denunciation under the Protocol. This is consistent with practice in previous CER agreements.

If there is ever a need for New Zealand to withdraw from or denounce the Protocol the Vienna Convention on the Law of Treaties<sup>19</sup> offers a mechanism to do so.

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<sup>19</sup> Article 56 of the Vienna Convention on the Law of Treaties 1969.

## **11 AGENCY DISCLOSURE STATEMENT**

This extended National Interest Analysis (NIA) has been prepared by the Treasury. The extended NIA identifies those obligations in the *Protocol on Investment to the Australia New Zealand Closer Economic Relations Trade Agreement* and accompanying letters which require legislative implementation.

The Treasury's Regulatory Impact Analysis Panel has reviewed this NIA and considers it to be adequate according to the adequacy criteria.

## **APPENDIX 1 – HOW DOES THE OVERSEAS INVESTMENT ACT DEFINE SENSITIVE LAND?**

Schedule 1 of the Overseas Investment Act (2005) specifies that the following is sensitive land:

<b>LAND IS SENSITIVE IF IT IS OR INCLUDES THIS TYPE OF LAND...</b>	<b>AND EXCEEDS THIS AREA THRESHOLD (IF ANY)</b>
non-urban land	5 hectares
land on islands specified in Part 2 of this schedule	0.4 hectares
land on other islands (other than North or South Island, but including the islands adjacent to the North or South Island)	–
foreshore or seabed	–
bed of a lake	0.4 hectares
land held for conservation purposes under the Conservation Act 1987	0.4 hectares
land that a district plan or proposed district plan under the Resource Management Act 1991 provides is to be used as a reserve, as a public park, for recreation purposes, or as open space	0.4 hectares
land subject to a heritage order, or a requirement for a heritage order, under the Resource Management Act 1991 or by the Historic Places Trust under the Historic Places Act 1993	0.4 hectares
a historic place, historic area, wahi tapu, or wahi tapu area that is registered or for which there is an application or proposal for registration under the Historic Places Act 1993	0.4 hectares

LAND IS SENSITIVE IF IT ADJOINS LAND OF THIS TYPE...	AND EXCEEDS THIS AREA THRESHOLD (IF ANY)
Foreshore	0.2 hectares
bed of a lake	0.4 hectares
land held for conservation purposes under the Conservation Act 1987 (if that conservation land exceeds 0.4 hectares in area)	0.4 hectares
any scientific, scenic, historic, or nature reserve under the Reserves Act 1977 that is administered by the Department of Conservation and that exceeds 0.4 hectares in area	0.4 hectares
any regional park created under the Local Government Act 1974	0.4 hectares
land that is listed, or in a class listed, as a reserve, a public park, or other sensitive area by the regulator under section 37	0.4 hectares
<p>land that adjoins the sea or a lake and exceeds 0.4 hectares and is 1 of the following types of land:</p> <ul style="list-style-type: none"> <li>• an esplanade reserve or esplanade strip (within the meaning of section 2(1) of the Resource Management Act 1991); or</li> <li>• a recreation reserve under the Reserves Act 1977; or</li> <li>• a road (as defined in section 315(1) of the Local Government Act 1974); or</li> <li>• a Māori reservation to which section 340 of Te Ture Whenua Māori Act 1993 applies</li> </ul>	0.4 hectares
land over 0.4 hectares that is subject to a heritage order, or a requirement for a heritage order, under the Resource Management Act 1991 or by the Historic Places Trust under the Historic Places Act 1993	0.4 hectares
land over 0.4 hectares that includes a historic place, historic area, wahi tapu, or wahi tapu area that is registered or for which there is an application or proposal for registration under the Historic Places Act 1993	0.4 hectares

## APPENDIX 2 – NEW ZEALAND SCHEDULES OF RESERVATIONS SUMMARY

Note the following abbreviations are used as part of this summary:

- NT – National Treatment
- MFN – Most-Favoured Nation
- PRs – Performance Requirements
- SMBD – Senior Management and Boards of Directors

ANNEX 1	OBLIGATIONS RESERVED AGAINST
Overseas companies must prepare audited financial reports each year	NT
Foreign investment regime under the Overseas Investment Act	NT, PRs, SMBD
Ownership and access to information held by the Livestock Improvement Corporation Ltd, under the Dairy Industry Restructuring Act	NT, PRs, SMBD
Ownership and board of directors restrictions in Telecom New Zealand Ltd	NT, SMBD
Restrictions on acquisition of radio frequency spectrum licenses and management rights	NT, PRs
Maintenance of primary products marketing monopolies under the Primary Products Marketing Act	NT, PRs, SMBD
Licensing requirements and restrictions to be a New Zealand international air service provider	NT, SMBD
Ownership, head office location and board of directors restrictions in Air New Zealand	NT, SMBD
Restrictions on the provision of crop insurance for wheat and export kiwifruit	NT
Any tax measures	PRs

ANNEX 2	OBLIGATIONS RESERVED AGAINST
Social services (delivered in the exercise of governmental authority)	NT, MFN, PRs, SMBD
Water rights	NT
Devolving a service in the exercise of governmental authority	NT, MFN, PRs, SMBD
Privatising wholly government owned or controlled entities	NT, PRs, SMBD
Foreign investment regime under the Overseas Investment Act	NT, PRs, SMBD
Most-favoured nation does not apply to agreements already in force or to future agreements involving aviation, fisheries or maritime matters	MFN
Management/use of protected areas/species owned by the Crown	NT
Animal welfare and preservation of plant, animal and human life and health	NT, SMBD
Foreshore and Seabed Act	NT, PRs, SMBD
Provision of publicly funded legal services	NT, SMBD
Provision of fire fighting services	NT
R&D carried out by universities, CRIs and natural science areas	NT, PRs
Technical testing and analysis services eg. drug testing	NT
Controlling the activities of foreign fishing	NT, MFN, PRs, SMBD
Production, use, retail and distribution of nuclear energy	NT, MFN, PRs, SMBD
Film co-production agreements remain separate	MFN, PRs
Local content requirements for public television and radio broadcasting	PRs

ANNEX 2	OBLIGATIONS RESERVED AGAINST
Sale of shares or disposal of assets under the Dairy Industry Restructuring Act	NT, PRs, SMBD
Export marketing of fresh kiwifruit to markets other than Australia	NT, PRs, SMBD
Distributions and export rights for products covered by the WTO Agreement on Agriculture	NT, PRs, SMBD
Mandatory marketing plans for agriculture, beekeeping, horticulture, arboriculture, arable farming and the farming of animals	NT, SMBD
Adoption services	NT
Gambling, betting and prostitution	NT, PRs, SMBD
Cultural, public archives, library and museum services, and the preservation of historical or sacred sites or buildings	NT, PRs
Sea carriage of passengers or cargo, certain port services, establishment of registered companies for operating a fleet, and registration of vessels	NT, MFN, PRs, SMBD
Supply of compulsory insurance by ACC and disaster insurance by EQC	NT
Use by a non-financial entity of “bank”, “building society”, “credit union” etc	NT

### **APPENDIX 3 – AUSTRALIAN SCHEDULES OF RESERVATIONS SUMMARY**

<b>ANNEX 1</b>	<b>OBLIGATIONS RESERVED AGAINST</b>
Pre-existing measures taken by regional government	NT, MFN, PRs, SMBD
Foreign Acquisitions and Takeovers Act	NT, SMBD
Foreign fishing vessels authorisation requirements	NT
Australia Post – exclusive right to carry letters	NT
Ownership restrictions on Telstra	NT, SMBD
Local content requirements for television broadcasting	PRs
Foreign banks – local presence requirements and minimum deposit restrictions	NT
Commonwealth Serum Laboratories – location and voting requirements, nationality of board of directors restrictions	NT, SMBD
Ocean carriers ability to utilise competitive redress in Australia	NT
Australia-New Zealand Single Aviation Market	NT
Ownership, boards of directors and location restrictions on Australian airlines other than Qantas	NT, SMBD
Ownership, boards of directors and location restrictions on Qantas	NT, SMBD

ANNEX 2	OBLIGATIONS RESERVED AGAINST
Preferential measures for indigenous people/organisations	NT, PRs, SMBD
Foreign Acquisitions and Takeovers Act – urban land investment restrictions	NT, PRs
Social services (delivered in the exercise of governmental authority)	NT, MFN, PRs, SMBD
Spectrum licensing, local content and subsidies and grants restrictions for television broadcasting.	NT, PRs
Local content requirements for television broadcasting	PRs
Film co-production agreements remain separate	MFN, PRs
Primary education	NT, PRs, SMBD
Registration of Vessels in Australia	NT
Maritime cabotage and offshore transport services	NT, PRs, SMBD
Investment in federally leased airports	NT, SMBD
Most-favoured nation does not apply to agreements already in force or to future agreements involving aviation, fisheries or maritime matters	MFN
Devolving a service in the exercise of governmental authority and privatising wholly government owned or controlled entities	NT, PRs, SMBD

