

To: Minister of Finance: Hon Grant Robertson

## Overseas investment: potential transaction of national interest

<b>Rā / Date</b>	21 February 2022	<b>Kōmakatanga / Classification</b>	In confidence
<b>LINZ reference</b>	BRF 22-257	<b>Whakaarotau / Priority</b>	Medium

### Ngā mahi e hiahiatia ana / Action sought

<b>Minita / Minister</b>	<b>Hohenga / Action</b>	<b>Suggested Deadline</b>
Hon Grant Robertson, Minister of Finance	Direct officials whether an overseas investment transaction (for which an application for consent has been made) is a transaction of national interest and therefore requires a national interest assessment under section 20B(1) of the Overseas Investment Act 2005.	24 February 2022

### LINZ Contacts

<b>Ingoa / Name</b>	<b>Tūnga / Position</b>	<b>Contact number</b>	<b>First contact</b>
Paul Wrigley	Manager, Monitoring and Intelligence Overseas Investment Office	027 237 4950	<input checked="" type="checkbox"/>

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## Pūtake / Purpose statement

1. We (the **Overseas Investment Office, OIO**) seek direction regarding whether you, as Minister of Finance (**you**), wish to call in a consent application for a national interest assessment under s 20B(1) of the Overseas Investment Act 2005 (**Act**).
2. You have directed Toitū te Whenua LINZ (**LINZ**) to prepare a separate memorandum on OIO application 202100582 to determine whether a national interest assessment is required. Under s 20B(1) of the Act you have the discretion to make this decision if you consider the transaction could be contrary to New Zealand's national interest.

## Pānui whāinga / Key messages

3. On 18/10/2021, Ampol Limited (**Ampol**) applied to the OIO for consent under the Act to acquire 100% of the shares in Z Energy Limited (**Z**) by a scheme of arrangement under Part 15 of the Companies Act 1993 (**Proposed Transaction**). Z is a New Zealand fuel distributor with branded service stations.
4. The Proposed Transaction is an overseas investment in significant business assets that requires consent under the Act as the consideration for the shares exceeds \$100 million. It is also an overseas investment in sensitive land that requires consent under the Act. The consideration for the Proposed Transaction is approximately NZ\$1.96 billion. Z has an interest in sensitive land that consists of nine residential land sites, a site adjoining Otago Harbour, and a limited partnership interest in carbon forestry (that may include some farm land) (**Land**). Further details of the Land (including addresses, maps, and aerial photos) are included in the Appendix.
5. The residential land sites comprise fuel facilities, carparks, **s9(2)(b)(ii)**, and sites acquired in order to deal with historic contamination issues. The site adjoining Otago harbour is a truckstop fuel facility at the Port of Otago.
6. The interest in carbon forestry relates to an approximate 37% limited partnership interest in Dryland Carbon One Limited Partnership (**Dryland Carbon**), a New Zealand carbon forestry operation that owns approximately **s9(2)(b)(ii)** hectares of land for carbon forestry. As a limited partner, Z is a passive investor with no control or management over any of Dryland Carbon's assets. Dryland Carbon has previously obtained OIO consent to acquire sensitive land for carbon forestry.
7. The Proposed Transaction is not automatically captured by the Act as a transaction of national interest under section 20A because it will not result in a non-New Zealand government investor acquiring a greater than 25% interest in Z, nor is it an investment in a strategically important business. Further, Z's business does not appear to fall within the definition of strategically important business in s6(1) of the Act.
8. Under section 20B of the Act, you have the discretion to determine whether an overseas investment in sensitive assets could be contrary to New Zealand's national interest and, if so, constitute a transaction of national interest.
9. The Proposed Transaction involves matters that are relevant when assessing New Zealand's national interest, including market power within an industry and alignment with Government objectives. Further detail regarding these matters is provided below.
10. We do not consider the Proposed Transaction presents sufficient risk to recommend a national interest assessment. The overall national interest risk identified as a result of the Proposed Transaction is assessed as **low**.

## Ngā Tāwhaitanga / Next Steps

11. Review the details of the Proposed Transaction and direct officials whether you consider it is a transaction of national interest, or if you require additional information to make this decision.
12. If you decide that the Proposed Transaction is a transaction of national interest, we will provide you with a national interest assessment report so that you can determine whether the Proposed

In Confidence

Transaction is contrary to New Zealand's national interest. This report would be separate from, and additional to, the report that will be prepared for the decision making Ministers in relation to the substantive application.

13. If you decide that the Proposed Transaction is not a transaction of national interest, we will continue to assess the substantive application and provide this to the Ministers for a decision in due course.

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## Tohutohu / Recommendations

14. It is recommended that you:

- **tohutohu / direct** officials about whether you consider the Proposed Transaction constitutes a transaction of national interest:

Transaction of national interest: apply national interest assessment

OR

Not transaction of national interest: do not apply national interest assessment (**recommended**)

OR

Request more information from officials in order to decide whether this overseas investment constitutes a transaction of national interest.



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Paul Wrigley  
**Manager, Monitoring and Intelligence**



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Hon Grant Robertson  
**Minister of Finance**

Rā / Date: 23 / 02 / 2022

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## Te Horopaki / Background to national interest assessments

15. If overseas investments in sensitive land and significant business assets are transactions of national interest, one of the criteria for consent is that you have not declined consent to the transaction on the basis that you consider it is contrary to New Zealand's national interest.
16. A transaction is one of national interest if it is a transaction that involves certain non-New Zealand government investors or strategically important business under s 20A of the Act. Under s 20B of the Act, you also have the discretion to determine that any overseas investment application is a transaction of national interest if you consider the investment could be contrary to New Zealand's national interest.
17. In the Ministerial Directive Letter of 24 November 2021, you directed us to only recommend that a transaction is a transaction of national interest if the Proposed Transaction:
  - could pose risks to New Zealand's national security or public order;
  - would grant an investor significant market power within an industry or result in vertical integration of a supply chain;
  - has foreign government or associated involvement that is below the 25% threshold for automatic application of the national interest test, but grants that government (and/or its associates) disproportionate levels of access to or control of sensitive New Zealand assets;
  - would have outcomes that were significantly inconsistent with, or would hinder the delivery of, other Government objectives;
  - raises significant Treaty of Waitangi issues; or
  - relates to a site of national significance (e.g. significant historic heritage).
18. The Proposed Transaction involves matters that are relevant when assessing New Zealand's national interest, including whether this transaction will grant Z significant market power within this industry. We do not consider these matters are of sufficient concern to recommend that the Proposed Transaction is a transaction of national interest (and therefore requires a national interest assessment), but we leave this to your discretion. In addition to the matters set out above, we also note there is and will be some public interest as this is a large commercial transaction involving a well-known brand.

## Proposed investment

19. Ampol intends to acquire 100% of the shares in Z by a scheme of arrangement (**Scheme**) under Part 15 of the Companies Act 1993. In October 2021 Ampol and Z entered into a Scheme Implementation Agreement to record and give effect to the terms and conditions of the Scheme.
20. The Scheme Implementation Agreement is conditional on a number of regulatory approvals being obtained (including OIO consent and clearance from the Commerce Commission) as well as High Court and shareholder approval of the Scheme. As part of its application to obtain clearance from the Commerce Commission, Ampol will undertake to divest the Gull fuel business (that Ampol currently owns) in order to address competition concerns.
21. If all of the Scheme conditions are met and the Proposed Transaction proceeds, the total consideration to be paid by Ampol for the Z shares will be approximately NZ\$1.96 billion.
22. The Proposed Transaction would further Ampol's strategic objective to become a leader in the trans-Tasman fuel industry. A combination of Ampol and Z will deliver scale across its regional supply chain to support the safe and reliable sourcing of fuel products in Australia and New Zealand.

### Applicant

23. The Applicant is Ampol, a company registered in Australia. It is engaged in petroleum refinery, importation, marketing, and distribution and operates in Australia (under its own brand) and New Zealand (through the Gull brand, which it acquired in 2017).<sup>1</sup>
24. Ampol is listed on the Australian Stock Exchange (**ASX**) with market capitalisation of NZ\$7.5 billion. Its ownership is widely held, with only two shareholders having a more than 5% interest, *i.e.*, AustralianSuper Pty Ltd<sup>2</sup> and Magellan Asset Management Ltd.<sup>3</sup>

### Target

25. The target is Z, a company incorporated in New Zealand. Its core business is supply of fuel. Z's operations span crude oil and refined product procurement, contracted refining, national distribution, and commercial and retail marketing. Z currently supplies approximately 45% of all transport fuels in New Zealand.
26. It is listed on both the New Zealand Stock Exchange (**NZX**) and ASX, with market capitalisation of approximately NZD\$1.8 billion as at 12 October 2021. Its ownership is widely held, with only two shareholders having a more than 5% interest, *i.e.*, L1 Capital Pty Limited and Accident Compensation Corporation.
27. Z owns, manages, or has investment in the following:
- a 15.4% stake in Refining NZ which currently runs New Zealand's only oil refinery at Marsden Point, but plans to become a fuel import business;
  - a 25% stake in Loyalty New Zealand, which runs Flybuys;
  - a 37.1901% interest in Dryland Carbon, a carbon forestry operation designed to help New Zealand meet its climate change commitments through forestry on land where trees are the best use of land;
  - a 70% interest in Flick Electric, an independent electricity retailer with approximately s9(2)(b)(ii) customers;
  - investment in Te Kora Hou, New Zealand's only commercial scale biodiesel production plant, which can produce 20 million litres of pure, high-quality biodiesel per annum;
  - s9(2)(b)(ii)
  - a 32% interest in Mevo, an early-stage car sharing and virtual fleet company;
  - approximately 198 service stations and 60 truck stops; and
  - pipelines, terminals, and bulk storage terminal infrastructure around New Zealand.
28. Z has an interest in sensitive land because it owns (a) nine parcels of land classified as residential land under the Act<sup>4</sup>, (b) a leasehold interest in one parcel of land that is sensitive under the Act as it adjoins marine and coastal area, and (c) an interest in Dryland Carbon, which in turn owns approximately s9(2)(b)(ii) ha of forestry land.

<sup>1</sup> OIO Case number 201710023.

<sup>2</sup> An Australian superannuation and pension fund. Ampol submits that this is an industry superannuation fund run only to profit members and is not a non-New Zealand government investor under the Act.

<sup>3</sup> An investment management company which offers asset management, equities, securities, hedge funds, investment strategies, financial planning, and advisory services.

<sup>4</sup> including service station carparks, an aviation fuel facility in Whakatane, a service station, tenanted and untenanted flats, and a truck stop.

**National Interest matters**

29. Further to the directions noted in paragraph 17, in order to consider whether the Proposed Transaction raises matters concerning national interest, the following scenarios are relevant<sup>5</sup>:

- could pose risks to New Zealand’s national security or public order,
- would grant an investor significant market power within an industry or result in vertical integration of a supply chain,
- has foreign government or associated involvement that was below the more than 25 per cent ownership or control interest threshold for automatic application of the national interest test, but granted that government (and/or its associates) disproportionate levels of access to or control of sensitive New Zealand assets,
- would have outcomes that were significantly inconsistent with or would hinder the delivery of other Government objectives,
- raises significant Treaty of Waitangi issues, or
- relates to a site of national significance (e.g. significant historic heritage).

30. In relation to the Proposed Transaction, the matters in the second and fourth points are relevant and we comment on these points individually below.

s6(a) [Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

*Market power*

34. Z is one of a number of substantial players in the fuel industry in New Zealand. The three major players (Z, BP, and Mobil) supply more than 90% of the retail fuel sold in New Zealand.<sup>9</sup> Z currently supplies approximately 45% of all transport fuels in New Zealand (including petrol, diesel, jet fuel, bitumen, and fuel oil).
35. Collectively, Z, BP, Mobil, and Gull control the supply of fuel to more than 1,300 retail sites under 20 different retail brands, either directly or indirectly through a distributor or reseller.<sup>10</sup> Approximately 60% of retail sites carry brands outside of the three major players. However, these sites only account for 20% of petrol volumes sold in 2018, up from 11% in 2011. Many of these sites are located outside the major metropolitan areas.<sup>11</sup>
36. Ampol has applied to the Commerce Commission for clearance to undertake the Proposed Transaction. Ampol has advised us that this application to the Commerce Commission is based on a full divestment of Gull within s9(2)(b)(ii) after completion of the Proposed Transaction. We anticipate the Commerce Commission will only grant clearance if the Proposed Transaction is not likely to result in a substantial lessening of competition.
37. Following divestment, Gull will have the option to acquire fuel from Ampol pursuant to a fuel supply agreement. This will replicate the current situation where Gull imports fuel from Ampol. However, Gull will be free to obtain wholesale fuel from elsewhere if it can obtain a more competitively priced supply.
38. This divestment and fuel supply arrangement will mean that there would be no consolidation of the New Zealand fuel distribution market as a result of the Proposed Transaction and Gull would continue to be an active and independent competitor to Z (and vice versa). As a result, the Proposed Transaction is unlikely to have the effect of substantially lessening competition and would not give Ampol significant market power in New Zealand.
39. We consulted with the Ministry of Business, Innovation and Employment (**MBIE**) regarding the Proposed Transaction and the benefits claimed by Ampol. MBIE did not raise any particular risks or concerns in relation to the Proposed Transaction.

*Government objectives*

40. The Proposed Transaction is unlikely to have outcomes that are significantly inconsistent with the Government's objectives. It is likely the Proposed Transaction will advance certain Government policies as further details below:
- Climate change  
Ampol is targeting net zero operational emissions in Australia by 2040 and has committed at least AUD\$100 million for investment in Australia on future energy and decarbonisation solutions by 2025. Ampol will extend its decarbonisation strategy to New Zealand upon acquisition of Z by investing at least NZD\$50 million on future energy initiatives in New Zealand between 2023-2028 by actively pursuing future fuel initiatives s9(2)(b)(ii) We will consider appropriate conditions of consent to secure the claimed benefits during our assessment of this application. Ampol also expects to make further investments in relation to Z's future energy strategy over time.

<sup>9</sup> Commerce Commission: Market Study into the retail fuel sector (5 December 2019)

[https://comcom.govt.nz/data/assets/pdf\\_file/0028/193915/Retail-fuel-market-study-Final-report-5-December-2019.PDF](https://comcom.govt.nz/data/assets/pdf_file/0028/193915/Retail-fuel-market-study-Final-report-5-December-2019.PDF)

<sup>10</sup> Ibid 2.

<sup>11</sup> Ibid 2.



- Fuel security

Ampol's supply chain and infrastructure appears likely to support or enhance the Government's policy to better secure New Zealand's fuel security. As a result of the Proposed Transaction, Ampol will provide Z with access to its extensive fuel supply infrastructure on the east coast of Australia (a four-day sail to New Zealand), including its Lytton refinery in Brisbane, its Kurnell Terminal in Sydney, and access to mid-range tankers. Ampol has assisted New Zealand with supply chain issues in the past.

- Improving New Zealand's capital market

If the Proposed Transaction proceeds Ampol intends to apply for a secondary listing on the NZX. This will add another substantial company to the NZX that New Zealand investors can access. While Z is currently listed on the NZX, its market capitalisation (approximately NZD\$1.8 billion) is much less than Ampol's market capitalisation (approximately NZD\$7.5 billion).

### *Benefits*

41. The Ministerial Directive Letter does not outline benefits as a factor to consider when recommending whether a transaction is a transaction of national interest. However, this investment appears likely to result in benefit to New Zealand, including additional investment (especially in future energy and decarbonisation), advancing Government policy (including climate change, fuel supply, improving New Zealand's capital markets), greater efficiency (lower supply costs), new jobs (cadetships and graduate recruitment), and New Zealand ownership and participation (New Zealand management and ability for New Zealanders to invest in Ampol). The proposed benefits will be assessed as part of this application.

### **Assessment and recommendation**

42. From the information that we have, we consider the national security risk is **low** and also consider that the impact of the Proposed Transaction on New Zealand's national interest is likely to be **low**. As noted in paragraph 18, the Proposed Transaction involves matters that are relevant when assessing New Zealand's national interest. We do not consider these matters involve any material risks, nor are these matters of sufficient concern to recommend that the Proposed Transaction is a transaction of national interest, but we note your discretion to call a transaction in is broad and that this is a matter reserved for your Ministerial judgement. The purpose of this advice is to inform your decision.
43. While the Directive Letter sets out the Government's approach to the national interest, it is not binding on you. Therefore, you might wish to consider other potential risks when deciding whether the transaction could be contrary to New Zealand's national interest and is therefore a transaction of national interest.

**Appendix**

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