

# Changes to the Overseas Investment Screening Regime for Forestry and other profits à prendre: Questions and Answers

## ***1) What are the changes being proposed to the forestry screening regime and why is the Government making these changes?***

### ***Context***

The Overseas Investment Act (OIA) currently screens overseas investments in certain interests in land. For example, an overseas investment in forestry in New Zealand requires consent if it is undertaken on land meeting the legislative definition of “sensitive land”. However, under the OIA, profits à prendre are exempted interests in land and so are not currently screened. Forestry rights are a type of profit à prendre.

Currently in most cases, overseas investors who want to invest in freehold and leasehold sensitive forestry land for forestry purposes in New Zealand generally need to go through a screening process and get consent from the Overseas Investment Office (OIO). However, those acquiring ‘forestry rights’, which in practice can grant the investor a high degree of control over large parcels of land for long periods of time, are not.

The Government’s view is that leaving forestry rights out of the screening regime makes the regime inconsistent and less effective, because these rights provide their holders similar control as freehold and leasehold interests in the land.

### ***The changes***

The changes to the screening regime have two main components:

- a. Bringing further interests in land (forestry rights over 1000 hectares per year and other profits à prendre) into the screening regime alongside freehold and leasehold interests; and
- b. Introducing a new streamlined consent pathway, “the special benefits test for forestry”, that will create more certainty for investors in forestry and landowners alike. It will be available for investors seeking to acquire land through freehold, leasehold or forestry rights.

These changes also introduce a system of ‘standing consents’, for use with the streamlined pathway only, which allows an investor to obtain a prior approval to enter into future forestry transactions within the scope defined in a particular standing consent. This is designed to speed up and simplify the process for the landowner and investor, in cases where an investor is likely to be entering into a number of different transactions.

## **2) *When does this take effect?***

The changes to the screening regime for forestry assets and certain profits à prendre are expected to commence on 22 October 2018 (that is, two months after the legislation received Royal assent).

The legislation does allow for the regime (or parts of it) to potentially start on an earlier date. However, the Government has no intention of exercising its power to start the regime prior to 22 October 2018 at this time as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership is not expected to enter into force before this date.

## **3) *What consultation was done around these changes?***

These changes have gone through the parliamentary Select Committee process. As part of this process, the Finance and Expenditure Committee invited the public to make written and oral submissions. Twenty-seven submissions were received from various stakeholders, including overseas investors, landowners, and domestic wood processors.

In addition, the Treasury conducted three rounds of consultation hui across New Zealand. These were undertaken in good faith and generated ideas that were adopted in the Bill reported back to the House by the Finance and Expenditure Committee, such as providing investors with the ability to choose which pathway to use when seeking consent.

## **4) *What is a profit à prendre and how does that relate to screening of forestry rights?***

A profit à prendre is a type of interest in land that confers a right to take part of another's land, including things growing on or in the land. Things that are part of the land, and capable of being owned, may be the subject of a profit à prendre. Some examples of profits à prendre are to cut and remove timber or flax and remove soil.

A profit à prendre creates an interest that is binding on future purchasers of the underlying land. It also provides the holder with rights that come from having an interest in land, for example the right to bring action where there is substantial interference with the profit à prendre.

A forestry right is a kind of profit à prendre, which gives the rights holder the ability to “establish, maintain and harvest” or just to “maintain and harvest” a crop of trees on land. They can also include associated rights of access to land and to construct buildings and other facilities on the land.

The screening of profits à prendre is limited to those involving the dominant use of the land. So, for example, a profit à prendre to graze livestock (that is, to take grass) amongst an orchard or vineyard would not be screened, as the principal use of that land is as an orchard or vineyard, not as grazing pasture.

Profits à prendre to take minerals are also excluded from screening. Other profits à prendre can be excluded through regulations.

## **5) *Why is forestry important to New Zealand?***

Forestry is a sector of strategic importance to New Zealand. Forestry accounts for around 3 percent of New Zealand's GDP and is one of New Zealand's largest export earners, behind dairy and meat. Forestry is a long term investment. Security of tenure and the ability to realise investment are both crucial to investment. The three main types of ways that ownership is exercised in relation to the forestry sector are: freehold, leasehold and forestry rights.

The forestry sector is reliant on direct overseas investment in a way that neither other rural land nor residential land are. Although current information on overseas investment in forestry is not definitive, research suggests that up to 70 per cent of plantation forest trees are in overseas control.

## **6) *What challenges exist under the current screening regime for forestry investments?***

Stakeholders have provided feedback that the existing screening regime for overseas investment in freehold and leasehold land can take a long time and involve significant expense.

Additionally, it can sometimes be challenging for forestry investors to meet the existing test required to obtain consent. This is because it requires the buyer to complete a counter-factual analysis requiring investors to demonstrate that their investment adds more benefit to New Zealand than a potential alternative investor. This is hard to show because in forestry there is limited scope for one forestry investor to significantly vary the activities they carry out on the land compared to other potential investors (i.e. typically all potential owners would carry out essentially the same forestry activities in essentially the same way on the land).

## **7) *Who is affected by the changes and what will be different?***

The stakeholders most affected by the changes will be owners of land (including iwi) currently being used for forestry or intended to be converted to forestry use, those wishing to invest in other profits à prendre, owners of relevant land and overseas persons who are potential investors.

*Impacts on overseas investors and landowners entering into freehold and leasehold arrangements:*

Overseas investors wishing to acquire freehold or leasehold interests in forestry land are currently screened. New streamlined consent pathways are being introduced and are intended to provide a lighter-touch screening approach, which is easier for the investor to understand and apply, and therefore provides more certainty to both the investor and the vendor.

The new standing consent process has the potential to even further simplify things for an investor looking to enter into multiple investments using the special benefits test for forestry.

*Impacts on overseas investors and landowners entering into forestry rights arrangements and other profits à prendre:*

Overseas investments in forestry rights and other profits à prendre are not currently screened. The changes will in many cases now require screening of these transactions.

Note that there are some circumstances where the transactions can go ahead without consent – these are listed in the response to the next question.

**8) *In what circumstances will overseas investors be able to invest in forestry rights without consent?***

There are a range of circumstances in which overseas investors will not need OIA screening:

- If the overseas investor is purchasing less than 1,000 hectares of forestry rights per calendar year, or a forestry right of less than three year's duration.
- If the overseas investor already has a 'standing consent' that applies to a transaction.
- If the transaction flows from a pre-existing profits à prendre agreement between a landowner and an overseas investor that did not require consent and was made prior to the legislative changes taking effect.
- Acquiring Crown Forestry Licences. These are not caught by the regime (as they are not an interest in land).
- Transactions utilising exemption provisions allowing new forestry right agreements to replace existing agreements with the same key terms.
- Transactions utilising transitional provisions allowing Crown Forestry Licences to be replaced with forestry rights on the same key terms.
- Australian investors will also be exempt from the new screening requirements for forestry rights and other profits à prendre.

*This question focusses on exceptions relating to forestry rights. There are also some circumstances where overseas investors will not need to be screened in relation to freehold and leasehold transactions, such as land under a certain size, typically five hectares, or for leases for a term of less than three years.*

## 9) *What happens if the overseas investor does need to apply for consent?*

It is primarily the responsibility of the overseas investor to manage their application and comply with the screening regime. Complying with the screening regime will require the investor to pass two tests:

- a. **The investor test:** a test of their business experience and acumen, and their character.
- b. **The benefits test:** a test showing how the investment will be of benefit to New Zealand.

Two new benefits tests for forestry are being introduced alongside the existing test as part of the changes, and the forestry investor is able to choose which one best suits them.

- The *existing benefits test*: this compares the investment against what a hypothetical alternative investor may do with the land, requiring the investment to be of more benefit to New Zealand;
- The *modified benefits test*: this is the same as the existing benefits test but compares the investment against a counterfactual of what the *current owner* only would do with the land; or
- The *special benefits test*: this is a requirements-based list with no counterfactual analysis.

The new tests are intended to allow more streamlined processing of applications and create more certainty for investors and landowners.

### ***More about the Special Benefits Test for Forestry***

The special benefits test for forestry is intended to provide a lighter touch screening approach to forestry investments by overseas persons. It takes the form of a “checklist” of requirements which, if met, means no further assessment will be required. The Act and draft regulations provide that relevant Ministers must be satisfied the applicant complies with a number of requirements including:

- meeting the existing “investor test”;
- maintain existing requirements regarding maintaining historic heritage (including wāhi tapu), biodiversity, environmental or public access commitments relating to the land;
  - wāhi tapu are sites sacred to Māori/ iwi and subject to long-term ritual restrictions on access or use. For example, a burial ground, a battle site or a place where tapu objects were placed;
- replanting felled areas, where the investor’s interest in land allows this;
- maintaining existing contractual commitments to provide logs to domestic processors; and

- if the overseas investor might otherwise acquire the freehold estate in foreshore, seabed, or a bed of a river or lake, offering that land to the Crown under the procedure set out in the Overseas Investment Regulations 2005.

***Time and cost of a consent application with the Overseas Investment Office.***

Processing times and fees are not yet confirmed under the new regime, but current fees for similar transactions range from \$22,500 to \$49,500 with processing times of 12-20 weeks.

***More information about the consent process for landowners under the current legislation can be found here:***

<https://www.linz.govt.nz/overseas-investment/what-you-need-do-if-you-are-selling-new-zealand-assets-overseas-investors>

***More information about the consent process for overseas investors under the current legislation can be found here:***

<https://www.linz.govt.nz/overseas-investment/applying-for-consent-purchase-new-zealand-assets>

***10) How does the 'standing consent' prior-approval pathway work?***

A standing consent allows an investor to obtain a prior approval to enter into future forestry transactions, for which the special benefits test will be met and which fall within the scope defined in the standing consent. The criteria for granting a standing consent is based in part on investors showing a strong track record of acting on similar regulatory requirements in the past.

This is designed to speed up and simplify the process for both the landowner and the investor, in cases where an investor is likely to be entering in a number of different transactions. A standing consent for forestry investments is available only for future transactions using the special benefits test.

***11) What is the screening threshold for forestry rights?***

If an overseas investor acquires forestry rights of 1,000 hectares or more within a calendar year then they will need to seek consent from the Overseas Investment Office.

Acquisitions of forestry rights relating to a combined area of less than 1,000 hectares within a calendar year will not be screened. If an overseas investor acquires rights over 1,000 hectares or more in a calendar year, only the transaction that takes the total over 1,000 hectares and any subsequent acquisitions will be screened. The prior acquisitions below 1,000 hectares per calendar year will not be screened. For example:

- a transaction by an overseas investor for 1,200 hectares of forestry rights would be screened;

- a transaction by an overseas investor for 900 hectares of forestry rights would not be screened – provided it was their first transaction in that calendar year;
- should the overseas investor who invested in 900 hectares of forestry rights then invest in a further 200 hectares of forestry rights in the same year, their total accumulated rights are over 1,000 hectares, so the transaction for 200 hectares would be screened. Their original transaction for 900 hectares would not be screened. Any further transactions in that year would be screened.

Setting the screening threshold for forestry rights at 1,000 hectares per calendar year strikes a balance between ensuring that significant transactions are subject to screening but avoids imposing unreasonable compliance costs on owners of and investors in small holdings. It is estimated that about 8 percent of registered forestry rights are of more than 1,000 hectares but those rights capture over two-thirds of the land area subject to registered forestry rights.<sup>1</sup>

The forestry rights held by different entities in the same corporate group are added together for the purposes of calculating whether the 1,000 hectare threshold is met.

## ***12) What support will be provided to investors to help them comply with the new pathways?***

The OIO will provide information to potential investors and other interested parties about the changes to the OIA as it relates to forestry and the screening of other profits à prendre to support them in understanding and complying with the changes.

## ***13) How will these changes impact on Crown Forestry Licences?***

### ***OIO consent is not needed for Crown Forestry Licences***

Crown Forestry Licences are not screened under the current or proposed new screening regime because the Overseas Investment Act screens interests in land and, under the Crown Forest Assets Act 1989, a Crown Forestry Licence is not an interest in land. After Crown forest land is transferred from the Crown, if the terms and conditions of a Crown Forestry Licence over that land are changed by mutual agreement of the parties, then it likely stops being a Crown Forestry Licence.

If both the landowner and licensee want to change the commercial terms of an arrangement that was previously subject to a Crown Forestry Licence, in some circumstances OIO consent will not be needed. This is subject to all of the following conditions being met:

- The new forestry right involves the same licensee (that is, the overseas investor is the same) or a closely related party.
- The forestry right covers only land that formed all or part of the previous Crown Forestry Licence.

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<sup>1</sup> See table 1 of the Regulatory Impact Analysis <https://treasury.govt.nz/sites/default/files/2018-03/ria-tsy-aoia-mar18.pdf>

- The termination date of the new forestry right is no more than 35 years after the land is transferred from the Crown (that is, the maximum period of a Crown Forestry Licence) and can be extended by up to a further three years.
- No rights of renewal are granted.

#### ***14)How will these changes impact on non-forestry profits à prendre?***

The changes also bring some non-forestry profits à prendre into the OIA screening regime. Non-forestry profits à prendre will be subject to screening if all of the following are met:

- Five hectares or more of sensitive land is subject to the profit à prendre;
- The profit à prendre is for three years or more;
- The land covered by the profit à prendre is (or will be) used exclusively or principally for the purposes of the profit à prendre. So, for example, a profit à prendre to graze livestock (that is, to take grass) amongst an orchard or vineyard would not be screened, as the principal use of that land is for an orchard or vineyard, not as grazing pasture.

Profits à prendre consisting only of rights to take minerals are not subject to screening.

#### ***15)Why are these changes being made to bring all profits à prendre into the screening regime (and why are they not treated the same way as forestry rights)?***

These changes are being introduced to ensure consistency across the regime. It is important that profits à prendre are subject to the same scrutiny as other asset classes.

The new pathways for forestry and the higher screening threshold for forestry are intended to support more foreign investment in forestry specifically, where this supports wider Government priorities.

#### ***16)How will these changes impact on people who had pre-existing arrangements?***

The legislation is not retrospective. OIO consent is not needed for existing forestry rights and other profits à prendre, including renewal rights or options on those existing rights.

If there is a pre-existing profit à prendre arrangement or understanding in place with an overseas investor before the changes to the Overseas Investment Act come into force, that arrangement and actions that flow from it will not be subject to screening.

Once existing rights/arrangements expire (or are not exercised) any subsequent forestry rights or other profit à prendre on that land granted to an overseas investor would require OIO consent.