

Changes to the Forestry Screening Regime: Questions and Answers

1) **What are the changes being proposed to the forestry screening regime?**

The changes to the regime have two main components:

- a. To make forestry rights and certain other types of *profits à prendre* subject to screening under the Overseas Investment Act to remove an existing regulatory inconsistency
- b. To provide a new pathway for obtaining consent where an overseas investment in sensitive land relates to forestry activities, to streamline processing and create more certainty for investors.

2) **What are forestry rights and why are they now going to be screened?**

Forestry rights are a type of *profit à prendre* that refer to the ability to “establish, maintain and harvest” or 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. They are not currently screened under the Overseas Investment Act even though they are an interest in land and provide control of the land for long periods of time – forestry investments can commonly be for a 20-25 year period. Bringing forestry rights under the OIA creates more consistency with freehold and leasehold transactions.

3) **What is a profit à prendre and what other than forestry rights might also be subject to screening?**

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

A *profit à prendre* creates an interest which 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*.

The SOP brings certain types of *profits à prendre* within the scope of the OIA. An overseas person will need to obtain consent to acquire a “regulated *profit à prendre*”, which is a *profit à prendre* over an area of land that is 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 as an orchard or vineyard, not as grazing pasture.

The SOP excludes from screening *profits à prendre* over minerals (which is broadly defined in the Crown Minerals Act 1991). This essentially creates a distinction between *profits à prendre* on parts of land on and above the ground (subject to OIA screening) and parts of land below the ground (not subject to OIA screening)

4) **What is the screening threshold for forestry rights, and why is it so much higher than for freehold and leasehold transactions?**

If an overseas investor is acquiring forestry rights over 1000 hectares or more within a calendar year then it will be the subject of screening under the OIA.

Acquisitions below 1000 hectares within a calendar year will not be screened. If an overseas investor acquires 1000 hectares or more in a calendar year, only the transaction that takes the total over 1000 hectares and any subsequent acquisitions will be screened. The prior acquisitions below 1000 hectares per calendar year will not be screened. For example:

- a transaction by an overseas investor for 1200 hectares of forestry rights would be screened;

- a transaction by an overseas investor for 900 hectares of forestry rights would not be screened;
- 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 1000 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 1000 hectares per calendar year strikes a balance between ensuring that significant transactions are subject to screening but avoids imposing unreasonable compliance costs on owners and investors of small holdings. It is estimated that this approach would capture about 8 percent of forestry rights but over two-thirds of the land area subject to registered forestry rights.

5) What are the new pathways to consent available?

There are two new pathways for meeting the benefits test if the land is or will be forestry land: the modified benefits test and the special benefits test.

Modified benefits test

The modified benefits test is intended to be used for situations where a freehold or leasehold interest in land is being purchased with the intent to convert it into forestry. The counter-factual analysis of the benefits of the investment against an alternative New Zealand purchaser will be removed. Instead, the intentions of the overseas purchaser will be measured against the ongoing use of the land by the vendor.

Special benefits test

The special benefits test is intended to provide a lighter touch screening approach to forestry investments by overseas persons (except situations where they are purchasing a freehold or leasehold interest in land to convert to forestry). It takes the form of a “checklist” of requirements which, if met, means no further analysis will be required. Details of the checklist will be provided in regulations. Draft regulations include requirements for ensuring that the investor:

- passes the existing “investor test”;
- maintains existing commitments regarding historic, biodiversity, environmental or public access features of the land;
- replants felled areas, where the investor’s interest in land allows this;
- maintains existing contractual commitments to provide logs to domestic processors; and
- if the relevant land includes foreshore, seabed, or a bed of a river or lake, offers that land to the Crown under the procedure set out in the Overseas Investment Regulations 2005.

6) Who is affected by the changes?

Forest owners and overseas persons who are potential purchasers of forestry are the stakeholders most impacted by the changes, particularly those seeking to transact forestry rights which were not previously screened under the OIA, and those transacting in other types of *profits à prendre*.

7) Why has a different approach been adopted for land being converted into forests?

Under the new Ministerial Directive Letter issued to the Overseas Investment Office the Government states that it is important that there are substantial and identifiable benefits from overseas investment in rural land, given New Zealand is already a world leader in producing primary products. However, the letter also states that the

Government is seeking to encourage overseas investment in forestry, in line with the one billion trees programme. This new alternative intermediate pathway provides an easier path than the status quo for overseas investors buying or leasing land to plant forestry while, compared to the special benefits test, providing additional safeguards to ensure the land is used appropriately.

8) How does the investor pre-approval pathway work?

An investor could obtain a “standing consent” from the Overseas Investment Office under the new forestry benefits test pathways, allowing them to make purchases without needing prior approval. A standing consent would only be given to investors that the OIO has confidence to make good judgements about when the new forestry benefits tests would be met.

In the case of the modified benefits test, after a purchase was made, the investor would then seek the OIO’s endorsement that the purchase did meet the modified benefits test. The OIO could then impose conditions specific to the new land acquired, or may seek a court order that the land should not have been purchased and must be divested.

A standing consent is only possible if the investor is using either the modified or special benefits test. It is not possible under the existing benefits test.

9) 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 *profit à prendre* to support them in understanding and complying with the changes.

10) What challenges existed under the current screening regime for forestry investments?

Stakeholders have provided feedback the existing screening regime for overseas investment in freehold and leasehold land involves lengthy delays and expense; investors complained of processes taking many months, with application fees of up to \$49,000 per transaction or up to \$54,000 where significant business assets are also included. They may also incur substantial legal costs in preparing their applications.

Additionally, it can sometimes be challenging for forestry investors to meet the existing benefits test, given that it requires a counter-factual analysis of comparing their investment with a potential alternative investor. This is because there is more limited scope for one forestry investor to significantly vary the activities they carry out on the land from 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).

11) 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 New Zealand’s third-largest export product earner 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 ownership 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 percent of the plantation forest trees (including long term control of, but not always freehold ownership, of the underlying land) are in overseas ownership.