

The Treasury

Overseas Investment Forestry Information Release

Release Document

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Overseas Investment in Forestry

Proposal

1. This paper seeks Cabinet agreement to include forestry rights as an interest in 'sensitive land' under the Overseas Investment Act 2005 (the OIA). It also proposes policy changes intended to address current issues with how investments in forestry, and profits à prendre (a right to take some part of the soil or the "natural produce" of the land off another person's land such as minerals, timber, or flax) are screened under the OIA.
2. ^[1]^[5]

Decisions and implementation of these changes need to proceed rapidly and can be given effect through the current OIA Amendment Bill, which is before Select Committee.

Executive Summary

3. 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 also contributes to broader environmental, social and climate change goals.
4. The forestry sector is reliant on direct overseas investment in a way that neither 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.¹

¹ The Legality of New Zealand's Forest Products, A report prepared by the Ministry for Primary Industries and the New Zealand Forest Industry (2013).

5. This is reflected in the volume of applications to the Overseas Investment Office (OIO) for approvals for purchases of forest land. The OIO has screened 32 sensitive land applications covering 472,000 hectares of forest land since 1 January 2017. This figure does not include sales of forests held under forestry rights, as forestry rights are currently excluded from the OIA definition of sensitive land, and so are not screened. Forestry rights can grant a high degree of control over large parcels of New Zealand land for large periods of time (forests can take up to 25 years to grow). Labour Party pre-election policy included screening forestry rights on lots of more than 50 hectares.
6. Officials recently consulted stakeholders on bringing forestry rights into the OIA. Stakeholders raised significant concerns about this proposal. The existing screening regime for freehold and leasehold land involves lengthy delays and expense; investors complained of processes taking many months, high application fees and substantial legal costs.
7. Enabling the easier screening of forestry purchases is necessary as ongoing high quality foreign investment in forestry is crucial to the success of the sector. Therefore I propose to proceed with bringing forestry rights into OIA screening, and at the same time addressing stakeholder concerns regarding difficulties with the existing screening of forestry land and leases, by introducing a significantly more permissive screening regime for forestry land, leases, and rights.
8. I propose that, as an alternative to the current OIA screening test, forestry investors buying forestry land, leases or rights, be able to utilise a simpler test, designed to protect existing benefits associated with the forest land, lease or right being transacted. I propose the test be specified in regulation. The criteria in the regulations will include:
 - That the investor passes the usual OIA investor test,
 - That any existing historic, bio-diversity, environmental or public access commitments are maintained (where the purchaser can make this commitment),
 - That felled areas will be replanted, where the investor obtains an interest that allows the investor to replant,
 - That any existing commitments to provide logs to domestic customers are maintained,
 - For land sales, if the relevant land is or includes foreshore, seabed, or a bed of a river or lake, that the investor has complied with the procedure for offering foreshore, seabed, riverbed, or lakebed land to the Crown under the Overseas Investment Regulations 2005,

- Other factors that could be added by regulation.

The regulation-making power will be cast so as to enable the above criteria to be included in the regulations.

9. Currently, sensitive land freehold and leasehold land is screened if it is over 5 hectares. I consider that the hectare minimum size should be significantly increased for the screening of forestry rights to 1,000 hectares per calendar year, so that only larger forestry right transactions, representing the bulk of forest land are captured without imposing undue screening requirements on smaller and medium-sized forestry rights.
10. Bringing forestry rights into the OIA screening will require the existing OIA blanket exemption of profits à prendre to be modified. Therefore I propose that the current blanket exemption for a profit à prendre be removed, but with protections retained so that OIA screening of profit à prendre is limited to those involving the dominant use of the land,^{[1][5]}

This will bring some profit à prendre beyond forestry into the OIA screening regime.

11. Fiscal implications will arise through this proposal. It is likely that staff training, communications and system upgrades will be required for the OIO. It will also likely require enhanced monitoring and potentially enforcement to ensure compliance with the more liberal requirements. As final design decisions have not been finalised, these costs are still being worked through. Preliminary analysis indicates that these costs can be managed within the funding set aside in HYEPU to fund the implementation of the non-residents ban as part of the 100-Day Plan.
12. If forestry rights are to be brought under OIA screening, it needs to be done before the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) enters into force. Therefore, if agreed, these changes will be made by way of a Supplementary Order Paper (SOP) to the OIA Amendment Bill, currently before Select Committee.

Forestry screening under the Overseas Investment Act

13. Forests are a major land use in New Zealand and the forestry sector is reliant upon foreign direct investment with about 70 percent of forests (not land) under some form of overseas ownership. Forestry is a long term investment with rotations of 25 to 30 years common. 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.
14. Currently, overseas persons seeking to purchase, or lease for three years or more, forestry land over 5 hectares are already screened by the OIO to get consent for the investment. Consent will only be granted if a proposed investment meets a set of criteria which includes determining that the

transaction will, or is likely to, substantially and identifiably benefit New Zealand, while requiring a complex counterfactual test to be applied by the OIO.

15. I recently asked officials to undertake work on the approach to forestry land screening under the OIA. This work had two components; to consider whether forestry rights should be included under the OIA, and more broadly, to consider whether changes should be made to the screening regime for freehold forestry land to better support the industry (with the aim of supporting the Government's wider objective for increasing housing stock and climate change).
16. The OIA regulates overseas investments in New Zealand's sensitive assets. The purpose of regulating these overseas investments is to reflect that it is a privilege to own or control sensitive New Zealand assets.
17. Other interests in land, specifically easements and profits à prendre are currently exempted from the OIA screening regime as an interest in land. Forestry rights (created under the Forestry Rights Registration Act 1983) are a type of profit à prendre and are currently not screened. This is despite the fact that forestry rights can grant a high degree of control over large parcels of New Zealand land for large periods of time (forests can take up to 25 years to grow). Labour Party pre-election policy included screening forestry rights on lots of more than 50 hectares.
18. At my direction, officials recently consulted stakeholders on a proposal to bring transactions of forestry rights of more than 50 hectares and 3 years duration into the OIA.
19. Stakeholders had significant concerns about the prospect of forestry rights being subject to OIA screening. The existing screening regime for freehold and leasehold land involves lengthy delays and expense; investors complained of processes taking many months, with application fees of \$50,000 per transaction in addition to substantial legal costs.
20. Consultation feedback supports reviewing the screening criteria used when assessing applications for leasehold and freehold land to allow for quicker, less expensive and more permissive OIO screening of forestry land transactions. ^[1]

Overseas investors are also concerned that their ability to realise their investment is compromised by the existing regime.

21. If forestry rights are to be brought under OIA screening, it needs to be done before the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) entering into force.

Purpose of the proposals

22. Therefore I propose to proceed with bringing forestry rights into OIA screening, and at the same time addressing stakeholder concerns regarding difficulties with the existing screening of forestry land and leases, by introducing a significantly more permissive screening regime for forestry land, leases, and rights.
23. Enabling the easier screening of forestry purchases is necessary as high quality foreign investment in forestry is crucial to the success of the sector. It is estimated that 70 percent of forestry plantation trees (including long term control of, but not always freehold ownership, of the underlying land) are foreign owned and the projected future growth for the sector is reliant on continuing and increasing overseas investment.
24. A strong forestry sector contributes to multiple Government priorities, including regional development and employment, and climate change policy. The one billion trees programme is an important plank of this Government's strategy for driving regional economic growth, building more resilient forestry and wood processing industries and providing a further opportunity for Māori to develop their land. A viable and successful wood processing sector will also play an important part in ensuring that this Government's housing objectives can be achieved cost effectively and on time.
25. I expect these proposals would significantly streamline and speed up processing of applications compared to using the current tests. ^[1]^[5]
26. There is currently a Bill before Select Committee which implements the Government's 100 day commitment to restrict overseas buyers from purchasing existing homes by bringing 'residential land' within the category of 'sensitive land' under the OIA. An SOP to that Bill can implement the necessary changes within the necessary timeframe.
27. While it is a tight timeframe in which to make significant changes to the forestry screening regime prior the enactment of CPTPP, I consider it important to both preserve New Zealand's flexibility to have forestry rights within the OIA in the future as well as creating a targeted approach within the regulatory regime better aligns to the Government's forestry objectives. It is my intention to review these changes two years after they have taken effect.

Achieving a more permissive forestry screening regime

28. Feedback from stakeholders and the OIO indicate that there are two main issues with the current regime:

- The **benefit test** that investments are required to meet: there are 21 benefits that an overseas person can demonstrate (these are outlined in Appendix Two). It can be difficult to meet the test for mature, well-managed forests.
- The **counterfactual analysis** used to assess applications: a number of the benefit factors require an assessment of what would happen with and without the investment (e.g. new jobs, increased exports, new technology, increased local processing). Forestry investors can struggle to show a 'point of difference' from the current owner or a New Zealand investor.

Proposed changes for investments in Forestry

29. My preferred approach is to move away from a benefits test and towards a checklist test. If an investor meets all the criteria in the checklist, the application would be approved. The test moves from a complex assessment of benefit, to compliance with a list of criteria that the investor can judge for themselves with a high level of confidence. The proposed criteria will be designed to protect existing benefits associated with the forest land, lease or right being transacted, but will not require the investor to demonstrate additional benefit beyond the status quo. I believe the benefit to New Zealand will flow from additional investment in forestry.

30. I propose the OIA include legislative guidance to guide the development in regulations of the checklist criteria. The regulation-making power will be cast so as to enable the below criteria to be incorporated into the regulations:

- That the investor passes the OIA investor test (business experience and acumen, demonstrated financial commitment, good character),
- That any existing historic, bio-diversity, environmental or public access commitments are maintained (depending on what interests and rights are being assigned - leaseholders and forestry right holders may not always be in a position to provide this assurance),
- That felled areas will be replanted, where the investor obtains an interest that allows the investor to replant (e.g. a freehold or leasehold interest),
- That any existing commitments to provide logs to domestic customers are maintained,

- For land sales, if the relevant land is or includes foreshore, seabed, or a bed of a river or lake, that the investor has complied with the procedure for offering foreshore, seabed, riverbed, or lakebed land to the Crown under the Overseas Investment Regulations 2005, and
 - Other factors that could be added by regulation,
31. This separation of the guidance regarding the checklist criteria from the actual checklist criteria is intended to provide clear statutory guidance regarding the intended scope of the criteria, without defining the detailed criteria in the primary legislation. This will enable the checklist criteria to be reviewed and modified as necessary without requiring further changes to the primary legislation.
 32. I propose that the legislation also include a power to add other criteria to enable further criteria to be added to the checklist as necessary.
 33. In addition to meeting the criteria set out in regulation, investors would have to pass the “investor” test under the current legislation, which applies to all overseas investments that are subject to the Act. The investor test requires the investor to demonstrate business experience and acumen, financial commitment and good character.
 34. The key benefit of this checklist approach is certainty for the investor. They can know before submitting their application with the OIO whether they have met the criteria for approval.
 35. To deliver this certainty I propose that the regulations defining the criteria come into force at the same time as the other proposed changes to the screening regime for forestry. [Do we need to insert language on process needed to achieve that, with matching recs as required]
 36. In moving to a simplified checklist approach, and seeking to significantly reduce processing times, some of the usual discretion in considering applications is removed. Reducing processing times will also require OIO to place more onus on the applicant to provide accurate and honest information. If post purchase breaches of replanting agreements become problematic, increased effort into monitoring and enforcement (as opposed to processing applications) may be necessary. New penalties introduced in the Overseas Investment Amendment Bill will discourage non-compliance. I consider the need for overseas investment in forestry is sufficient to outweigh this risk.
 37. A further benefit is this approach facilitates investor pre-approval. A pre-approval mechanism can be included with the checklist that allows an investor to agree to these conditions in advance, and then make subsequent transactions without needing to seek further OIO approval of each transaction (although disclosure and monitoring of transactions would still be required).

38. The checklist will also be supported by the use of Statutory Declarations to ensure the robustness of investors' statements of fact and/or intent.
39. Therefore, my preferred approach to liberalise the screening regime for forestry investment and improve the flow of private capital for such a strategic resource is to implement a checklist as described above. This will provide investors with certainty, and allow the OIO to process applications in a timelier manner.
40. ^[1] ^[2] ^[5]

Other options considered

41. Officials considered two alternative options to address inadequacies with the current screening tests for forestry investments. These include amending the benefit factors that apply to forestry applications, or altering how these benefit factors are assessed.

a Amending the benefit factors

There are currently 21 benefit factors in the Overseas Investment Act (and associated regulations). These are divided into 3 broad groups – economic, environmental and other.

Different benefit factors could be added to the list to make it more appropriate for forestry investment and create a clear pathway to consent for forestry investors. However, consultation feedback indicated that the volume of benefit factors created complexity and uncertainty. There are no obvious gaps in the benefit factors that might disadvantage forestry applications, but also none specific to forestry that help them demonstrate the required benefit either.

b Amending how the benefit factors are assessed

As noted above the main issues with the current regime are the benefit test and the counterfactual analysis used to assess applications. Officials provided advice on two options that made these tests easier to meet. Firstly by moving from the need for the benefit to be “*substantial and identifiable*” to a test used elsewhere in the OIA, that the investment “*will, or is likely to, benefit New Zealand*”; and secondly by moving to a status quo counterfactual test.

42. These alternative options do not meet my objective of liberalising the screening regime for forestry land. My concern is that they still present uncertainty to the investor and will restrict foreign direct investment that is required in the forestry industry. ^[1]

[1]

As these alternative proposals would still retain the benefit test (in modified form) investors would still need to satisfy the OIO that the investment brought net benefit. Officials noted this could still be difficult for investors in well-run forestry blocks to demonstrate where there is little potential upside from improved management.

43. Officials note that a checklist may have unintended consequences and not necessarily deliver on governments wider objectives. Unintended consequences could include the early harvesting and/or export of all the logs from the land, removal prior to sale of access and other rights/benefits. It is also difficult to design a checklist that manages the diverse arrangements and interests, and the nuances of and changes in policy and strategy. My view is that if this proves to be the case the checklist can be modified.

Setting a Minimum size for Forestry Rights Screened under the OIA

44. In including forestry rights within the OIA regime it is important to strike a balance between ensuring that significant investments are subject to review but not creating an unduly high regulatory burden for small operators and investors. Small blocks are rationalised through consolidation, especially in Northland. This is currently seen by some as important to maintaining log supply to mills. Some stakeholders emphasised that subjecting small and medium sized forestry rights to OIA screening would make it uneconomic for overseas investors to buy those rights, and suggested only forestry rights of 1000 hectares or more be subject to screening. However, other stakeholders are also seeing OIO screening as offering some protection for owners of small blocks with less experience.
45. Table 1 in the Appendix shows the number and distribution of registered forestry rights. The proposal that stakeholders were consulted on was to screen forestry rights of 50 hectares or more. This would capture almost 60 percent of all rights issued, and 98 percent of the land subject to registered forestry rights. Given the feedback I consider now this threshold is too low.
46. Therefore I propose that acquisitions of forestry rights be subject to OIA screening if the investor and the investor's associates acquire 1,000 hectares or more of forestry rights per calendar year (either directly, or through acquisition of a 25% or more ownership or control interest in a person that owns or controls forestry rights). This threshold would capture only about 8 percent of forestry rights, freeing over 90 percent of forestry rights transactions from OIA screening, while still capturing over two-thirds of the land area subject to registered forestry rights.
47. To safeguard against investors purchasing multiple small forestry rights, an aggregation rule will be put in place so a forestry investor is covered by

the screening regime once the total area of forestry rights purchased in a year exceeds the threshold. This would require increased monitoring and enforcement on the part of the OIO. A related party test, similar to that applied under Securities or Tax legislation, would prevent avoidance by use of related corporate entities.

What Forest Rights would be Included?

48. To mitigate the risk of avoidance I recommend that the regime covers both Statutory Forestry Rights and forestry-related profit à prendre that exist outside the Forestry Rights Registration Act ('Non-statutory Forestry Rights'). In both cases, the regime would cover rights that are for 3 years or more. This is consistent with the current coverage of leases.
49. Officials have also considered whether Crown Forest Licences should be added to the OIA regime. Crown Forest Licences are established under the Crown Forests Assets Act 1989. Licences were granted to the buyers of Crown forests when the Crown's forest assets were sold in the early 1990s. A Crown Forest allowed for the land to be utilised for forestry while it was the subject of a potential Treaty of Waitangi claims.
50. I am satisfied that Crown Forest Licences *should not be included* under the screening regime, for the following reasons:
 - a. The Crown Forest Assets Act 1989 expressly provides that a Crown Forest Licence is **not** an interest in land. ^{[1] [2] [5]}

legally privileged).

- b. ^[5]

(legally privileged).

- c. Crown Forest Licences can be terminated after a specified term. Once this occurs, any future sale of forestry rights will be subject to the OIA in accordance with the proposals in this paper.

Other Issues

51. It is clear from the stakeholder feedback that more could be done beyond legislative change to make the OIO process more accessible and clearer for applicants. These proposed reform options will be supported by non-legislative measures, such as the OIO publishing populated templates of forestry applications, to give investors more confidence of the evidence and benefits required in order to secure a successful application. It will

also be important for the Government to be clear about its long term strategy for forestry.

Requirements in relation to New Zealand’s climate change targets

52. I have considered whether the checklist should include a requirement for forestry investment to be aligned with New Zealand’s climate change strategy. In particular, it is important to preserve the ability for forestry to contribute to New Zealand’s climate change targets under the Paris Agreement, rather than being claimed against another country’s target. Following advice from officials, I am satisfied that this risk can be adequately managed under the Climate Change Response Act, and therefore the checklist does not need to contain a climate change criterion. If this changes in the future, the checklist can be updated.

Profit à prendre on products other than trees

53. The work on forestry rights has raised concerns that profit à prendre on other primary products may be used to construct transactions that side-step the OIA screening regime, due to the existing exemption of these agreements from the OIA definition of an interest in land. I am aware of two recent purchases of vineyards using a profit à prendre.

54. This matters more than it used to as the recent tightening of screening of non-urban, non-forestry land via a revised Ministerial Directive Letter to the OIO will increase investors’ incentives to find alternative contracting arrangements that avoid OIO screening.

55. Wider data on the use of profit à prendre in non-forestry applications is very limited. The LINZ Landonline database includes registered profit à prendre, sorted by area. Forestry accounts for over 470,000 hectares of the 500,000 hectares with profit à prendre registered in Landonline.

Type	Number	Total Size (ha)
Forest, trees, timber	799	472,702
Coal, earths, minerals	39	4,530
Beehives	3	989
Crops	6	924
Vineyards	9	355
Unknown	91	21,104
Total	947	500,604

56. ^[5]

[5]

(legally

privileged).

57. This is significant because the OIA screens land or “interests in land”. However, extending the OIA to capture contracts involving plants that are annually planted or cultivated would extend sensitive land screening beyond interests in land.
58. In addition, a profit à prendre can involve activities that are peripheral to the primary use of the land, or otherwise unlikely to be of policy interest in screening, such as locating beehives on a property to harvest honey. Therefore it is not contemplated that all profit à prendre will be screened, for instance forestry rights below a threshold or profits à prendre that are not the main use of the land.
59. Therefore I propose that the current blanket exemption for a profit à prendre be removed, but with protections retained so that OIA screening of profit à prendre is limited to those involving the dominant use of the land, and are consistent with our trade obligations. ^{[1] [2] [5]}
- It is anticipated
- that the great bulk of profit à prendre subject to screening will be forestry-related.
60. Officials considered OIA screening of cultivation or harvesting contracts for grapes that do not convey an interest in land under the OIA regime. ^{[1] [2] [5]}

International Obligations (Legally Privileged)

61. ^{[1] [2] [5]}

62.

63. [1] [2] [5]

64.

65.

66.

67.

68. [1] [2] [5]

69.

Other Background

70. [1] [2] [5]

71.

72.

Iwi/Māori Consultation

73. The Treasury engaged in a targeted consultation process with iwi/Māori with particular forestry interests in January 2018. This reflects that thirty per cent of the land under New Zealand's plantation forests are in Māori ownership and Māori may be disproportionately impacted by any changes. Approximately 33 settlements of historical Treaty of Waitangi claims include forestry land redress.
74. The process saw the sharing of a consultation document and facilitation of four hui in regions across New Zealand over the Christmas/New Year period. ^[6]
75. Engaging with iwi/Māori on the proposal was valuable and a range of views were shared. At a high level, the feedback included:
- Concerns that the consultation process was too short and did not give rise to meaningful or informed discussions about the proposal
 - Concern that not all affected groups were invited to make submissions or attend hui
 - Concern that the proposal to include forestry rights into the OIA screening regime would deter much needed overseas investment in forestry
 - Concern that the proposal would affect the value of forestry investments by iwi/Māori and their ability to realise their investments
 - An appreciation for the small window of opportunity to include forestry rights in the OIA and the need to weigh up that risk against the uncertainty that the proposed regime may impose
 - A preference that the protections from high risk overseas investment be built into mechanisms other than changes to primary legislation.
76. This feedback has informed the development of the policy. Given the time constraints that this proposal has been developed under, driven by the need to implement any changes ahead of the CPTPP coming into force, I am satisfied that it was reasonable to undertake targeted consultation within the available time frames.

77. **(Legally privileged)** ^[5]

78. The Ministers for Crown-Māori Relations, Māori Development and Regional Development have been consulted on this issue.

Industry Consultation

79. Forest growers, investors, forestry rights holders and wood processors provided written submissions to the Treasury highlighting their frustrations with the current screening regime for leasehold and freehold land under the OIA. Submitters made 182 written submissions, including some from iwi/Māori groups. At a high level, this feedback included;

- A key difficulty for the forestry sector is that the net benefit test, and/or the way it is applied, is not fit for purpose, given unique characteristics associated with the asset class
- Unlike farmland, there is limited scope for overseas forestry owners to invest further to create significant economic benefits from their ownership of forestry, given forests are mature assets
- As the counterfactual test is currently assessed, and the benefit test applied, it is becoming increasingly difficult for overseas persons to obtain consent to purchase freehold land use for forestry purposes
- The current tests lend themselves to uncertainty and delay, which impacts liquidity and potential investors are deterred
- For an acquisition of a well-managed forest, it can be very difficult to satisfy a number of the existing criteria, as for an existing forest there is little development or additional employment expenditure that can be undertaken

- Domestic wood processors have raised the concern that under current settings there is not a sustainable log supply for domestic wood processors, which risks the security of timber supply for local markets. They note that woodlots are being purchased by overseas persons specifically for the export of timber to their home country and there is no opportunity for local discretion or opportunity to bid on them. The Wood Processing and Manufacturers Association has for some time raised the issue that higher trade barrier for more highly processed products make New Zealand processed and manufactured wood product exports less competitive and discourage moving up the value chain from raw logs.

Departmental Comments

Department of Conservation

80. The Department of Conservation does not support the change from a benefit test to a checklist for overseas investors in forestry. Such a change will mean losing the ability in the current test to assess whether the investment provides protection for significant indigenous vegetation, habitats of indigenous fauna and wildlife protected under the Wildlife Act 1953. We note that threatened species including kiwi, weka, bats, frogs and New Zealand Falcon reside in some production forests. Threatened ecosystems, such as wetlands, can also be found in some production forests. The sensitive management of these habitats and species is vital given their threatened status. We note that the checklist provides for existing formal commitments (such as easements and covenants) to be retained but we will lose the ability to provide new formal protection or encourage less formal arrangements with investors which may benefit the natural, recreation and historic values found in production forests.

Overseas Investment Office – Risks and Mitigations

81. The OIO has raised concerns regarding the ability to implement the proposed changes on an operational level so quickly.
- a. There are already resource and capacity pressures as OIO work to implement the proposed restriction on non-residents purchasing existing homes in New Zealand.
 - b. To be successful for both government and industry, a significantly different approach will need to be taken to supporting industry. This will require both time and resources which are currently not available to OIO.

- c. It will take some time and resource to design a targeted and effective monitoring regime for forestry and to ensure compliance with the more permissive regime. Monitoring requirements and clarity about the approach to enforcement will need to form part of any approvals process, the detail of which cannot be confirmed until the Act is passed.

82. Should Cabinet be minded to agree to the proposals in this paper, OIO note that setting out a more detailed mandatory checklist for forestry applications in regulations, and setting out in legislation the principles that must be considered and the date that the Regulations must be made by, goes some way to mitigating the timing risks while further supporting governments overall objectives and could satisfy the requirement that forestry rights be screened before CPTPP enters into force. Until the Regulations are made, forestry rights could be assessed against the investor test (as proposed in this paper) and land purchases could continue to be subject to the current regime. Industry would have certainty of the commitment as this would be set out in the Bill. If sufficient time is allowed (eg 8 – 12 months), industry and other key interests could be engaged in the development of the check list, further improving the final product.

83. ^[1]

A check list for forestry applications could have unintended consequences such as undermining the quality of the investment or driving business decisions that take advantage of the gap between the two assessment regimes (eg undesirable conversion of valuable and important productive land). The checklist approach also removes the usual discretion that applies to similar regulatory decision making.

Consultation

84. The following departments have been consulted on this paper: Te Puni Kōkiri, Ministry of Foreign Affairs and Trade, Land Information New Zealand (Overseas Investment Office), Ministry of Justice, Inland Revenue, Ministry for Primary Industries, Ministry for the Environment and Department of Conservation. The Department of Prime Minister and Cabinet has been informed.

85. Hon Davis and Hon Mahuta have been consulted on this proposal. New Zealand First (Hon Jones) and the Green Party (Hon Sage) have also been consulted.

Financial Implications

86. Fiscal implications will arise through this proposal. Preliminary analysis indicates that the OIO can manage the set-up costs for this proposal from within its existing funding. The OIO is assessing costs associated with screening forestry rights, creating a new test for forestry investments more generally, and designing and implementing an appropriate approach to monitoring and enforcement. Costs of processing applications and monitoring conditions are expected to be recovered from applicants. There is a potential need for ongoing funding for enforcement costs as these cannot be met from third party fees as set out in the current fees guidelines.
87. The intention of the proposal is to streamline the test for forestry investment. The application fees will be reviewed after taking into account the costs of implementing this regime.
88. It is likely that staff training, communications and system upgrades will be required for the OIO. It will also likely require enhanced monitoring and potentially enforcement to ensure the more liberal requirements are being complied with. Not doing the latter will undermine the integrity of the wider OIA regulatory framework.
89. The OIO are working through the likely costs associated with this proposal and once known, approval will be sought from Joint Ministers, likely in mid-March 2018. Preliminary analysis indicates that the financial implications of the OIA Amendment Bill, including this proposal, can be managed within the tagged funding set aside in HYEPU to fund the implementation of the non-residents ban as part of the 100-Day Plan.

Human Rights

90. The proposals contained in this Cabinet paper may have implications concerning consistency with the New Zealand Bill of Rights Act 1990, and the Human Rights Act 1993. Specifically, the proposal to bring forestry rights into the OIA screening regime engages the right to freedom from discrimination (on the grounds on national origin). In relation to discrimination, the limitation on the freedom is connected to the Bill's objective and is proportionate.

Legislative Implications

91. Including forestry rights in the screening regime and amending the existing tests for freehold and leasehold land will require changes to the Overseas Investment Act 2005 and its Regulations.
92. This proposal will be included in a Supplementary Order Paper to the Overseas Investment Amendment Bill.

Regulatory Impact Analysis

93. The Regulatory Impact Analysis Team has considered the Regulatory Impact Statement (RIS) in the light of requirements for proposals included in the Government's 100-day plan. The RIS shows that alternative approaches to achieve the Government's objectives have been considered, and the way in which the adopted approaches are intended to work towards those objectives is clearly set out. However, the analytical and time constraints, in particular the lack of opportunity to consult with forestry and other holders of profits à prendre rights, mean that it has not been possible fully to consider the likely impacts of the proposals in practice. This includes impacts on the relative attractiveness of different ways of investing in New Zealand forestry, which in turn impacts on the willingness of overseas investors to invest and therefore their potential ability to help to achieve the Government's broader objectives in forestry; and whether and how the arguments made here for amending OIA requirements in this area, also apply to the OIA regime as a whole.
94. It would be desirable, as far as possible, to consult further with a broader range of stakeholders before new requirements are finalised and in due course to monitor their impact in practice, for example by looking for evidence of a change in the level and nature of screening applications received after the new arrangements are introduced.

Gender Implications

95. There are no gender implications arising from these proposals.

Disability Perspective

96. There are no disability implications arising from these proposals.

Publicity

97. I propose that this Cabinet paper, with appropriate redactions, will be proactively released on the Treasury website. The Cabinet paper on the ban on foreign speculators purchasing existing homes was similarly proactively released.
98. Following Cabinet agreement, I propose a joint press release with the Minister for Land Information, and associated information can be published on the websites of the Treasury and the Overseas Investment Office.

Recommendations

99. I recommend that the Committee:

Background

1. [1] [2] [5]

2. **Note** that currently any overseas persons seeking to purchase, or lease for three years or more, forestry land over 5 hectares must be screened by the Overseas Investment Office (OIO) to get consent for the investment, including forestry land.

3. **Note** that other interests in land, specifically easements and profits à prendre (a right to take some part of the soil or the “natural produce” of the land off another person’s land such as minerals, timber, or flax), including forestry rights are currently exempted from the OIA screening regime.

4. **Note** that officials recently consulted forestry stakeholders on making forestry rights (cutting rights) subject to OIA screening.

5. **Note** that stakeholders have expressed concern that the current forestry screening regime is not fit for purpose and it is difficult for investors to demonstrate that investments will provide substantial and identifiable benefit to New Zealand.

6. **Note** that forestry is a key component of a number of this Government’s priorities, including the one billion trees programme, and quality foreign investment is key to the success of the sector.

Policy

7. **Agree** that a set of criteria be developed to provide overseas forestry investors an alternative path to meeting the current benefits test under the OIA.

8. **Agree** that those criteria be specified in regulations, and the OIA include legislative guidance to guide the nature and scope of those regulations.

9. **Agree** that the regulation-making power be cast such that the criteria below can be included in the regulations:

- a. That the investor passes the OIA investor test (business experience and acumen, demonstrated financial commitment, good character).
 - b. That any existing historic, bio-diversity, environmental or public access commitments are maintained (depending on what interests and rights are being assigned - leaseholders and forestry right holders may not always be in a position to provide this assurance).
 - c. That felled areas will be replanted, where the investor obtains an interest that allows the investor to replant (e.g a freehold or leasehold interest).
 - d. That any existing commitments to provide logs to domestic customers are maintained.
 - e. For land sales, if the relevant land is or includes foreshore, seabed, or a bed of a river or lake, that the investor has complied with the procedure for offering foreshore, seabed, riverbed, or lakebed land to the Crown under the Overseas Investment Regulations 2005.
10. **Agree** that additional criteria may be added by regulations.
 11. **Agree** that the criteria specified in the supporting regulations described in recommendation 8 commence at the same time as the regulatory guidance described in recommendation 9.
 12. **Agree** that investors in forestry remain subject to the current investor test.
 13. **Agree** that the test for forestry investment be supported by a requirement for investors to make statutory declarations as to their statements of fact and/or intent.
 14. **Agree** that forestry investors be able to choose whether to apply for OIA screening of a transaction under either the existing net benefit test, or the new mandatory criteria.
 15. **Agree** that a screening pre-approval regime be developed so that forestry investors can be pre-approved purchasers of forestry investments (subject to appropriate criteria, reporting, monitoring and compliance requirements).
 16. **Note** in including forestry rights within the OIA regime balance is required between ensuring that significant investments are subject to review but not creating an unduly high regulatory burden on small operators and investors.

Forestry Rights

17. **Agree** that Statutory Forestry Rights and forestry-related profit à prendre that exist outside the Forestry Rights Registration Act ('Non-statutory Forestry Rights') be subject to OIA screening if the investor and the investor's associates are acquiring 1,000 hectare or more of forestry rights per calendar year (in one or more transactions).
18. **Agree** that Statutory Forestry Rights and Non-statutory Forestry Rights be subject to the existing minimum duration threshold (3 years) for OIA screening that currently applies to leases of sensitive land.
19. **Agree** that assignments of Crown Forestry Licences not be subject to OIA screening.
20. **Note** that the changes to the screening regime will be supported by non-legislative measures by the OIO to provide greater clarity and support for forestry investors making applications to the OIO.

Non-forestry profit à prendre

21. **Note** that there may be potential for profit à prendre on other primary products to be used to construct transactions that side-step the OIA screening regime.
22. ^[5]
23. **Agree** that the current OIA exemption for profit à prendre be changed, so that profit à prendre of policy interest are screened, and mechanisms provided to enable other profit a prendre to not be screened.
24. **Agree** that non-forestry profit à prendre be subject to the existing hectare thresholds (typically 5 hectare) and duration thresholds (3 years) for OIA screening that currently apply to leases of sensitive land.

Legal

25. ^{[1] [2] [5]}

26. **Invite** Associate Minister of Finance, Hon David Parker to issue drafting instructions to the Parliamentary Counsel Office to give effect to the above proposals by amendments to the OIA as a Supplementary Order Paper to the Overseas Investment Amendment Bill.
27. **Invite** the Associate Minister of Finance, Hon David Parker to instruct the Parliamentary Counsel Office to draft regulations that will prescribe the criteria for investments in forestry land.
28. **Invite** the Associate Minister of Finance, Hon David Parker to present the regulations to Cabinet on 19 March 2018.
29. **Authorise** a group of Ministers consisting of the Deputy Prime Minister, Minister of Finance, Associate Minister of Finance (Hon David Parker), and the Minister of Land Information with power to act on further detailed policy matters that may need to be addressed.
30. **Note** that the proposals contained in this Cabinet paper may have implications concerning consistency with the New Zealand Bill of Rights Act 1990, and the Human Rights Act 1993.

Publicity

31. **Note** that this Cabinet paper, with sections redacted where required, will be published proactively on the Treasury website following introduction of the proposed SOP.
32. **Agree** that responsible Ministers make an announcement about the liberalisation of the forestry screening regime and inclusion of forestry rights following Cabinet approval.
33. [1]
34. **Agree** that relevant information be published on the websites of the Treasury and the Overseas Investment Office

International Obligations

35. [1] [2] [5]
36. **Agree** that Australian investors not be subject to screening of forestry rights or any profit à prendre brought into OIA screening by these proposals.

37. **Invite** Associate Minister of Finance, Hon David Parker to issue drafting instructions to the Parliamentary Counsel Office to prepare regulations to give effect to the exemption for Australian investors.

38. [1] [2] [5]

(legally privileged).

Risks

39. **Note** that the Overseas Investment Office has expressed concerns regarding the ability to implement the proposed changes on an operational level so quickly, including:

- a. resource and capacity pressures, including for enforcement, as OIO work to implement the proposed restriction on non-residents purchasing existing homes in New Zealand;
- b. not having the time to work with industry to develop appropriate criteria to assess forestry applications or develop a targeted and effective monitoring regime for forestry;
- c. making significant changes to the approval criteria for forestry assets that undermine the credibility of the regime.

40. **Note** that OIO have noted that the check list criteria for forestry could have unintended consequences and that extending the timeframe for commencement of the forestry provisions by 12 months would go some way to addressing the risks.

41. **Note** that the Treasury engaged in a targeted consultation process with iwi/Māori with forestry interests in January who expressed concerns about the length of time allowed for consultation and the implications that including forestry rights under the regime will have on attracting overseas investment.

42. **Note** that I intend to review the effect of the proposed changes two years after the changes have taken effect.

Financial Implications

43. **Note** that financial implications will arise through this proposal. The OIO is assessing costs associated with administering any new forestry requirements and exploring options for cost recovery, including appropriate fees.

44. **Note** that effective operation of the forestry regime requires OIO to undertake enforcement action which, as enforcement is not generally funded through fees, will have fiscal implications.
45. **Note** that the previous commitment to ban foreign speculators from purchasing existing homes in New Zealand authorised joint Ministers (Deputy Prime Minister, Minister of Finance, Minister for Housing and Urban Development, Associate Minister of Finance (Hon David Parker) and Minister for Land Information to take decisions around design, implementation and associated charges.
46. **Agree** that the financial and implementation implications associated with these proposals be considered by the Joint Ministers group in recommendation 45 above as part of their consideration of options to address OIO capacity to implement the wider OIA Amendment Bill.
47. **Note** that the decisions referred to in recommendation 46 above could impact on the timeliness and effectiveness of implementation.
48. **Note** that the OIO intends to provide advice to Joint Ministers on the financial and implementation implications of the wider OIA Amendment Bill in mid-March 2018 and that preliminary analysis indicates that the financial implications of the Bill, including this proposal, can be managed within the funding set aside in HYEPU to fund the implementation of the non-residents ban as part of the 100-Day Plan

Authorised for lodgement
Hon David Parker
Associate Minister of Finance

Appendix One: Current regime for forestry land under OIA

1. Overseas persons seeking to *purchase* or *lease* (for a term of three years or more) forestry land over 5 hectares must be screened by the Overseas Investment Office (OIO) to get consent for the investment². Consent will only be granted if a proposed investment meets a set of criteria which includes determining that the transaction will, or is likely to, substantially and identifiably benefit New Zealand.
2. *Forestry rights* are exempted from screening as ‘sensitive land’ under the OIA. This is despite the fact that forestry rights can grant a high degree of control over large parcels of New Zealand land, and the associated domestic wood supply, often for long periods of time, in a manner that would be comparable to a lease of such land (as well as providing a right to harvest the forest, forestry rights under the Forestry Rights Registration Act can grant a right to “establish and maintain” a forest).
3. If forestry rights are included in the Act, any future overseas investment in such rights (including the on sale of already foreign owned forestry rights) will be subject to screening by the OIO and consent for the investment will be required.
4. Applicants for consent to acquire sensitive land must satisfy a number of criteria. In addition to the core criteria (the investor test), consent will only be granted if either:
 - i In the case of an individual, the relevant overseas person intends to reside in New Zealand indefinitely; or
 - ii In the case of a non-individual, all the individuals with control of that overseas person are New Zealand citizens, ordinary New Zealand residents or are intending to reside in New Zealand indefinitely, or
 - iii The transaction will, or is likely to, benefit New Zealand (and if the land is non-urban land over 5 hectares, that benefit is substantial and identifiable) as assessed against 21 factors (listed in Appendix two).
5. Most forestry transactions will seek approval under (iii) by demonstrating substantial and identifiable benefit to New Zealand against a selection of the 21 factors. The factors are a combination of economic, environmental and other factors.

² OIO consent may also be required for smaller areas, if they include or adjoin a sensitive feature.

6. Industry stakeholders within the forestry sector provided strong feedback that the current regime is time consuming, uncertain and costly to comply with, and, due to the nature of investments in existing commercial forests, often very difficult for an overseas investor to demonstrate the “substantial and identifiable benefit to New Zealand” necessary to gain OIO approval. Many did not support the inclusion of forestry rights in the OIA as it would further limit the ability to attract overseas investors to forestry.
7. The OIO advises that they consider the current benefit to NZ test under the Act difficult for applicants to meet in relation to forestry land, due to the long term nature of the investment and the fact that, because processing occurs many years in the future, many applicants are unable or unwilling to commit to increase processing. It is also often difficult to demonstrate a point of difference from the counterfactual, which usually involves management, harvest and replanting.
8. The Forest Land directive in the Ministerial Directive Letter was designed to encourage overseas investment that increased value added wood processing and the advance of the Government’s forestry-related strategies. This was achieved by elevating the importance of the ‘increased processing primary products’ and the ‘advance significant Government policy or strategy’ factors for overseas investments in *existing forestry*.
9. Overseas investments involving the planting of *new forests* are subject to the new Rural Land directive which elevates a different group of factors and is more difficult to meet.
10. Overseas investments in New Zealand forestry can involve the acquisition of interests (including freehold)³ in large amounts of sensitive land. This can be through a single transaction or a series of transactions as an investor builds a portfolio.
11. Since 2012, the two largest consented transactions involving freehold transfers of forestry in a single transaction have been approximately 14,130 ha and approximately 9,170 ha.
12. Overseas investments may occur between overseas investors or involve the transfer from New Zealand ownership to overseas ownership (the Act regulates both). The OIO observes that smaller transactions are more likely to involve the transfer from New Zealand to overseas ownership.

³ Many operators acquire a mix of freehold land, leasehold land and forestry rights.

Table 1: Distribution of forestry rights registered with Land Information New Zealand

Forestry right size	Number of forestry rights registered	Total Area (ha) in this Size Range	Matching Potential Threshold	Percentage of Rights Captured at this Threshold	Percentage of Area Covered at this Size threshold
Less than 50 ha	2428	45,897	zero (5 ha)	100.0%	100.0%
50 - 100 ha	872	63,853	50 ha	57.8%	97.9%
100 - 250 ha	1116	180,560	100 ha	42.6%	95.1%
250 - 500 ha	606	211,804	250 ha	23.2%	86.9%
500 - 750 ha	192	115,888	500 ha	12.7%	77.4%
750 - 1000 ha	100	85,496	750 ha	9.3%	72.1%
Over 1000 ha	303	1,514,119	1000 ha	7.6%	68.3%
No Area / Shared Area with another Title	134				

Source: Land Information New Zealand

Appendix Two: Existing consent criteria under the Overseas Investment Act

Applicants for consent to acquire sensitive land must satisfy a number of criteria. In addition to the core criteria (the investor test), consent will only be granted if either:

- in the case of an individual, the relevant overseas person intends to reside in New Zealand indefinitely,
- in the case of a non-individual, all the individuals with control of that overseas person are New Zealand citizens, ordinary New Zealand residents or are intending to reside in New Zealand indefinitely or
- the transaction will, or is likely to, benefit New Zealand (and if the land is non-urban land over 5 hectares, that benefit is substantial and identifiable) as assessed against 21 factors.

Special land has specific consent criteria which includes offering that land back to the Crown, and the Crown must decide whether to accept the offer.

Benefit to New Zealand factors

The Benefit Test involves assessing an investment against 21 factors, set out in section 17 of the OIA and regulation 28 of the Overseas Investment Regulations 2005. The factors are described below.

Benefit Factor	Summary description⁴
Economic factors Additional investment for development purposes.	Additional investment occurs after the initial purchase and is distinct from the purchase price. Such investments often focus on upgrading facilities.
Added market competition, greater efficiency or productivity or enhanced domestic services.	Added market competition usually results from the addition of new players or supply (quantity or quality) in a specific market where the additional players or supply will have a measurable increase in competition.
Increased processing of primary products.	The increased processing must occur in New Zealand (this includes on board fishing vessels in the New Zealand Exclusive Economic Zone prior to export), and the increased processing may be carried out by another party (for example developing a new dairy farm may result in increased processing of milk products in New Zealand). The more direct the relationship between the overseas investment and the increase in processing, the more relevant this factor will be.
Increased export receipts.	Exports are goods or services of a domestic origin which are sold in another country. New Zealand exports include the provision of domestic tourist and education services to overseas visitors to New Zealand.

⁴ Exerts from the Overseas Investment Office webpage (<https://www.lin.govt.nz/regulatory/overseas-investment>)

	Creation of new job opportunities or retention of existing jobs.	Generally, two types of new job opportunity are recognised: Direct jobs: These are provided directly by the applicant or the business it is buying, such as additional staff for an expanding business. Direct jobs also include temporary jobs, such as seasonal workers or contractors for the construction of a new factory. Indirect jobs: These flow from the overseas investment indirectly via suppliers or elsewhere in the relevant industry. Indirect jobs must be sufficiently linked to the occurrence of the overseas investment.
	New technology or business skills.	This factor will not be relevant for many investments as, although the technology or skills may be new for the Applicant or in relation to the investment, in many cases they are already being used elsewhere in New Zealand by others.
Environmental factors	Walking access.	Walking access is the right of members of the public to gain access to the New Zealand outdoors by passing on foot. Walking access may be of particular relevance where it provides public access to: foreshore, lakes and rivers; conservation areas; areas of scenic or recreational value; sports fish; or adjoining public walking trails. In order to demonstrate a benefit under this factor, an applicant needs to show new or enhanced mechanisms for providing, protecting or improving walking access.
	Significant indigenous vegetation and significant habitats of indigenous fauna.	In order to demonstrate a benefit under one of these factors, an applicant needs to show new or enhanced mechanisms for protecting and enhancing: significant habitats; trout salmon wildlife and game; or historic heritage.
	Trout, salmon wildlife and game.	
	Historic heritage.	
Other factors	Consequential benefit.	Benefits that do not fall within the scope of other factors may be considered as a consequential benefit (for example, environmental benefits which do not meet the requirements of one of the recognised environmental benefit factors).
	Key person in a key industry	The key person may be an individual or an entity. The key person should be of high standing and influence in an industry and their involvement in such industry must be more than as a regular, or even prominent, player. It may be difficult to meet this factor if the key person is already operating in New Zealand.
	Affect image, trade or international relations and international obligations.	This factor is sometimes relevant to a large transaction with an international profile where the New Zealand portion of the transaction is small in the context of the overall transaction. An adverse effect to New Zealand's appeal as an investment location alone is generally not sufficient to adversely affect New Zealand's image overseas.

Owner to undertake other significant investment.	This factor recognises that granting the application for consent may result in the owner (this is usually the vendor) of the relevant land undertaking other significant investment in New Zealand. For example, the vendor may direct the purchase proceeds into another significant investment.
Previous investments.	In order to meet the requirements of this factor the previous investment must have been of benefit to New Zealand. Investments that have not yet resulted in benefits to New Zealand are irrelevant.
Advance significant government policy or strategy.	The overseas investment must give effect to or advance a significant Government policy or strategy in a way that will measurably contribute to the policy or strategy. The policy or strategy may be either a central or local government policy or strategy and it must be significant.
Enhance the viability of other overseas investments.	This factor recognises that some overseas investments may not otherwise meet the threshold in their own right, but nonetheless support or enhance another overseas investment. The other overseas investments must be previous investments that required consent under the Overseas Investment Act and were undertaken by the relevant overseas person.
Strategically important infrastructure.	This factor is relevant when an investment is in strategically important infrastructure on sensitive land, and the investment assists New Zealand to maintain New Zealand control of that infrastructure. Strategically important infrastructure may include (but is not limited to) assets such as international airports, shipping ports, national power supply networks or national communication networks.
New Zealand's economic interests.	The factor has a broader focus than the other economic factors and concerns the effect of the overseas investment on the wider New Zealand economy. The requirements of this factor will not be met if the overseas investment will not have any material affect on New Zealand's economic interests.
Oversight and participation by New Zealanders	This factor is intended to provide investors with an opportunity to show how they will allow for New Zealand oversight or involvement in the overseas investment.