

# Overseas Investment Act Forestry Review: Amended Terms of Reference

## Context

1. The Overseas Investment Amendment Act 2018 (Amendment Act) changed the way overseas investments in forestry are screened under the Overseas Investment Act 2005 (the Act). The Amendment Act:
  - a. streamlined consent pathways for forestry investment and introduced standing consents for repeat investors in forestry, in order to facilitate overseas investment in forestry, and
  - b. brought forestry rights into the screening regime, in order to improve the regime's coherence.
2. The Amendment Act also required the Minister to commence a review of the operation and effectiveness of these changes within two years of them taking effect (that is, by 22 October 2020).<sup>1</sup> The Minister is satisfied that the work done by officials in early 2020 to develop this Terms of Reference satisfied that obligation.
3. This review (Forestry Review) will be led by the Treasury, with input and support from Toitū Te Whenua Land Information New Zealand (LINZ), the Overseas Investment Office (OIO) and Te Uru Rākau (TUR) (collectively, 'the agencies').

## Purpose

4. The Forestry Review will:
  - a. assess the operation and effectiveness of the forestry-related amendments introduced by the Amendment Act, and
  - b. commence legislative change to:
    - i. remove forestry conversions from the Overseas Investment Act 'special forestry test' (with forestry conversions to instead be subject to the revised Benefit to New Zealand Test), and
    - ii. improve the operation and effectiveness of the forestry-related amendments introduced by the Amendment Act.
  - c. report to the Minister on any operational changes that may be required for those issues not resolved, or not appropriate to be addressed, by the legislative changes six months after the conclusion of any legislative change.

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<sup>1</sup> Clause 10(1)-(2), Schedule 1AA of the Overseas Investment Amendment Act 2018.

## Background

### **Forestry sector**

5. Forestry is a significant industry for New Zealand. It:
  - a. accounts for around 1.6 per cent of New Zealand's GDP, which equated to \$6.9 billion in September 2020, and is New Zealand's third largest export product earner, behind dairy and meat
  - b. contributes an annual gross income of around \$5 billion and directly employs 38,000 people in production, processing and commercialisation, and
  - c. accounts for around 7 per cent of land use in New Zealand.
6. A strong forestry industry contributes to many of the Government's priority areas, including enhancing regional development and employment, and mitigating climate change.
7. The forestry sector is heavily dependent on inward investment, with up to 70 per cent of forestry plantations being foreign-owned. This means rules for screening such investment have a particular impact on the sector.

### **Amendment Act changes**

8. In 2018, the Government changed the way forestry investments are screened under the Overseas Investment Act (the Act). This was in recognition of the importance of inward investment to forestry and in support of the Government's broader forestry priorities (eg, the One Billion Trees Programme). The changes sought to:
  - a. facilitate overseas investment in forestry, by streamlining consent pathways for investments. This responded to concerns from domestic and international stakeholders that existing consent processes were time-consuming, costly and, due to the nature of forestry, difficult to satisfy, and
  - b. improve the coherence of the screening regime, by ensuring all types of investments in forestry are screened.
9. There were four key elements of the changes.
  - a. *Introducing a 'special test relating to forestry activities' (known as the 'special forestry test')*, an alternative to the existing benefits test, which assesses an investment against a "checklist" of requirements and does not involve a 'counterfactual' analysis.
  - b. *Introducing a 'modified benefits test'*, in which the investor uses a modified version of the existing benefits test that assesses the benefits of what an overseas investor proposes to do with the land against what the current owner would do if they continued to own the land.

- c. *Introducing standing consents*, a form of pre-approval from the OIO which enables an investor to make multiple investments without having to seek consent each time. To receive a standing consent, an investor must demonstrate a strong track record of compliance with the Act or overseas legislation, amongst other things.
- d. *Bringing large acquisitions of forestry rights and forestry-related profits-à-prendre (right to take soil or produce off the land) into the Act's screening regime*. Such rights can grant a high degree of control over large parcels of New Zealand land for long periods of time, so their inclusion was considered appropriate to the Act's overarching focus on overseas ownership or control of sensitive New Zealand assets.

### **Statutory review**

- 10. Clause 10 of Schedule 1AA of the Amendment Act provides for a mandatory review of the operation and effectiveness of these changes, given they represent significant innovations in the design and operation of the screening rules for overseas investment in forestry.
- 11. A two-year commencement period was selected to balance the desire to ensure the changes were reviewed quickly (given their significance) with the need to provide sufficient time for insights to be gained from the functioning and use of the new regime.

### **Changing operating context for the forestry sector**

- 12. Since the Government introduced the 'special forestry test' in 2018, the operating context for the forestry sector has changed. There are a range of drivers resulting in better investment prospects for forestry and stronger investor interest, particularly for forestry conversions, than anticipated in 2018.
- 13. In addition, there is increasing concern about the negative spillovers from whole farm forestry conversions, particularly in relation to the use of pastoral land.
- 14. While high quality foreign investment in forestry and a strong forestry sector remain important, the value proposition for facilitating increased overseas investment in land to be converted to forestry is no longer as compelling. In particular, the Act does not act as a substantial check on overseas demand for investment in new production forestry in the same way the Act does for other land-based investments.
- 15. The current forestry screening settings for forestry conversions reduce our ability to manage or protect against current and emerging concerns or risks from overseas investment in forestry to New Zealanders' wellbeing. This increases our exposure to negative effects of some forestry conversions on the four capitals – financial/physical, human, social and natural.

## Scope

### ***Legislative change***

16. This part of the Forestry Review will commence legislative change to:
  - a. remove forestry conversions from the Act's 'special forestry test' with forestry conversions instead going through the revised Benefit to New Zealand Test), and
  - b. improve the operation and effectiveness of the forestry-related amendments introduced by the Amendment Act, as identified by the review's consideration of the operation and effectiveness of the forestry changes (see below).

### ***Operation of the forestry changes***

17. This part of the Forestry Review will consider:
  - a. the functioning of the new and amended consent pathways and standing consent criteria, taking into account the ease and volume of use of each pathway for applicants, their lawyers/advisors, and the OIO
  - b. the functioning of the forestry rights exemption provisions, and
  - c. any minor and/or technical amendments required to resolve unintended consequences associated with the implementation of the forestry-related amendments in the Phase One reform.<sup>2</sup>

### ***Effectiveness of the forestry changes***

18. This part of the Forestry Review will consider whether the changes are achieving their original policy intent, and whether they are aligned with other Government objectives and work programmes.

### ***Achieving original policy intent***

19. The Forestry Review will consider the extent to which the changes are achieving their original policy intent of:
  - a. facilitating overseas investment in forestry (which would be measured by any changes to the speed of processing applications, and to the volume, value and type of applications), and
  - b. improving the coherence of the overseas investment screening regime.

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<sup>2</sup> The Phase One reform considered changes to the Act that were required to be enacted prior to the ratification of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). The Phase Two reform, which is currently being progressed, has considered a wider range of policy changes to the Act which were not constrained by CPTPP timing.

20. In considering the extent to which the changes are facilitating overseas investment in forestry, the Forestry Review will ensure that any recommended change is aligned with the legislative change to remove forestry conversions from the Act's 'special forestry test'.
21. In relation to the '**special forestry test**', the Forestry Review will consider whether the mandatory "checklist-style" criteria are appropriate and achieve the right balance between being more permissive of overseas investment while retaining a sufficient level of regulatory discretion to impose conditions on consent.
22. In relation to the **modified benefits test**, the Forestry Review will consider whether the pathway remains fit for purpose in light of changes to the counterfactual assessment in the Act's general benefits test, agreed to as part of the Phase Two reform.
23. In relation to the **standing consent for repeat investors**, the Forestry Review will consider whether the pathway has reduced the regulatory burden on the OIO, and whether it is encouraging repeat investments.
24. In relation to the **introduction of forestry rights into the screening regime**, the Forestry Review will consider whether:
  - a. the screening thresholds are set at the appropriate level to achieve a balance between ensuring forestry investments benefit New Zealand while not disincentivising investment or increasing illiquidity, and
  - b. the screening of forestry rights is better supporting landowners to make decisions about land use based on the highest value use.

*Alignment with other Government objectives and work programmes*

25. The Forestry Review will consider the extent to which the changes are aligned with the Government's objectives for **domestic wood processing**.
26. It will also consider the outcomes of other relevant work programmes including:
  - a. work on addressing afforestation concerns, which is looking at options such as changing National Environmental Standards-Plantation Forestry (NES-PF) settings and resource management policy
  - b. the review of the Emissions Trading Scheme (ETS)
  - c. the emissions Reduction Plan (ERP)
  - d. the One Billion Trees Programme
  - e. reform of the resource management system

- f. the development of an Industry Transformation Plan (ITP) for the forestry and wood processing sector, the establishment of a mandatory registration system for forestry advisers and log traders, and the development of a national Wood Legality Assurance system, and
- g. *Te Mana o Te Taiao - the Aotearoa New Zealand Biodiversity Strategy (ANZBS)* and the draft implementation plan.
- h. *Proposed National Policy Statement on Indigenous Biodiversity (NPSIB)*

## Out of scope

- 27. The Forestry Review must not inquire into, determine, or report on the original policy rationale and intent underpinning the changes (increasing overseas investment in forestry and improving the coherence of the screening regime), other than on the legislative change to remove forestry conversions from the 'special forestry test'. The place of the forestry industry within New Zealand's economy is being considered through other work across government.
- 28. The review will not consider whether carbon farming (permanent forestry) should be able to begin to use the 'special forestry test'.
- 29. The Forestry Review will not revisit non-forestry related substantive issues that arose with the passing of the Amendment Act, for example requiring purchases of residential land to be screened. Nor will it consider the addition of new categories of sensitive assets to the Act.

## Constraints

- 30. The Forestry Review will not result in the screening of investments that are not currently screened, and will only develop policies consistent with New Zealand's international obligations.

## Process

### ***Roles and responsibilities***

- 31. The Treasury will lead the review, with input from and supported closely by LINZ, the OIO and TUR, who together hold the operational and technical expertise in overseas investment and forestry.
- 32. A cross-agency group involving senior representation from each of the agencies, as well as input from the Ministry for the Environment (MfE) and the Ministry of Foreign Affairs and Trade (MFAT), will provide governance for the Forestry Review. The Treasury will be responsible for coordinating the meetings of and generally servicing this group.

### **Consultation**

33. The agencies will work collaboratively with other interested agencies and external stakeholders as appropriate, including MfE, MFAT, the Department of Conservation (DOC), and the Department of Prime Minister and Cabinet.
34. In addition to consultation within government, the agencies will consult with users of the regime using existing networks where possible (such as the Reference Group on Overseas Investment Changes (Forestry), the Forestry Ministerial Advisory Group, and the OIO's Legal Reference Group). Agencies will also undertake targeted engagement with key users of the regime and stakeholders (including industry groups, investors, lawyers/advisors, iwi and Māori, and interested agencies) on how the changes are functioning.

### **Timeframes**

35. Early, targeted engagement with key users and stakeholders will take place mid-2021. Legislative change is expected to commence in 2022. Officials will report to the Minister on any operational changes that may be required for those issues not resolved, or appropriate to be addressed by the legislative changes, six months after the conclusion of any legislative change.

### **Coordination and alignment**

36. Several other work programmes underway across government are relevant to the Forestry Review. These include:
  - a. **Work on addressing afforestation concerns.** This work is ongoing and officials will continue to advise the Minister on how to achieve their objectives, particularly in light of the release of the Climate Change Commission's draft report.
  - b. **The review of the Emissions Trading Scheme**, led by MfE and MPI, concluded in June 2020 with the passing of the Climate Change Response (Emissions Trading Reform) Amendment Act 2020 (ETR Act). The review resulted in a provisional emissions budget for the period 2021-2025 and changes to Emissions Trading Scheme (ETS) settings including unit supply and price controls. It is now in an implementation phase, with most amendments to improve the forestry aspects of the ETS due to come into effect in 2023. The Government's decision not to extend averaging accounting to post-1989 forests already registered in the New Zealand ETS will be revisited in 2022.
  - c. The first **Emissions Reduction Plan (ERP)**. The ERP will describe how we are going to meet emissions budgets and make progress towards meeting our 2050 target. This work is being coordinated by MfE and involves a range of agencies. The ERP will include sector-specific policies for the role of forestry in meeting climate change targets.

- d. **The One Billion Trees Programme**, led by TUR, the purpose of which is to increase tree planting across New Zealand and support landowners to integrate trees into their land use. TUR is required to report in six monthly intervals on the progress as measured under the programme's monitoring and evaluation framework. The 24-month report is expected in 2021.
- e. **The reform of the resource management system**, based on the comprehensive review of the Resource Management Act (RMA) carried out last year. Through stronger national direction, there will be more focus on natural environmental outcomes, enabling more development within environmental limits. The RMA will be replaced by three new acts:
- the Natural and Built Environment Act
  - the Strategic Planning Act to require regional spatial planning and alignment across related planning statutes, and
  - the Managed Climate Change Retreat and Adaptation Act to address specific challenges of managed retreat and adaptation.
- f. **The Industry Transformation Plan (ITP)** for the forestry and wood processing sector. The ITP aims to develop a globally competitive and resilient supply chain; and attract investment in wood processing that lifts productivity and accelerates the transition to a low emissions economy by providing low-emissions materials and bioenergy.
- g. The establishment of a mandatory registration system for **forestry advisers and log traders** is being led by MPI and TUR, and will support improved professional standards and a more transparent market for log trading.
- h. The development of a national **Wood Legality Assurance system** is being led by MPI and TUR and aims to put in place a robust chain of custody framework for imported and New Zealand grown, processed, and exported wood products.
- i. **Te Mana o Te Taiao - the Aotearoa New Zealand Biodiversity Strategy (ANZBS)**. This was approved in 2020 and meets one of New Zealand's commitments under the UN Convention on Biological Diversity (CBD) to provide an overarching national strategy for biodiversity management to 2050. An implementation plan is being prepared which will include a review of legislative and policy constraints on co-ordination in biodiversity management in government, between central and local government, and with Treaty partners.
- j. **Proposed National Policy Statement on Indigenous Biodiversity (NPSIB)**. The proposed NPSIB would be a regulatory instrument under the RMA that strengthens and clarifies the requirements that are already in place for local authorities to manage Aotearoa New Zealand's indigenous biodiversity, providing clarity and guidance for landowners, iwi/hapū, and local government.
37. Officials will ensure the Forestry Review is coordinated and aligned with the outcomes of this work.