

The Treasury

Overseas Investment Act Forestry Review Information Release

June 2022

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Treasury Report: Overseas Investment (Forestry) Amendment Bill: transitional arrangements

Date:	28 April 2022	Report No:	T2022/898
		File Number:	IM-5-8

Action sought

	Action sought	Deadline
<p>Hon Grant Robertson Minister of Finance</p> <p>Hon David Parker Associate Minister of Finance and Attorney-General</p> <p>Hon Damien O'Connor Minister for Land Information Minister for Trade and Export Growth</p> <p>Hon Stuart Nash Minister of Forestry</p>	<p>Agree to an approach to transitioning to the new rules in the forthcoming Overseas Investment (Forestry) Amendment Bill</p>	<p>2 May 2022 to enable us to instruct Parliamentary Counsel on the preferred approach</p>

Contact for telephone discussion (if required)

Name	Position	Telephone	1st Contact
Michael Mathieson	Senior Policy Analyst, International	[35]	✓
Conor McBride	Manager, International	[39]	

Minister's Office actions (if required)

Return the signed report to Treasury.

Note any
feedback on
the quality of
the report

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Executive Summary

The Overseas Investment (Forestry) Amendment Bill (the Bill) will require overseas investments involving the conversion of land into production forestry to demonstrate stronger benefits. It achieves this by requiring such investments to go through the Benefit to New Zealand screening pathway, rather than the more permissive special forestry test.

At a meeting on 14 April 2022, Ministers expressed concern over the number of forestry conversions that might occur under the special forestry test before the Bill commences around November 2022. You requested advice on managing this risk via the Bill's transitional provisions or any alternative arrangements.

Transitional provisions should balance speed of implementation, ^[1] maintaining investor confidence, and the Legislation Design and Advisory Committee's (LDAC) guidance on legislative design that all Bills should be consistent with.

Recap on earlier advice and preferred approach

We previously recommended that the Bill have transitional provisions consistent with the Legislation Act. These provisions would allow investors and vendors to utilise the current (more permissive) rules if they have taken substantive steps to completing an investment in reliance on these rules (that is, if they had applied for consent, or legitimately entered a transaction conditional on consent). These transitional provisions align with our international obligations, supports investor confidence (a key goal of the recent Phase 2 reform), and complies with the LDAC guidelines.

We note that the National Interest test remains available on a case-by-case basis if the Minister of Finance considers a particular investment to be contrary to New Zealand's national interest. While this judgement is one for the Minister of Finance to make on a case-by-case basis, we do not consider that routine forestry conversions would meet this threshold.

[36]

This option would see investors able to enter into and/or apply for consent in reliance on the special forestry test until the Bill commences in November 2022. After discussions with the regulator, we note that the Bill could come into force the day after the day of Royal Assent rather than two weeks as previously advised.

On an equal weighting of the criteria this remains our preferred approach.

Alternative option one: Condensing the legislative process

However, if greater weight is placed on the speed of implementation, our alternative recommendation is to condense the legislative process for the Bill while maintaining conventional transitional provisions. This speed could be achieved through either a truncated select committee process and/or urgency could be accorded to the Bill.

To preserve time for Parliamentary and public scrutiny, we recommend that the select committee report back within two months following the date of referral (as opposed to the normal four to six months). Subject to the Bill receiving priority in the House, the new rules could be in force by late August 2022 without needing to resort to urgency (though urgency remains an option).

Alternative option two: Retrospective legislation (not recommended)

Another option is to pass the Bill on a standard timeframe but apply the new rules retrospectively after a certain deadline announced by Ministers in advance, say one month after introduction (approximately 30 June). However, relative to a condensed legislative process, this approach has several risks and complexities, including that:

- The starting point is that legislation should not retrospectively affect existing rights and duties – such as a contract entered into under the more permissive rules or an application before the regulator. To do otherwise would have a negative impact on New Zealand’s reputation as a stable and attractive investment decision.

- [36]

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- The regulator would be required to administer the current rules before the commencement of the Bill. If investors were unwilling to withdraw such applications, this would result in consents being granted and then automatically revoked once the Bill is in force.

Finally, we considered other ways to manage transitional transactions, such as applying the national interest test to all transactions progressing via the transitional provisions or altering the test that is applied via a ministerial directive letter or other secondary legislation. [36]

Next steps

Under all options we remain on track to introduce the Bill on 31 May 2022 subject to Cabinet’s approval to introduce the Bill. However, if retrospective legislation is progressed, you will need to seek Cabinet approval for this option as it is outside the delegation granted to joint Ministers from Cabinet. In this scenario, we suggest that

the Associate Minister of Finance aim to take a paper directly to Cabinet seeking approval to include retrospective provisions in the Bill, alongside approval to introduce the Bill itself.

Recommended Action

We recommend that you:

For all options:

- a **agree** that the Bill commence the day after the date of Royal assent (rather than two weeks as previously advised)

Agree/disagree.

Either:

Conventional transitional provisions (Treasury preferred)

- b **agree** that transitional provisions provide that the old rules apply only when an investor
- has made application to Toitū Te Whenua Land Information New Zealand (the regulator) before commencement (whether or not the transaction has been entered into), or
 - has entered a transaction before commencement but has not yet applied to the regulator for consent

Agree/disagree

- c **note** these transitional provisions would allow investors to utilise the current, more permissive rules for transactions entered or applications currently before the regulator as at commencement in November 2022
- d **note** the Act's national interest test remains available to any transaction that may be contrary to New Zealand's national interest as determined by the Minister of Finance on a case-by-case basis

Or:

Alternative option one: condensing the legislative process (Treasury preferred alternative option)

- e **agree** to the transitional provisions set out in recommendation b and bring forward their commencement by seeking Parliament's approval to condense the legislative process, by requiring the select committee considering the Bill to report back within two months

Agree/disagree.

f **note** this approach would allow investors to utilise the current, more permissive rules for transactions entered into or with the regulator as at commencement in late August 2022

Or:

Alternative option two: legislation with retrospective effect (not recommended)

g **agree** that the Bill contain provisions that retrospectively apply the new rules to any relevant transactions under the special forestry test received on or after a certain deadline

Agree/disagree

h **agree** to announce at the Bill's introduction (likely 31 May 2022) that the Bill will retrospectively apply to relevant transactions one month after the date of introduction (likely from 1 July 2022)

Agree/disagree.

i **agree** that for the Bill to have retrospective effect, the Bill will:

- provide for any consent granted in the period after the deadline but before the Bill commences to be reassessed under the new rules
- require the relevant assets to be disposed of if consent cannot be obtained under the new rules, and
- suspend civil and criminal penalties that directly arise from the retrospective application of the new rules to previously lawful activities.

Agree/disagree

[36]

j

k **note** you will need to seek Cabinet approval for this option as it is outside the delegation granted to joint ministers from Cabinet

l **agree** that the Associate Minister of Finance (Hon Parker) take a paper directly to Cabinet seeking approval to include retrospective provisions in the Bill at the same time as approval to introduce the Bill is sought

Agree/disagree.

Decision for Hon Parker as Attorney-General only if alternative option two (legislation with retrospective effect) is progressed

m **agree** that officials can instruct the Parliamentary Counsel Office in advance of Cabinet policy approval of the Bill having retrospective effect

Agree/disagree.

Conor McBride
Manager, International

Hon Grant Robertson
Minister of Finance

Hon David Parker
**Associate Minister of Finance
Attorney-General**

Hon Damien O'Connor
**Minister for Land Information
Minister for Trade and Export Growth**

Hon Stuart Nash
Minister of Forestry

Purpose of Report

1. This report provides additional advice requested by joint Ministers on transitional provisions for the Overseas Investment (Forestry) Amendment Bill (the Bill).
2. This report has been prepared by the Treasury in consultation with the Ministry of Foreign Affairs and Trade, Te Uru Rākau – New Zealand Forestry Service / Ministry for Primary Industries, Toitū Te Whenua Land Information New Zealand, the Ministry of Justice, and the Crown Law Office.

Background

3. The Bill requires overseas investors wishing to convert land to production forestry to meet the 'Benefit to New Zealand' test, rather than the streamlined 'special forestry test'. We recently provided advice on the commencement and transitional provisions for the Bill (T2022/501 refers).
4. In that advice, we recommended transitional provisions in line with the default position in the Legislation Act 2019 (ss 32-33) and that the Bill commence two weeks after Royal assent (to allow time for implementation and publication of guidance). This transitional provision would allow investments substantively underway at commencement to proceed under the current more permissive rules.
5. However, our advice noted that other options are available that would more quickly apply the new rules to forestry conversions. At a meeting on Thursday 14 April 2022, the Minister of Finance, Associate Minister of Finance (Hon Parker), the Minister for Land Information, and the Minister of Forestry discussed these options.
6. With the Bill likely to come into force around November 2022 – based on current legislative timeframes (and subject to Ministers agreeing to the Bill commencing the day after Royal assent), Ministers expressed concern over the number of forestry conversions under the more permissive special forestry test that could occur in the interim. As such, Ministers:
 - requested further advice on alternative transitional provisions that would see the new rules apply more quickly to mitigate the potential of a 'rush' of opportunistic transactions; and
 - agreed standing consents issued under the current rules can continue to be utilised on the terms set out in the original grant (which may include additional forestry conversions).
7. Ministers specifically requested advice on an option designed around:
 - announcing that the Bill's provisions would apply from a certain date, for example one month after the announcement, and

- the Bill applying the new rules retrospectively from this date.
8. Ministers agreed that the Benefit to New Zealand test can be used where the farmland is to be used exclusively or nearly exclusively for forestry activities and replanted after harvest.

Analysis

Criteria for assessing transitional provisions

9. In developing alternative commencement and transitional provisions, we have drawn on the Legislation Design and Advisory Committee (LDAC) guidance that Cabinet requires Bills to generally comply with. Applying this guidance to this issue, transitional provisions need to balance:
- speed of implementation to realise Cabinet’s goal of ensuring conversions of farmland to forestry demonstrate benefits to New Zealand,
 - [1] and maintaining confidence in New Zealand as an attractive destination for productive investment by providing a stable investment environment, and
 - the LDAC guidelines, including the presumption against retrospectivity and maintenance of the rule of law.

Recap on earlier advice

10. As set out in our initial advice, our preferred approach was to permit those investors who have made substantive steps towards completing an investment in reliance on the old rules to finalise it via transitional provisions. This approach would comprise scenarios where an investor:
- has made an application to Toitū Te Whenua Land Information New Zealand (the regulator) before commencement (whether or not the transaction has been entered into), or
 - has entered into a transaction before commencement (that requires approval of the regulator) but has not yet applied for consent. This limb recognises that investors enter into conditional transactions in reliance on the rules in force at the time with, an application for consent often being the last in several contractual conditions before settlement. Failure to obtain consent in these scenarios may have contractual penalties.
11. In all other cases where an overseas investment involves forestry conversions, the new rules would apply from commencement. After discussions with the regulator, we consider commencement can occur the day after the date of Royal assent (rather than two weeks, as previously advised). We will work closely to support the regulator to implement the Bill as we recognise a longer lead-time is generally the preferred approach.
12. On an equal weighting of the criteria, this is our preferred approach. It aligns with our international obligations, supports investor confidence, and maintains New Zealand’s reputation as a stable and attractive investment destination (key

goals of the recent Phase 2 reform). It complies with the LDAC guidelines endorsed by Cabinet.

13. However, this option would likely see some forestry conversions initiated prior to commencement continue to proceed under the special forestry test via the transitional provisions.

National interest test

14. The Minister of Finance has discretion to escalate a transaction to the national interest test (by way of a section 20B notice) where the transaction could be contrary to New Zealand's national interest. This allows an application to be declined, or have conditions imposed, if the Minister of Finance then determines that the investment is contrary to New Zealand's national interest.
15. The Government's *Foreign Investment Policy and National Interest Guidance* (the Guidance) notes this escalation power will usually be used rarely and for transactions that pose material risks. Such decisions always need to be considered on a case-by-case basis and we do not consider that routine forestry conversions would always meet this threshold.

16. [36]

- 17.

Alternative options to have the new rules in force more quickly

18. As mentioned in our initial advice, there are alternative options that would minimise the number of forestry conversion investments progressing via the special forestry test prior to the Bill coming into force, if that is Ministers' priority.
19. These options are described below and analysed against the criteria in Annex One. Options are assessed relative to each other – there is no counter-factual in this scenario as Ministers are required to take a decision or the default provisions in the Legislation Act will apply (effectively, our initial option).

Alternative option one: Condensing the legislative process

20. Given the complexities associated with retrospective legislation (set out below), Ministers may wish to consider condensing the legislative process to have the

¹ We note transactions must be assessed on a case-by-case basis.
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changes in force more quickly. Under this option, the Bill would contain conventional transitional provisions and Parliament would be asked to approve a shortened select committee process and/or accord urgency Bill to one or more of the Bill's stages in the House.

21. The speed of the legislative process should be balanced against the need to allow for public and parliamentary scrutiny of the Bill. We suggest truncating the select committee period to a minimum of two months from the date of referral, which would be subject to debate in the House. This would allow one month for submissions to be made, as well as one month for the presentation of the departmental report and revised track version of the Bill to the select committee.
22. So long as the Bill received a relatively high priority on the 2022 Legislative Programme via the agreement of the Cabinet Legislation Committee (LEG) and the Leader of the House, the Bill could be in force by mid-to-late August 2022 without urgency being accorded to the Bill.²
23. [1], [36]
24. We think a two month select committee process is sufficient [36] as it allows the public (including foreign investors) reasonable amount of time to consider the changes, make a submission, and time to take the changes into account before they come into force. We would recommend avoiding utilising urgency alongside a truncated select committee [36] however, urgency remains a backstop should Ministers wish to further speed up the process.
25. As above, providing advance notice and the opportunity for our international partners to submit on the Bill will also support us to manage key trading relationships [36]
26. While the minor and technical changes in the Bill are not of a scale or nature that would otherwise warrant a condensed legislative process, they are largely clarifications that will either benefit investors, confirm current practice of the regulator, or remove redundant provisions.³ As such, we consider they can appropriately remain in the Bill (though noting their technical nature means a longer select committee process may have been beneficial).
27. This option can be met within existing Treasury resourcing for the Forestry Review. However, officials would have limited capacity to consider policy proposals beyond that proposed in the Bill, for example additional forestry-related policy changes at select committee.
28. This approach does not need further Cabinet policy approval and could be covered in the LEG paper and via special instructions to the select committee in the first reading speech.

² The Bill is currently classified as Category 3, to be passed if possible in 2022 as part of the 2022 Legislation Programme.

³ Cabinet had agreed that the Bill will: amend the special forestry test's restriction on residential use; repeal the modified benefits test for forestry activities; clarify the definition of forestry activities and the calculation of the 1,000 hectare screening threshold exemption; and clarify that activities unconnected to the interest being acquired are excluded for the purposes of assessing whether the land will be used exclusively, or nearly exclusively, for forestry activities.

Alternative option two: Retrospective legislation (not recommended)

29. Under this option, the Bill would contain provisions that retrospectively applied the new rules to any investment that has not been entered into or lodged with the regulator before a certain date (the deadline). This deadline would be earlier than the date the Bill is expected to pass and commence.
30. To ensure overseas investors and domestic vendors had some notice of the changes, we understand Ministers would make an announcement informing investors of the forthcoming deadline. We suggest there be at least a month between Ministers' announcement and the date from which the new rules would retrospectively apply.
31. This approach has several risks and complexities. The starting point in the Legislation Act 2019 (and LDAC guidelines) is that law should not have retrospective effect. It should not affect existing rights and duties – such as a contract entered in reliance on the more permissive rules or an application before the regulator. Use of retrospective legislation is generally limited to a few extraordinary circumstances and in most cases the presumption against retrospective legislation would apply.
32. [36]
- 33.
34. [1], [36]
35. [1]
36. The regulator would be required to administer the current rules before the commencement of the Bill. If investors were unwilling to withdraw such applications, this could result in applications filed after the deadline but before the Bill commences having to be granted. In these scenarios, the Bill would need to provide that such investors would need to have the investment re-assessed under the new rules. If the investment did not meet the new rules,

they would be required to dispose of the asset. We also recommend that none of the Act's civil and criminal penalties apply where the relevant a breach arises solely from the retrospective application of the new rules.

37. This option would require further policy decisions from Cabinet because this approach falls outside the authority Cabinet delegated to joint Ministers.

Recommended approach

38. On an equal weighting of the criteria, we remain in favour of conventional transitional provisions with a standard-length parliamentary process. This approach aligns with our international obligations, supports investor confidence (a key goal of the recent Phase 2 reform), and complies with all relevant legislative guidelines endorsed by the Cabinet. We note if a transaction poses significant risks such that the Minister of Finance considers the transaction could be contrary to the national interest, it can be escalated for consideration under the national interest test.
39. However, our preferred approach does provide opportunity for investors to be able to enter into and/or apply for consent in reliance on the special forestry test up until the Bill is planned to commence around November 2022.
40. If Ministers prioritise faster implementation, our alternative recommendation is to condense the legislative process for the Bill so it is in force from late-August 2022. This narrows the window for investors to utilise the special forestry test for conversions in the interim.
41. Relative to retrospective legislation, we consider a condensed legislative process has advantages in that it:
- avoids the complexity of the regulator administering the old rules before the commencement of the Bill retrospectively. This may result in consents being granted, reassessed, and the assets disposed of if the new rules cannot be met (unless investors choose to withdraw their application),
 - maintains compliance with LDAC guidelines on the design of legislation, and
 - [1], [36]

Options considered but not progressed

42. We also considered other options that could realise Ministers' objective of requiring forestry conversions to demonstrate greater benefits quickly. We did not progress these options for the following reasons:
- [36]

4 There may be an option to effectively exclude forestry conversions from utilising the 'special forestry test' via regulation in advance of legislative change. This would mean applications for forestry conversions would need to go through the new Farm Land Benefit test (rather than the Benefit to New Zealand test). However, this approach could not be used to exclude a forestry conversion in every circumstance and

[36]

- *A routine application of the national interest test:* A Ministerial Directive Letter could be issued stating that the Minister of Finance would consider all forestry conversions under the national interest test. However, there is a high threshold for applying the national interest test: it is expected to be applied rarely and only where necessary to protect New Zealand's core national interests. While judgement on what is contrary to the national interest is properly one for the Minister of Finance, we consider it unlikely that routine forestry conversions would meet this threshold. As such, this approach is likely to impose additional time, cost, and complexity on applications that would not be suitable to ultimately may not meet the threshold to decline.

[1], [36]

- *Ministers assume responsibility for decisions under the special forestry test involving forestry conversion:* Currently all special forestry test applications, except for standing consent applications, are delegated to the regulator. Ministers could assume decision-making under test and exercise Ministerial discretion. However, the test provides little flexibility to apply Ministerial judgement, so this is unlikely to change the outcomes of any applications.

Next steps

43. Under all options we remain on track to introduce the Bill on 31 May 2022 so long as we are able to instruct Parliamentary Counsel on the desired approach shortly.

If Treasury's preferred option, or preferred alternative, are progressed

44. Under Treasury's preferred option (and preferred alternative) the immediate next steps are to finalise the drafting of the Bill and provide you with a draft Cabinet Legislation Committee paper.

If Ministers wish to progress retrospective legislation

45. If Ministers wish to progress retrospective legislation, a further Cabinet decision is required. To ensure introduction remains on track for 31 May you will need to take a paper directly to Cabinet that seeks both approval for the policy changes

it risks exacerbating investor uncertainty.

and to introduce the Bill. The next steps would be, as soon as possible following Ministers' decisions:

- instruct Parliamentary Counsel in advance of Cabinet policy approval to draft retrospective portions legislation (and we seek Hon Parker's approval, as Attorney-General to do so via this report); and
 - seek Cabinet Office and the Prime Minister's approval for submitting a paper direct to Cabinet that covers both policy matters and approval to introduce the Bill.
46. Drafting the Bill to apply retrospectively will be complex. Issues may arise that we cannot resolve quickly and result in a delay to the introduction of the Bill.
47. The subsequently legislative process will be different depending on your choice of preferred option as set out in Table One. The timelines are indicative only.

Table One: Indicative legislative timetable

	Preferred: conventional transitional provisions	Preferred alternative: condensing the legislative process	Alternative option two: retrospective legislation
Cabinet dates	Lodge 12 May LEG 19 May CAB 23 May	Lodge 12 May LEG 19 May CAB 23 May	Lodge 26 May Direct to CAB 30 May
Introduction of Bill	31 May 2022	31 May 2022	31 May 2022
First reading	Early June 2022	Early June 2022	Early June 2022
Select committee consideration	June-October 2022	June to late July 2022	June-October 2022
Select committee report-back	October 2022	Early August 2022	October 2022
Second reading and Committee of the whole House	[33]		
Third reading and royal assent			
Commencement	November 2022	Late August 2022	November 2022 (but would have retrospective effect from early July 2022)

Annex one: detailed analysis of options

<i>Criterion</i>	<i>Preferred: conventional transitional provisions</i>	<i>Alternative option one: condensed parliamentary process</i>	<i>Alternative option two: retrospective legislation</i>
<i>Speed of application</i>	<p>Neutral</p> <p>This option utilises default provisions for bringing the changes into force. Under a conventional parliamentary process, the Bill would be in force by November 2022, likely resulting in some forestry conversions being approved under the current rules throughout 2022 and post-commencement (if investments were entered into prior to commencement). Ministers retain residual discretion to apply the national interest test on a case-by-case basis to manage significant risks.</p>	<p>Positive</p> <p>This option would allow the changes to come into force by mid-to-late August (subject to the Bill receiving a high legislative priority or the use of urgency). Alternatively, urgency could be accorded to the Bill – in which case the Bill could be enacted soon after introduction (i.e., early-June).</p>	<p>Strongly Positive</p> <p>In effect, this option would allow Ministers to apply the new, more stringent rules to forestry conversions investments unbound by the timing of the parliamentary process (though still subject passage and amendment through that process). If Ministers choose to provide investors with one month's notice, the changes would be backdated to approximately 31 June 2022. This considers the time needed for Cabinet approval. While the regulator would still need to apply the old rules until the Bill commences, the ultimate revocation and reassessment of these consents would discourage investors from applying while the Bill passes through its Parliamentary stages.</p>
<i>Maintains investor confidence and compliance with our international obligations</i>	<p>Positive</p> <p>[1], [36]</p>	<p>Neutral</p> <p>[36]</p>	<p>Negative</p> <p>[36]</p>

			[36]
<i>Alignment with principles of good legislative design and the rule of law</i>	Strongly positive This option aligns with the presumption that legislation should not have retrospective effect as it does not interfere with existing contractual relationships between parties.	Neutral / moderately negative While it is best practice to have a full select committee process, this does not undermine the rule of law or violate legislative guidelines. This is further mitigated because the Bill applies an existing test to forestry conversions – not an entirely new test.	Strongly negative Retrospective legislation in this scenario is contrary to legislative guidelines and risks undermining the rule of the law. [34]