

The Treasury

Overseas Investment Act Forestry Review Information Release

June 2022

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- [33] 9(2)(f)(iv) - to maintain the current constitutional conventions protecting the confidentiality of advice tendered by ministers and officials
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TE TAI ŌHANGA
THE TREASURY

Treasury Report: Overseas Investment Act Forestry Review: Draft Cabinet Paper and Amended Terms of Reference

Date:	19 November 2021	Report No:	T2021/2806
		File Number:	IM-5-8-4-1

Action Sought

	Action Sought	Deadline
Minister of Finance (Hon Grant Robertson)	Note the contents of this report.	None.
Associate Minister of Finance (Hon David Parker)	Provide feedback on the attached draft Cabinet paper. Refer this report to the Minister for Māori Crown Relations: Te Arawhiti, Minister for Land Information, Minister of Forestry and Minister for Māori Development.	22 November 2021.

Contact for Telephone Discussion (if required)

Name	Position	Telephone		1st Contact
Jemma Jackson	Analyst, International	[39]	N/A	✓
Conor McBride	Acting Manager, International		[35]	

Actions for the Minister's Office Staff (if required)

Return the signed report to the Treasury. Refer this report to the Minister for Māori Crown Relations: Te Arawhiti, Minister for Land Information, Minister of Forestry and Minister for Māori Development

Note any feedback on the quality of the report

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Enclosure: Yes (attached)

Treasury Report: Overseas Investment Act Forestry Review: Draft Cabinet Paper and Amended Terms of Reference

Executive Summary

This advice seeks your feedback on the attached draft Cabinet paper (Annex 1) for the Economic Development Committee (DEV) and the amended Terms of Reference (Annex 2), which propose legislative change to remove forestry conversions from the 'special forestry test'. It also seeks agreement to the timeframes for progressing legislative change, the timing of public announcement, and the Māori engagement strategy (all of which are subject to Cabinet approval).

In October 2021, you (as Associate Minister of Finance), Minister of Land Information, and Minister of Forestry decided to remove forestry conversions from the 'special forestry test' under the Overseas Investment Act 2005. Ministers indicated their preference that forestry conversions would instead go through the revised Benefit to New Zealand test, rather than the new Farm Land benefit test, which has a higher benefit threshold and that their preference was for timely legislative change.

You subsequently agreed to rescope the Forestry Review so that it is focussed on legislative change to both remove forestry conversions and improve the operation and effectiveness of the Act's forestry provisions. After these changes officials would consider any further operational changes that may be required that are not resolved through legislation.

The draft Cabinet paper outlines the rationale for the proposed change including that the operating context for production forestry investments has changed. It notes that New Zealand has seen an increase in farmland conversions to forestry (both permanent and production) by local and overseas investors and that this is being driven by a range of factors, including the significant increase in the carbon price. There has also been increasing concern among stakeholders about the negative spill-over effects of whole farm forestry conversions, particularly in relation to the use of pastoral land.

We understand that a standalone bill would be required deliver this change. Subject to Cabinet approval, a bill to give effect to Cabinet's decisions could be enacted by the first quarter of 2023, though this would depend on the bill's priority on the 2022 legislative programme.

Any reduction in sector attractiveness risks a capital or revenue hit to significant iwi investments. Te Arawhiti have advised that continuing with a Cabinet decision to introduce legislation without comprehensive consultation with impacted Māori groups and iwi poses risks to Māori-Crown relations and a Treaty of Waitangi risk if the acknowledged risk of negative impacts materialise. In addition there are risks to the durability of Treaty settlements involving Crown forest licensed land.

[34]

To support Māori-Crown relations, the Treasury propose to conduct two sets of targeted engagement with Māori following Cabinet's decision (subject to Cabinet agreeing to the proposed changes). Firstly, we propose engagement prior to the announcement of the proposed change, to give key Māori stakeholders the earliest opportunity to consider the impact of the changes, as well as engagement after the announcement, to enable a broader set of Māori stakeholders to advise on the potential impacts of the changes. These meetings would occur with a view to report back to DEV in early 2022 with the outcomes of these hui, including key messages or areas of concern among Māori.

There are also reputational risks to Government (including with industry and key trading partners) of making legislative change without comprehensive consultation. Furthermore, announcing this change could create uncertainty as to the role of overseas investment in forestry more generally. We are seeking your direction on the timing of making an announcement (subject to Cabinet agreement) and sharing the amended Terms of Reference with industry groups and organisations whom the Treasury engaged with as part of the first tranche of stakeholder engagement of the Forestry Review.

You may also wish to consult with Minister of Forestry on whether this announcement should take the form of a joint announcement with the work to consider resource consents for land use change into forestry, which we understand the Minister of Forestry is looking to announce pre-Christmas.

Recommended Action

We recommend that you:

- a **note** that in October 2021, you (the Associate Minister of Finance), together with the Minister for Land Information and Minister of Forestry, agreed to remove forestry conversions from the 'special forestry test' and indicated that you prioritise timely legislative change
- b **note** that in November 2021, you agreed to seek Cabinet approval to give effect to Ministers' decisions by rescoping the Forestry Review so that it is focused on legislative change to remove forestry conversions from the 'special forestry test'.
- c **review** the draft Cabinet paper (Annex 1) and amended Terms of Reference for the Forestry Review (Annex 2), and provide officials with any feedback to be incorporated prior to circulating the draft for Ministerial consultation
- d **agree** to take the draft Cabinet paper and amended Terms of Reference to the Cabinet Economic Development Committee (DEV) on 8 December 2021, subject to any changes following your review, and consideration of comments from your Ministerial colleagues

Agree/disagree

- e **note** that subject to Cabinet approval, a Bill to give effect to Cabinet's decisions could be enacted by the first quarter of 2023, though this would depend on the Bill's priority on the 2022 legislative programme
- f **agree** that the Treasury conduct targeted engagement with Māori both immediately following Cabinet's decision, prior to the announcement of change (with a small but representative group of Māori forestry representatives) and post the announcement (with a wider group of Māori with economic interests in forestry)

Agree/disagree

Subject to your agreement to recommendation f)

- g **agree** to lead the pre-announcement engagement with Māori (if you agree, we will engage with your office to see whether such engagement could be accommodated)

Agree/disagree

- h **note** that we understand Ministers have a preference for action and prioritise an announcement before Christmas 2021
- i **note** that officials recommend announcing shortly after any Cabinet approval to enable engagement to take place before the Christmas break
- j **note** that Wednesday 15 December (two days after Cabinet would approve these proposals) is not suitable for an announcement as the Half Year Economic and Fiscal Update (HYEFU) is being released that day
- k **indicate** how and when you would like to publicly announce this change, subject to Cabinet approval (expected on Monday 13 December 2021):

Date	Agree/Disagree and details on how
Tuesday 14 December 2021	
Thursday 16 December 2021	
Alternate date to be determined through Ministerial engagement	

- l **refer** this report to the Minister for Māori Crown Relations: Te Arawhiti, Minister for Land Information, Minister of Forestry and Minister for Māori Development

Refer/not referred

- m **note** that officials will share with your office a draft Regulatory Impact Statement next week for your information, and
- n **note** that talking points for DEV at Annex 3.

Conor McBride
Acting Manager, International

Hon Grant Robertson
Minister of Finance
Noted, 22 November 2021

Hon David Parker
Associate Minister of Finance

Purpose of Report

1. This report seeks your (Minister Parker's) agreement to:
 - a. a draft Cabinet paper for the Economic Development Committee (DEV) seeking approval of the amended Terms of Reference (ToR) for the statutory review of the forestry-related changes made to the Overseas Investment Act 2005 (the Act) ('Forestry Review') (**Annex 1**),
 - b. the amended ToR (**Annex 2**),
 - c. the timeframes to progress legislative change to remove forestry conversions from the 'special forestry test'¹ (subject to Cabinet approval),
 - d. the timing of the announcement of this change (subject to Cabinet approval), and
 - e. the Māori engagement strategy.
2. It also provides talking points to support the discussion at the DEV meeting on 8 December 2021 (Annex 3).

Background

Forestry Review currently under way

3. In March 2021, Cabinet agreed to conduct a tightly focused review (the Forestry Review) of the operation and effectiveness of the 2018 changes relating to how overseas investments in forestry are screened under the Act.
4. During targeted stakeholder engagement on the Forestry Review, officials heard from stakeholders that the 2018 changes are achieving their primary policy intent: facilitating overseas investment in forestry (T2021/1911 refers).² The key message we heard was that the changes have improved investor confidence by providing greater certainty and improved timeframes than would have occurred if investors were only able to access the Benefit to New Zealand pathway.
5. Stakeholders identified some technical issues and suggestions to improve the operation of the regime. Some of these issues would be most effectively addressed through legislative change, while others may be able to be addressed through operational changes by, or release of guidance from, the Overseas Investment Office.

Ministers' decisions on removing forestry conversions from the 'special forestry test'

6. The Associate Minister of Finance, Minister for Land Information, and Minister of Forestry met on 28 October 2021 to discuss whether to initiate work to consider removing forestry conversions from the 'special forestry test' (T2021/2512 refers).

¹ The 'special test relating to forestry activities', commonly known as the 'special forestry test'. The 'special forestry test' assesses an investment against a "checklist" of requirements and does not involve a 'counterfactual' analysis. The test was introduced to facilitate more overseas investment in plantation forestry than would be facilitated under the existing benefits test. It aims to be more permissive, create more certainty for investors and streamline the processing of applications.

² The 2018 changes also intended to improve the coherence of the screening regime.

7. Ministers agreed to remove forestry conversions from the 'special forestry test'. Instead of using the streamlined 'special forestry test' pathway, Ministers agreed that forestry conversions would go through the revised Benefit to New Zealand test, rather than the new farmland benefit test (which has a higher benefit threshold). Instead of using the streamlined 'special forestry test' pathway, Ministers agreed that forestry conversions would go through the revised Benefit to New Zealand test, rather than the new farmland benefit test (which has a higher benefit threshold). Both tests come into effect on 24 November 2021. Ministers indicated that they have a preference for action and that they prioritise timely legislative change.

Progressing 'Option 3' to rescope the Forestry Review to focus on legislative change

8. You subsequently agreed to rescope the Forestry Review so that it is focussed on legislative change to both remove forestry conversions and improve the operation and effectiveness of the Act's forestry provisions, after which officials would consider any further operational changes that may be required that are not resolved by the legislative changes ('Option 3') (T2021/2764 refers).
9. Although progressing this option requires resourcing beyond what the Treasury has allocated to the Forestry Review, this Option requires relatively less resourcing compared to 'Option 1' (to introduce legislation to remove forestry conversions in addition to the Forestry Review), which presented the most significant resourcing demand. At the catch up with the Treasury's Executive Leadership Team on 10 November 2021, you confirmed that you would seek additional funding outside of the Budget process through the Cabinet paper to bridge this resourcing gap.

Draft Cabinet Paper

10. We have prepared the attached draft Cabinet paper "Overseas Investment Act Forestry Review: Removing Forestry Conversions from the 'Special Forestry Test'" (Annex One), which seeks agreement to:
 - a. remove forestry conversions from the Overseas Investment Act '**special forestry test**' (and that forestry conversions instead go through the revised Benefit to New Zealand Test) and commence legislative change to give effect to this decision,
 - b. amend the Overseas Investment Act Forestry Review Terms of Reference (ToR) to include forestry conversions within scope of the Forestry Review, and
 - c. make minor/technical changes to the Overseas Investment Act to improve the operation and effectiveness of the forestry related provisions, consistent with the Overseas Investment Act Forestry Review ToR.
11. The draft Cabinet paper outlines the rationale for the proposed change. The operating context for production forestry investments has changed, including the significant increase in carbon price. New Zealand has seen an increase in farmland conversions to forestry (both permanent and production) by local and overseas investors. This is driven by a range of factors and that there has been increasing concern among stakeholders about the negative spill-over effects of whole farm forestry conversions, particularly in relation to the use of pastoral land.

12. Furthermore, the proposed removal of forestry conversions from the 'special forestry test' is necessary as 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.
13. In accordance with the outcomes of the October 2021 Ministers' meeting, the draft Cabinet paper proposes that overseas investors looking to acquire land for forestry conversions be required to access the revised Benefit to New Zealand pathway as opposed to the more stringent new Farm Land Benefit test. This is because it would be difficult for forestry investors to meet the higher benefit threshold of the new Farm Land Benefit test and may therefore reduce overseas investment in forestry to below desirable levels.
14. The draft Cabinet paper also identifies that the proposed change presents both communication risks and risks for Crown-Māori relations. It outlines that the communication of this change to the forestry industry will need to be carefully managed as one of the key drivers of the introduction of the streamlined test three years ago was a *quid pro quo* for bringing forestry rights into the screening regime (see Communications section below for more detail on how we propose to manage these risks).
15. Finally, the paper also proposes that Cabinet delegate authority to you (Minister Parker) along with the Minister of Finance, Minister for Land information, and Minister of Forestry to take further policy decisions consistent with the direction of the draft Cabinet paper for minor/technical legislative changes (raised through targeted engagement) that are aligned with the ToR for the Forestry Review to improve the operation and effectiveness of the 2018 changes.
16. Agencies have been consulted on the draft Cabinet paper and some significant concerns were raised, particularly with regard to the lack of consultation with Māori prior to Cabinet's agreement for legislative change. There were also concerns raised regarding interactions between this change and broader land-use reforms under the Resource Management Act. We have outlined these concerns below alongside a strategy which attempts to mitigate, but which will not eliminate, this risk.
17. Suggested talking points to support the introduction of the paper at DEV are attached at Annex 3.
18. Officials intend to share a draft Regulatory Impact Statement (RIS) with your office for your information on this proposed change on the week commencing 22 November. The version will be subject to change following assessment by the RIS Panel.

Progressing legislative change and anticipated timing of enactment

19. We understand Ministers have a preference for action and prioritise timely legislative change. As previously advised, we have assumed that a stand-alone bill would be required (T2021/2764 refers).³ Subject to Cabinet approval, a bill to give effect to Cabinet's decisions could be enacted **by the first quarter of 2023**, though this would depend on the bill's priority on the 2022 legislative programme.

³ We have considered whether there are other legislative vehicles available, but there do not appear to be any either before the House or in development.

20. We understand Ministers may be concerned about the impact of forestry conversion transactions that are progressed through the ‘special forestry test’ ahead of enactment. We have considered a number of options to manage this impact, however we advise against these options for the following reasons:
- *Progressing the legislation under urgency or via a truncated select committee process:* The Cabinet Manual (paragraph 7.27) notes that effective and appropriate consultation is a key factor in good decision-making, good policy, and good legislation. Given the proposal for Cabinet to agree to this change ahead of consultation, the select committee process would provide the principal opportunity for the public (including impacted and interested parties) to have input on the proposed legislative change.
 - *Retrospective effect:* While the Government could announce an intention for the legislation to have retrospective effect, New Zealand’s constitutional principles have a presumption against retrospectivity (reflected in section 12 of the Legislation Act 2019).
 - [36]
- *National interest test:* There is a residual lever (under section 20B of the Act) for the Minister of Finance to apply the national interest test to any transaction, if the Minister considers that an application could be contrary to New Zealand’s national interest. However, there is a high threshold for applying the national interest test: it is expected to be used rarely and only where necessary to protect New Zealand’s core national interest.
21. Given this change would only affect land use change by overseas investors, there are risks that New Zealand owners will convert land to forestry in order to sell to overseas investors via the ‘special forestry test’. There may be therefore be some forestry conversion ‘leakage’, however the scale of any policy leakage is uncertain.

Māori-Crown Relationship Implications

22. Any reduction in sector attractiveness risks a capital or revenue hit to significant iwi investments (T2021/1911 refers). Māori own at least 30 per cent of the land containing New Zealand’s plantation forests (but not always the trees themselves) and are often partners for foreign forestry investors.

⁴ The new Farm Land Benefit test under section 16A(1C) of the Act is mandatory, if the land includes farm land that exceeds 5 hectares. There is only a slim discretion for Ministers not to apply the Farm Land Benefit test, in the circumstances set out in section 16A(1D), none of which would be relevant to forestry conversions.

23. Iwi supported the liberalisation of overseas forestry investment screening and removing forestry conversions from the 'special forestry test' may impact negatively on the value of Māori assets. This change may deter overseas investment partners and hamper efforts to convert historically under-developed Ahu Whenua trust-land⁵ to production forest, including through aggregation arrangements.
24. Te Arawhiti have advised that continuing with a Cabinet decision to introduce legislation without comprehensive consultation with impacted Māori groups and iwi poses risks to Māori-Crown relations and a Treaty of Waitangi risk if the acknowledged risk of negative impacts materialise.⁶ In addition there are risks to the durability of Treaty settlements involving Crown forest licensed land.
25. There is a Te Arawhiti comment in the draft Cabinet Paper. If there are material changes to the Māori engagement strategy, we will work with Te Arawhiti to ensure the comment reflects these changes.

Officials considered whether seeking Cabinet's 'in-principle' agreement to remove forestry conversions was appropriate

26. When consulting on the draft Cabinet paper Te Arawhiti, Te Puni Kōkiri, and the Ministry for the Environment questioned how Māori views could be taken on board if the decision to introduce legislative change is taken before consultation can take place. A number of agencies also enquired as to whether this Cabinet paper could seek an 'agreement in principle' subject to the outcomes of consultation with Māori. They considered that this would frame the consultation as being a more genuine opportunity for iwi/Māori to influence.
27. The Treasury has considered this approach and agree that it would better manage the risks to Māori-Crown relations. However, this option would not align with Ministers' preference for timely change as holding consultation prior to Cabinet's decision to agree to commence the legislative process to enact the change would slow down the legislative process.
28. Making a decision earlier will allow a more concrete announcement of the change to be made, provide certainty to the sector of changes to come and allow you to provide an oral update/report back to DEV in early 2022, as opposed to being required to take a paper to the Committee seeking agreement to the change post-engagement.
29. We consider that engagement with Māori can be meaningful following Cabinet agreement as the engagement would be an opportunity to surface any negative impacts these proposals might present. This would go some way towards mitigating the risks as it presents an opportunity to consider addressing any negative impacts identified through operational (or legislative) change.

Proposed engagement with Māori

30. We are proposing to conduct targeted engagement with Māori on the proposed change to remove forestry conversions from the 'special forestry test', to consider whether there are specific Māori rights or interests requiring active protection, and surface options available to avoid negative impacts on the interests of Māori and support the full participation of Māori.

⁵ Established under Te Ture Whenua Māori Act 1993, Ahu whenua trusts are land administration trusts designed to manage whole blocks of Māori freehold land.

⁶ The particular principles include decision-making informed by good faith, robust engagement, and a clear understanding of the impacts of the policy change for Māori combined with measures to address negative impact.

31. To support Crown – Māori relations, the Treasury propose to conduct two sets of targeted engagement, subject to Cabinet agreement:
- *Pre-announcement:* Engagement with a small but representative group of Māori forestry representatives preceding the announcement of the proposed change (but post Cabinet approval), and
 - *Post announcement:* Broader engagement with Māori from the day after the announcement of the change.
32. These meetings would occur with a view to report back to DEV in early 2022 with the outcomes of this hui, including key messages or areas of concern among Māori.

Pre-announcement engagement with Māori

33. We would look to engage with a small but representative group of Māori forestry representatives, prior to the announcement (but post Cabinet approval). The initial list of individuals/organisations/affiliations are:

Proposed Individuals/Groups to engage with pre-announcement
Federation of Māori Authorities
[23]

34. The purpose of this hui preceding the announcement of this change is to inform Māori representatives, many of whom we have previously engaged with and established relationships with, of the proposal for change (subject to Cabinet agreement). We would be seeking to provide an update to this group in-confidence.
35. Although we would use this opportunity to give a 'heads up' to Māori forestry representatives to acknowledge that they had not been consulted prior to this decision and recognising that it is a significant industry, we also propose to use this opportunity to socialise a broader series of hui post-announcement, where the groups we have consulted can follow up with any questions regarding the change or feedback on the impact of these changes.
36. We are also seeking your agreement to lead this engagement, subject to your availability, which would demonstrate your willingness to hear from representatives in the sector, and your respect and recognition of the individuals that meet with us. Should you choose not to attend this hui (which will likely be in the form of a one-hour virtual meeting) it would be led by a Treasury representative at Deputy Secretary or Director level. We would also look to invite a key representative from Te Uru Rākau but keep the number of attendees limited.

Post-announcement engagement with Māori

37. The Treasury would also look to conduct a series of targeted engagements immediately after the announcement of any Cabinet decision to progress legislative change, to provide further information on the changes and to understand and assess the potential impact of change on Māori, and discuss how the settings could be calibrated to address potential negative impacts for Māori.
38. We would look to engage more widely than the members included in the list above, including (but not limited to) the members of the previously concluded Forestry Iwi Reference group⁷, iwi that are key users of the regime (with their overseas partners), and representative Māori land owner groups. These groups would include Ahu Whenua trusts and Māori incorporations and representatives of the owners of undeveloped Māori freehold land that do not yet have a trust or incorporation.
39. We recognise that the timing for this engagement is not ideal given the proximity to the end of the year, however we are proposing to arrange a series of engagements during the week that would have Cabinet considered the issue, to avoid engaging during the week of Christmas.
40. We are also cognisant of the wider interface of Māori-Crown relations, including the saturation of consultation with the Crown, in addition to tension points across various Government policy areas. The Emissions Reduction Plan, currently being consulted on, also canvasses changes that would, if progressed, materially and disproportionately impact Māori forestry interests. We will consider opportunities to take a more coordinated approach to engagement with Māori on forestry regulatory settings in order to reduce consultation saturation. Any consultation on forestry conversions will take place in good faith and operate within the context of existing tension points (particularly where they relate to environmental matters).

Communications Strategy

41. As previously indicated, there are also [1] of making legislative change without comprehensive consultation. Furthermore, announcing this change could create uncertainty as to the role of overseas investment in forestry more generally. These communication risks could be partially mitigated by clear Government messaging.
42. Ministers agreed to make an announcement of this change in 2021 (subject to Cabinet agreement). Officials will prepare the draft Cabinet paper and amended ToR to be published on the Treasury website (replacing the previously agreed ToR). We will also work with your office to assist with a press release (if required) and a series of Q and A's for potential media queries.
43. We are proposing to share the revised ToR with industry groups and other entities (including investors and law firms) that we have engaged with as part of the review. We would intend to share the amended ToR after this change has been announced. This will allow them to be updated on how the review has changed since officials last engaged with them on the review.

⁷ In 2018, the Government established an Iwi Forestry Reference group to allow for continued dialogue with iwi and the Māori forestry sector on the impact of forestry related changes. The fourth and final meeting took place in February 2021 (T2020/3315 refers).

Timing of the announcement

44. As you will be aware, the Half Year Economic and Fiscal Update (HYEFU) is planned for release on 15 December 2021. Given there is usually considerable media interest in the HYEFU once it is released, we recommend that you make any announcement regarding the Forestry Review on 14 or 16 December.
45. You may also wish to consult with Minister Nash on whether this announcement should take the form of a joint announcement with the work to consider resource consents for land use change into forestry, which we understand Minister Nash is looking to announce pre-Christmas.

Next Steps

46. Once we have received your feedback on, and agreement to, the draft Cabinet paper and amended ToR, we will:
 - update the documents and return them to you ahead of consultation with your colleagues beginning 24 November 2021, along with any consequent changes to the DEV talking points (Annex 3),
 - lodge the Cabinet paper and amended ToR for DEV on 8 December 2021, and
 - initiate work for legislative change and prepare an amendment bill for consideration of Cabinet in the first quarter of 2022.
47. Officials will also:
 - provide your office with a draft Regulatory Impact Statement for the week beginning 22 November 2021, and
 - work with your office (and Minister Nash's office, if necessary) to prepare the required materials for any announcement of this change.

Activity	Due date
Ministerial consultation on draft DEV paper	24 November – 1 December
DEV paper to be lodged	2 December 2021
DEV Meeting	8 December 2021
Cabinet Meeting	13 December 2021
Pre-announcement engagement with a small but representative group of Māori forestry representatives	TBC
Announcement	14 or 16 December 2021
Post-announcement engagement with Māori	16 and 17 December 2021 (TBC – subject to date of announcement)