

The Treasury

Overseas Investment Forestry Information Release

Release Document

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Chair
Cabinet

Overseas Investment Amendment Bill: Supplementary Order Paper – Forestry Activities and Profits-à-Prendre

Proposal

- 1 This paper seeks Cabinet approval to lodge a supplementary order paper (SOP) and publish draft regulations for consideration by the Finance and Expenditure Select Committee, which is considering the Overseas Investment Amendment Bill (the Bill). The SOP will include forestry rights and other profits-à-prendre as interests in land capable of being an “overseas investment in sensitive land” under the Overseas Investment Act 2005 (OIA). The Supplementary Order Paper and draft regulations also introduce changes to address current issues with how overseas investments in forestry are screened under the OIA.
- 2 Following Select Committee consideration of the SOP, a future paper will be brought to the Cabinet Legislation Committee to authorise final regulations for the screening of forestry investments under the OIA.

Executive summary

- 3 This paper seeks Cabinet approval to lodge an SOP and publish draft regulations, which relate to the OIA’s treatment of 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).
- 4 The process for developing these changes is driven by the timing of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).
- 5 Just about any forest that can be sold as a freehold or leasehold in the land can alternatively be sold as a forestry right (a right to establish, maintain, and harvest a crop of trees on land). Forestry rights can include more than one rotation. While freehold and leasehold purchases of forests are screened under the OIA, purchases of forestry rights are not. [1] [2] [5]

- 6 If forestry rights are to be brought under OIA screening, amendments to the OIA and regulations are required before the CPTPP enters into force. [1]
[1]
- 7 The proposed approach includes forestry rights under the OIA, but then imposes a very light-handed checklist screening regime, which will enable overseas purchases if the test is met. There is no evidence that this will have a substantial effect on commercial values. Overseas investors in forestry via freehold ownership, leasehold arrangements and forestry rights have welcomed the announcement, which suggests we will be stimulating rather than inhibiting forestry investment overall.
- 8 When developing the policy, the Treasury engaged in a targeted consultation process with iwi/Māori with particular forestry interests. Feedback included concerns that the consultation process was too short and did not give rise to meaningful or informed discussions, and concerns that the proposal would affect the value of forestry investments by iwi/Māori and their ability to realise their investments. The issues being raised by iwi/Māori are significant.
- 9 On 12 March 2018, Cabinet confirmed that the Minister for Crown/Māori Relations, in consultation with the Associate Minister of Finance (Hon David Parker), will be undertaking further consultation with iwi and Māori groups on the proposed changes [CAB-18-MIN-0084 refers]. If, through the consultation process, any unintended consequences on Māori rights and/or interests are identified, we will strive to address those unintended consequences in the Committee of the Whole House.
- 10 **Legally privileged:** [5]
- 11 The SOP provides for regulations setting detailed requirements of the new checklist test for forestry investment, and clarifying the types of profits-à-prendre captured under the OIA. These regulation-making powers present a risk of comment from the Regulations Review Committee (RRC) on the grounds that the relevant matters are more appropriate for primary legislation.

Policy

Cabinet policy decisions

- 12 On 5 March 2018, Cabinet agreed to policy proposals in relation to the treatment of forestry and profits-à-prendre under the OIA [CAB-18-MIN-0071.01]. The proposals included:

Extending the OIA to cover forestry rights and profits-à-prendre

12.1 Forestry rights (including statutory forestry rights and forestry-related profits-à-prendre outside the Forestry Rights Registration Act 1993) will be subject to OIA screening if the investor and the investor's associates are acquiring 1,000 hectares or more of forestry rights per calendar year.

12.2 Assignments of Crown forestry licenses will not be subject to OIA screening.

12.3 The current OIA exemption for profits-à-prendre will be changed, so that profits-à-prendre of policy interest are screened, and mechanisms provided to enable other profits-à-prendre to not be screened.

12.4 Australian investors will not be subject to screening of forestry rights or any profits-à-prendre.

Special benefit to New Zealand test for forestry investment ('the checklist')

12.5 A new checklist test will be established for forestry investors to seek OIO consent. The pathway will be provided for by the OIA empowering regulations that set out criteria for the checklist, with the OIA providing legislative guidance on the nature and scope of regulations.

12.6 The regulation-making power will be cast such that the criteria in regulations for the new checklist to New Zealand test can include:

12.6.1 The investor passes the OIA investor test (business experience and acumen, demonstrated financial commitment, good character).

12.6.2 Existing historic, biodiversity, environmental or public access commitments are maintained.

12.6.3 Felled areas will be replanted, where the investor's interest in land allows this.

12.6.4 Existing commitments to provide logs to domestic customers are maintained.

12.6.5 If the relevant land includes foreshore, seabed, or a bed of a river or lake, the investor has complied with the procedure of offering land to the Crown under the Overseas Investment Regulations 2005.

13 The 1,000 hectare screening threshold only applies to forestry rights. For a freehold or leasehold interest in forestry, the screening threshold will remain at 5 hectares (or smaller in the case of other types of sensitive land). Once screening is required, the checklist test is available for both forestry rights and for freehold or leasehold interests in forestry land.

14 If forestry rights are brought under OIA screening, amendments to the OIA and regulations are required to enter into effect before the CPTPP enters into force. Therefore, I propose requesting that the Finance and Expenditure Select Committee, which is considering the Bill, considers the SOP and draft regulations.

15 Cabinet authorised a group of Ministers consisting of the Deputy Prime Minister, the Minister for Crown/Māori Relations, the Minister of Finance, the Associate Minister of Finance (Hon David Parker), the Minister for Māori Development, the Minister of Forestry, the Minister for Climate Change and the Minister for Land Information to have Power to Act on further detailed policy matters that may need to be addressed.

Technical policy refinements

16 This paper and accompanying SOP have been drafted on the basis that the group of Ministers with Power to Act will approve three technical policy refinements regarding non-forestry profits-à-prendre. The Treasury has provided advice to that group of Ministers, however due to compressed timeframes, responses had not been received from all relevant Ministers ahead of the deadline for lodging this paper and accompanying SOP with Cabinet Office. The three issues are, that for non-forestry profits-à-prendre:

16.1 Definition of non-forestry profits-à-prendre subject to screening.

16.2 Uniform 5 hectare threshold for non-forestry profits-à-prendre.

16.3 Screening requirements for conversion of land into a forest.

Definition of non-forestry profits-à-prendre subject to screening.

17 Screening of non-forestry profits-à-prendre is driven by concerns that profits-à-prendre on other primary products may be used to construct transactions that sidestep the OIA screening regime. In particular, instead of acquiring a lease of land, an overseas investor could acquire a profit-à-prendre.

18 Given that the policy concern relates to acquiring interests in land regarding primary products from agricultural, horticultural and pastoral activities, the SOP provides that profits-à-prendre over minerals would not be screened. This essentially creates a distinction between profits-à-prendre on resources on and above the ground (screened) and resources below the ground (not screened).

19 A new definition of “regulated profits-à-prendre” will also only apply where the profit relates to the principal or exclusive use of the area of land where the profit-à-prendre exists. So, for example, a profit-à-prendre to harvest a vineyard or orchard [5] would be screened, but a profit-à-prendre to graze livestock amongst the vines would not be screened.

20 Further types of profits-à-prendre could be excluded from screening by regulation, to clarify where consent is not required. This need for clarification may arise over time as the new regime beds in, as industry practices in the primary sector change, or as the courts clarify or expand the products and uses of land that can be the subject of profits-à-prendre.

Uniform 5 hectare threshold for non-forestry profits-à-prendre

21 The screening threshold for non-forestry profits-à-prendre is where the rights apply over 5 hectares of land (and are for 3 years or more in duration). This 5 hectare threshold is based on the screening threshold in the OIA for non-urban land. Once an overseas person has accumulated over 5 hectares of non-forestry profits-à-prendre (over any period of time), they must obtain consent.

22 Other types of land have a smaller screening threshold, for example land adjacent to a lake is subject to screening if it exceed 0.4 hectares. The larger, uniform land area threshold of 5 hectares for non-forestry profits-à-prendre is appropriate given the

nature of the interest being acquired, and will also make it easier for investors to understand and comply with the regime.

Screening requirements for conversion of land into a forest

- 23 All forestry rights will be allowed to use the new checklist test. This includes rights for planting, harvesting and maintaining forestry. Investors purchasing a forestry right with the intent to convert the land to forestry will be able to apply through the checklist test.
- 24 Freehold and leasehold land that has already been converted into forestry can go through the checklist test.
- 25 Freehold and leasehold land that has not been, but is intended to be, converted into forestry, must go through the net benefit test (not the checklist test). However, investors in this category will not need to go through the counterfactual analysis required under the OIA, and pre-approval will be available.
- 26 Currently, the benefit test is met if the Ministers or the OIO judge that the proposed overseas investment will benefit New Zealand, making an overall assessment against 21 benefit factors. The Court has ruled in *Tiroa E* that most factors requires a counter-factual analysis, asking what would happen “with and without” the overseas investment. This is due to the language of the factors, for example, whether the investment is likely to result in additional jobs, or increased export receipts. The counter-factual analysis requires the OIO to understand who is likely to own the asset if the overseas person does not acquire it, and what they are likely to do with the asset. This can lead to a comparison against a hypothetical New Zealand investor, which is complicated and adds time to making and assessing applications.
- 27 The new approach described in paragraph 24 is intended to avoid that “with and without overseas investment” counter-factual analysis. To give effect to this, the OIA would specify that under this approach, the benefit test may be met by considering the benefit factors by comparing what the overseas investor would do against what the current owner would do if they continued to own the land. This would not involve the consideration of a hypothetical New Zealand investor. However, the comparison and consideration of the factors against what the current owner would do if they continued to own the land would still involve analysis by applicants and the OIO.
- 28 Pre-approval would allow a forestry investor to buy (or lease) land from the vendor (or landowner) quickly without needing OIO consent before completing the purchase. Whether the benefits test is met in a particular case depends on the nature of the land being purchased and what the current owner’s intentions are for use of the land. Accordingly, a pre-approval (“standing consent”) would only be given to investors that the OIO trusted to make good judgements about when the benefits test would be met. After a purchase was made, the investor would then seek the OIO’s endorsement that the purchase did meet the benefits test (with the modified counterfactual analysis). The OIO could then impose conditions specific to the new land acquired, or may seek a court order that the land should not have been purchased and must be divested.
- 29 The risk that pre-approvals are used for purchases that do not meet the benefits test, as determined by the OIO after the purchase is made, could be managed in two ways. First, the Ministerial Directive letter could give stronger guidance on what land

could be purchased using standing consents in order to give investors more confidence. Second, when granting a standing consent, the OIO (or Ministers) could impose various conditions on what types of purchases can be made using the standing consent, such as limiting its use to pre-identified areas of land (where the current use of the land is well understood) to support the investor's plans for a purchasing programme. If Ministers wanted greater control over conditions imposed in standing consents, then they could make those decisions themselves, as all decisions made by the OIO are made under delegation from Ministers.

International relations and obligations (legally privileged)

30 [1] [2] [5]

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Regulatory impact analysis

34 A Regulatory Impact Statement (RIS) was submitted at the time Cabinet approved the policy relating to the SOP and draft regulations [CAB-18-MIN-0071.01].

Compliance

35 The Treasury considers that the SOP is consistent with:

35.1 *The principles of the Treaty of Waitangi.*

35.1.1 When developing the policy, the Treasury engaged in a targeted consultation process with iwi/Māori with particular forestry interests, as

described further in the Consultation section below. Feedback included concerns that the consultation process was too short and did not give rise to meaningful or informed discussions, and concerns from some (not all) that the proposal would affect the value of forestry investments by iwi/Māori and their ability to realise their investments;

35.1.2 **Legally privileged:** [5]

- 35.2 *The rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.* The SOP engages the right to freedom from discrimination (on the grounds on national origin). The limitation on the freedom is connected to the Bill's objective and is considered to be proportionate;
- 35.3 *The disclosure statement requirements.* A draft disclosure statement has been prepared and is attached to this paper;
- 35.4 *The principles and guidelines set out in the Privacy Act 1993.* The SOP does not raise any privacy issues (but the Privacy Commissioner has criticised an aspect of the introduction copy of the Bill);
- 35.5 *Relevant international standards and obligations.* Refer to the discussion in the International Relations and Obligations section above, and
- 35.6 *The LAC Guidelines on the Process and Content of Legislation (2014 edition),* subject to the following comments regarding regulation-making powers.
- 35.6.1 The guidelines on the use of regulation-making powers provide guidance and factors for and against putting requirements in regulations versus primary legislation. It is difficult to confirm consistency with those guidelines. Treasury provides the following commentary.
- 35.6.2 The SOP provides for regulations to declare a class of profits-à-prendre to be treated as not falling within the definition of 'regulated profits-à-prendre' and so not be subject to the OIA screening regime. This would provide flexibility to clarify where consent is not required. This need for clarification may arise over time as the new regime beds in, as industry practices in the primary sector change, or as the courts

clarify or expand the products and uses of land that can be the subject of a profits-à-prendre. Flexibility is a factor in favour of using regulations.

35.6.3 However, such a regulation-making power risks comment from the Regulations Review Committee (RRC) on the grounds that it allows for regulations to determine the circumstances in which the amended Act would apply, and that is a matter more appropriate for primary legislation.

35.6.4 The SOP also provides for the detailed requirements of the checklist test for forestry investments to be set by regulations. Those requirements could be technically complex and possibly subject to change over time, which weigh in favour of locating them in regulations.

35.6.5 However, they could also be seen as covering matters of significant policy and accordingly be more appropriate for primary legislation. The RRC has recommended that the Government take steps to ensure that primary legislation does not allow regulations to be made adding factors or criteria listed in primary legislation, where such factors or criteria are to be taken into account in ministerial decision-making.¹

Consultation

36 The following consultation has taken place:

36.1 Treasury has consulted the following departments in the development of the advice supporting the recommendations in this paper: Land Information New Zealand; Ministry of Business, Innovation and Employment; Ministry of Foreign Affairs and Trade; Ministry of Justice; Inland Revenue; Parliamentary Counsel Office; the Overseas Investment Office; the Ministry for Primary Industries; the Department of Conservation; the Ministry for the Environment; and Te Puni Kōkiri. The Department of the Prime Minister and Cabinet has been informed.

36.2 Owing to time constraints, agencies were not consulted on the pre-approval proposal described in paragraph 28.

36.3 The Treasury engaged in a targeted consultation process with iwi/Māori with particular forestry interests in January 2018. This reflects that 30 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.

¹ In September 2008, the RRC considered a complaint about regulations adding factors to the existing benefits test in the OIA, made under existing section 17(2)(g) of the OIA (see *Complaint regarding the Overseas Amendment Investment Regulations 2008*). The RRC expressed the view that section 17(2)(g) is an undesirable regulation-making power and is a form of Henry VIII clause which permits regulations to add to the factors that may be statutorily taken into account in the decision-making process.

- 36.4 The process saw the sharing of a consultation document and facilitation of four hui in regions across New Zealand. The feedback received has informed the development of the policy.
- 36.5 The timeframe for consultation was constrained due the need to enact any policy changes prior to the CPTPP entering into force.
- 36.6 Some other forestry industry participants also provided submissions to the Treasury as part of that process, which also informed the development of the policy.
- 36.7 The New Zealand First and Green parties have been consulted in the development of the proposal reflected in the attached draft SOP and regulations. The Labour-New Zealand First coalition agreement includes a shared goal to “*Strengthen the Overseas Investment Act and undertake a comprehensive register of foreign-owned land and housing.*”
- 36.8 The Minister of Finance, as portfolio Minister, agrees with the submission of this paper.
- 37 On 12 March 2018, Cabinet confirmed that the Minister for Crown/Māori Relations, in consultation with the Associate Minister of Finance (Hon David Parker), will be undertaking further consultation with iwi and Māori groups on the proposed changes [CAB-18-MIN-0084 refers]. If, through the consultation process, any unintended consequences on Māori rights and/or interests are identified, we will strive to address those unintended consequences in the Committee of the Whole House.

Binding on the Crown

- 38 The OIA is currently binding on the Crown. The Bill, incorporating the SOP, will be binding on the Crown upon commencement.

Allocation of decision making powers

- 39 No changes to the current allocation of decision-making powers are proposed.

Associated regulations

- 40 Regulations would be required to create the new checklist for forestry investments and make it available for use.
- 41 The SOP amends the existing regulation-making powers in the OIA to provide for various regulations regarding the new checklist for forestry investment, being:
- 41.1 regulations to create the new checklist test for forestry investments;
 - 41.2 regulations to set out requirements the relevant Ministers (or OIO, under delegation) must be satisfied will be, or will likely be, met, in order to obtain consent under the new checklist, including:

- 41.2.1 requirements that must be met after the investment is made, including the times at or by which, or the periods throughout which, the requirements must be met;
 - 41.2.2 requirements regarding activities that must, or must not, be carried out on the relevant land;
 - 41.2.3 requirements regarding the maintenance or protection of things that exist when the investment is made; and
 - 41.2.4 requirements regarding outcomes that must result from investment;
- 41.3 regulations to set other requirements that the relevant Ministers (or OIO, under delegation) must be satisfied are met, including requiring the relevant land (or any part of it) to have been offered to the Crown; and
- 41.4 further regulations to set requirements for making such offers to the Crown.
- 42 The SOP also provides for regulations to declare a class of profits-à-prendre to be treated as not falling within the definition of 'regulated profits-à-prendre' and so not subject to the OIA screening regime.
- 43 Draft regulations to provide for the new checklist test have been drafted and I propose they are published and referred to the Finance and Expenditure Select Committee, alongside the SOP. In my capacity as Attorney-General, I agree to the publication of the draft regulations, but in this paper I also seek Cabinet's approval to publication. Following Select Committee consideration, I will provide a future paper to Cabinet Legislation Committee to authorise final regulations for the screening of forestry investments under the OIA.

Other instruments

- 44 The Bill does not introduce any provision empowering other legislative instruments.

Definition of Minister/department

- 45 No changes to the current definition of Minister or regulator are proposed.

Commencement of legislation

- 46 The Bill, as introduced, provides for commencement 10 days after its assent. I propose to raise the issue of the Bill's commencement in a separate Cabinet paper on the Bill.

Parliamentary stages

- 47 The SOP should be lodged with the Clerk of the House on 20 March 2018, the day after Cabinet considers this paper.
- 48 I would then request the Finance and Expenditure Select Committee to consider the SOP and supporting draft regulations, and the Committee may then call for public

submissions. I would request the Committee reports back to the House on the SOP as part of its report back on the Bill, which is due by 31 May 2018.

Recommendations

The Associate Minister of Finance (Hon David Parker) recommends that Cabinet:

Overseas Investment Amendment Bill

- 1 note that the Overseas Investment Amendment Bill holds a category 2 priority on the 2018 Legislation Programme;
- 2 note that the Bill amends the Overseas Investment Act in order to deliver the Government's policy goals regarding overseas investment in residential land (including built-on land);
- 3 note that Cabinet Business Committee, when agreeing to introduce the Overseas Investment Amendment Bill, noted that it was anticipated that significant new or amending material will be introduced into the Bill by way of Supplementary Order Paper during its passage in the House [CBC-17-MIN-0083 refers];
- 4 note that on 5 March 2018, Cabinet agreed to policy proposals in relation to the treatment of forestry and profits-à-prendre under the OIA [CAB-18-MIN-0071.01 refers];
- 5 note that the Finance and Expenditure Select Committee is currently considering the Bill and is scheduled to report back to the House by 31 May 2018;
- 6 [1] [2] [5]
- 7 note the combination of changes to include forestry rights under the Overseas Investment Act 2005 and introduce a light-handed new checklist test, is expected to stimulate rather than inhibit forestry investment;

Technical policy refinements

- 8 note that on 5 March 2018, Cabinet authorised a group of Ministers consisting of the Deputy Prime Minister, the Minister for Crown/Māori Relations, the Minister of Finance, the Associate Minister of Finance (Hon David Parker), the Minister for Māori Development, the Minister of Forestry, the Minister for Climate Change and the Minister for Land Information to have Power to Act on further detailed policy matters that may need to be addressed [CAB-18-MIN-0071.01 refers];
- 9 note that this paper and accompanying SOP have been drafted on the basis that the group of Ministers with Power to Act will approve policy refinements. These include:
 - 9.1 that for non-forestry profits-à-prendre:
 - a profits-à-prendre over minerals would not be screened under the OIA;

- b profits-à-prendre would only be screened where they relate to the principal or exclusive use of the area of land where the profit-à-prendre exists;
 - c a uniform screening threshold of 5 hectares will apply;
- 9.2 That all forestry rights will be allowed to use the new checklist test. This includes those for planting and harvesting and maintaining
- 9.3 That freehold and leasehold land that has already been converted into forestry can go through the new checklist test
- 9.4 That freehold and leasehold land that is intended to be converted into forestry must go through a modified benefit test with a different “counterfactual analysis” so that the benefits of the forestry investment would be measured against the future intended use of the land by the current owner, and a pre-approval process will be available.

Approval of supplementary order paper and draft regulations

- 10 approve the Associate Minister of Finance (Hon David Parker) lodging the Supplementary Order Paper on forestry and profits-à-prendre;
- 11 note the Attorney-General agrees to the publication of draft regulations to provide for the new checklist test for forestry investments under the Overseas Investment Act, subject to Cabinet’s approval;
- 12 approve the publication for public consultation of draft regulations to provide for the new checklist test for forestry investments under the Overseas Investment Act;
- 13 invite the Associate Minister of Finance (Hon David Parker) to request that the Finance and Expenditure Select Committee consider and call for public submissions on the Supplementary Order Paper as part of its consideration of the Overseas Investment Amendment Bill;
- 14 note that Cabinet confirmed that the Minister for Crown/Māori Relations, in consultation with the Associate Minister of Finance (Hon David Parker), will be undertaking further consultation with iwi and Māori groups on the proposed changes [CAB-18-MIN-0084 refers]; and
- 15 note the Associate Minister of Finance (Hon David Parker) will provide a future paper to Cabinet Legislation Committee to authorise final regulations for the screening of forestry investments under the OIA.

Authorised for lodgement

Hon David Parker
Associate Minister of Finance