

# The Treasury

## Overseas Investment Act 2005 – Phase One Review Policy Advice (2017/18) Information Release

March 2019

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## Treasury Report: Screening of Overseas Investment in Land to be converted to Forest (and Forest Rights on that land)

<b>Date:</b>	14 March 2018	<b>Report No:</b>	T2018/648
		<b>File Number:</b>	IM-5-1-2

### Action Sought

	Action Sought	Deadline
Deputy Prime Minister (Rt Hon Winston Peters)	<p><b>Note</b> that following discussions between Ministers on proposals in Treasury report T2018/610 regarding the screening of forestry conversions, an alternative approach is being proposed to deal situations where the land is to be converted into forestry.</p> <p><b>Agree</b> to the following proposals:</p> <ul style="list-style-type: none"> <li>i. All forestry rights will be allowed to use the checklist pathway. This includes those for planting and harvesting and maintaining</li> <li>ii. Freehold and leasehold land that has already been converted into forestry can go through the checklist</li> <li>iii. 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.</li> </ul>	9.30am Thursday 15 March 2018
Minister for Crown/Maori Relations (Hon Kelvin Davis)		
Minister of Finance (Hon Grant Robertson)		
Associate Minister of Finance (Hon David Parker)		
Minister for Māori Development (Hon Nanaia Mahuta)		
Minister of Forestry (Hon Shane Jones)		
Minister for Climate Change (Hon James Shaw)		
Minister for Land Information (Hon Eugenie Sage)		

### Contact for Telephone Discussion (if required)

Name	Position	Telephone		1st Contact
Steve Cantwell	Principal Advisor, Overseas Investment	[6]	[6]	✓
Thomas Parry	Team Leader, Overseas Investment	[6]	[6]	

**Actions for the Minister’s Office Staff** (if required)

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**Return** the signed report to Treasury.

Note any  
feedback on  
the quality of  
the report

**Enclosure:**      No

# **Treasury Report: Screening of overseas investment in land to be converted to forest (and forest rights on that land)**

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## **Purpose of Report**

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1. This report seeks agreement from the group of Ministers with Power to Act on changes to overseas investment in forestry on matters of detail regarding screening of overseas investment in land to be converted to forest.

## **Background**

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2. On 5 March 2018, Cabinet agreed to a set of criteria being developed to provide overseas forestry investors an alternative path to meeting the current benefits test under the Overseas Investment Act 2005 (OIA). Cabinet agreed that those criteria be specified in regulations, and that the OIA include legislative guidance to guide the nature and scope of those regulations [CAB-18-MIN-0071.01 refers].
3. On 12 March 2018, a Treasury Report was provided to the group of Ministers with Power to Act on these matters seeking agreement on three outstanding design features [T2018/610 refers].<sup>1</sup> One of these design features was the screening requirements for conversion of land into a forest. In that report, it was proposed that the new special benefit to New Zealand test for forestry investment can only be used where the land is already forestry land (and to not “forestry conversions” i.e. land that is currently in another use and intended to be converted to forestry land).
4. Following discussions between Ministers, a new approach is being proposed for how to deal with forestry conversions under the regime. Agreement is sought to the new approach through this report.

## **Proposal**

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5. To clarify the application of the new forestry screening test, and enable the finalisation of the Supplementary Order Paper to the Overseas Investment Amendment Bill, agreement is sought for the following approach to forestry screening:
  - a All forestry rights will be allowed to use the checklist pathway. This includes those for planting and harvesting and maintaining
  - b Freehold and leasehold land that has already been converted into forestry can go through the checklist pathway

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<sup>1</sup> 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 with respect to overseas investment in forestry [CAB-18-MIN-0071.01 refers].

- c Freehold and leasehold land that has not been, but is intended to be, converted into forestry must go through the net benefit test. However they will not need to go through the counterfactual analysis required under the Act, and pre-approval will be available.
- 6. Under (a) investors purchasing a forestry right with the intent to convert the land to forestry will be able to access the checklist approach.
- 7. Under (c), investors would be able to apply for consent using a modified benefit test.
- 8. Currently, the benefit test is met if the Ministers or 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, e.g. 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.
- 9. The proposal in (c) is intended to avoid that “with and without” 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 complicated and time consuming consideration of a hypothetical New Zealand investor. However, the comparison and consideration of the factors would still involve analysis by applicants and the OIO.
- 10. If adopted, this modified benefit test would also apply for any investment in an existing forest where the investor opted to make an application under the benefit test rather than the checklist.
- 11. Pre-approval will allow a forestry investor to buy (or lease) land quickly without needing OIO consent before completing the purchase. The Ministerial Directive letter could give stronger guidance on what land could be purchased in order to give investors more confidence about what land could be purchased using a standing consent, without the OIO disagreeing that the benefits test was met.

## Treasury comment

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- 12. The report was produced under very short timeframes. We have not had the opportunity to consult other agencies.
- 13. For forestry conversions, this package reduces, but does not remove, the inconsistent screening treatment between sales of freehold and leasehold land, and forestry rights. As forestry rights will face a more permissive test, it will still encourage, at the margin, forestry conversions involving foreign investors to be structured using forestry rights rather than land sales or leases.
- 14. The proposed package also introduces a second bespoke OIA screening test for forestry (the modified benefit test). Fragmentation of regulatory assessment frameworks creates compliance and administrative costs as OIO and forest investors face choices and uncertainties about which screening regime might apply to a given transaction.

15. This is undesirable from a design perspective and will complicate the administration of the rules by the OIO. From a regulatory design perspective we would recommend either subjecting freehold and leasehold forestry conversions to the same checklist test that forestry rights will be subject to (which would also be more compatible with the pre-approval process), or retain the existing benefits test, unmodified. However we understand neither of those options strike the right balance between Ministers' competing policy objectives.

## Next Steps

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16. Agreement is sought to these proposals to enable the finalisation of the Cabinet Legislation Paper, the Supplementary Order Paper to the Overseas Investment Amendment Bill and associated Regulations.
17. The timeframes of this project are extremely tight and there is no capacity for slippage. The Cabinet Legislation committee paper (which will go direct to Cabinet) needs to be lodged with the Cabinet Office no later than Friday 16 March for discussion at the 19 March Cabinet meeting. The SOP will be introduced on 20 March to enable Select Committee consideration.

## Recommended Action

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We recommend that you:

- a **Note** that following discussions between Ministers on proposals in Treasury report T2018/610 regarding the screening of forestry conversions, an alternative approach is being proposed to deal with situations where the land is to be converted into forestry.
- b **Agree** to the following proposals:
- i. All forestry rights will be allowed to use the checklist pathway. This includes those for planting and harvesting and maintaining
  - ii. Freehold and leasehold land that has already been converted into forestry can go through the checklist
  - iii. 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.

*Agree/disagree*  
*Rt Hon Peters*

*Agree/disagree*  
*Hon Davis*

*Agree/disagree*  
*Hon Robertson*

*Agree/disagree*  
*Hon Parker*

*Agree/disagree*  
*Hon Mahuta*

*Agree/disagree*  
*Hon Jones*

*Agree/disagree*  
*Hon Shaw*

*Agree/disagree*  
*Hon Sage*

Thomas Parry  
**Team Leader, Overseas Investment**

Rt Hon Winston Peters  
**Deputy Prime Minister**

Hon Kelvin Davis  
**Minister for Crown/  
Māori Relations**

Hon Grant Robertson  
**Minister of Finance**

Hon David Parker  
**Associate Minister of Finance**

Hon Nanaia Mahuta  
**Minister for Māori  
Development**

Hon Shane Jones  
**Minister of Forestry**

Hon James Shaw  
**Minister for Climate Change**

Hon Eugenie Sage  
**Minister for Land Information**