

The Treasury

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

March 2019

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Treasury Report: Overseas Investment in Forestry – Technical Amendments to Supplementary Order Paper No.19

Date:	11 May 2018	Report No:	T2018/1191
		File Number:	IM-5-8

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)	Note the contents of this report. Agree the technical amendments to Supplementary Order Paper No.19 contained in this report.	Monday 14 May.

Contact for Telephone Discussion (if required)

Name	Position	Telephone		1st Contact
Steve Cantwell	Principal Advisor	[6]	N/A (mob)	✓
Thomas Parry	Team Leader, Overseas Investment	[6]	[6]	

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

Return the signed report to Treasury.

Note any feedback on the quality of the report

Return the signed report to Treasury.

Refer a copy of this report to the Deputy Prime Minister, the Minister for Crown/Māori Relations, the Minister for Māori Development, the Minister of Forestry, the Minister for Climate Change and the Minister for Land Information.

Enclosure: No

Treasury Report: Treasury Report: Overseas Investment in Forestry - Technical Amendments to Supplementary Order Paper No.19

Executive Summary

This report recommends a number of technical changes to Supplementary Order Paper No.19 to the Overseas Investment Amendment Bill (the SOP). The amendment brings overseas investment in sensitive land that involves forestry rights or certain other profits à prendre within the scope of the Overseas Investment Act (the Act). These technical changes have been raised by submissions to the Select Committee, in consultation hui with iwi/Māori, and identified by officials.

Due to the technical nature of the issues contained in this report Cabinet approval is not required.

Stakeholder agencies have been consulted on this report, however due to time constraints we have not had the time and capacity to do a full economic analysis. The report therefore contains our best advice given the constraints under which it is written.

Recommended technical changes

We recommend technical changes to the SOP relating to the following issues:

- A. Protection of wahi tapu sites under the special benefits test
- B. Changing the use of land acquired under the new consent pathways to non-forestry use
- C. Investments that are a minority interests in a land – or rights – holding entity
- D. Accessing the new tests for a combination of forestry and non-forestry activities
- E. Provisions regarding “special land” (seabed, foreshore, riverbed and lakebed)
- F. Standing consents and modified benefits tests.

Recommended Action

We recommend that you:

- a **note** this report provides you with options on the technical issues raised by submitters, at the second round of hui with iwi/Māori and identified by officials;
- b **agree/note** the following recommendations based on technical issues

Protection of wahi tapu sites under the special benefits test

- c **agree** to include two additional specific categories of wahi tapu sites in the special benefits tests in the regulations:
 - 1. Land that is set apart as Māori reservation under section 338 of the Te Ture Whenua Māori Act because it is a wahi tapu, and
 - 2. Any wahi tapu sites identified in the agreement between the overseas person and the landowner.

Agree / Disagree.

Changing the use of land acquired under the new consent pathways to non-forestry use

- d **agree** to include a new provision in the Act allowing a consent holder under the modified or special benefits test to apply to change the land use from forestry by using the existing benefits test.

Agree / Disagree.
- e **note** that the draft Cabinet paper Overseas Investment in Forestry – Further Design Details following Select Committee Public submissions proposes to remove the existing benefits test.
- f **note** that officials will amend the draft Cabinet paper to clarify that the existing benefits test will need to be available for some specific fact situations involving non-forestry land or conversions from forestry land.

Investments that are a minority interests in a land- or rights- holding entity

- g **agree** to clarify the discretion to relax the screening criteria and conditions under the special benefits tests in cases of an overseas investor taking an indirect or minority direct interest in an entity that owns land or rights.

Agree / Disagree.

Accessing the new tests for a combination of forestry and non-forestry activities

- h **note** that for transactions involving both forestry and non-forestry land or land use, the overseas investor can put the whole transaction through the existing benefits test, or split it into two transactions and utilise the new pathways only for the forestry land.

Provisions regarding “special land” (seabed, foreshore, riverbed and lakebed)

- i **note** that special land must only be offered to the Crown for purchase, and in most cases the cost of surveying means the Crown does not acquire the land.
- j **agree** to narrow the empowering provision in the SOP to only refer to special land, as originally intended (new section 16E(8)).

Agree / Disagree.

Standing consents and the modified benefits tests - ability to direct the regulator to take enforcement action

- k **if** Cabinet retains a standing consent with the modified benefits test that emphasises post-transaction review **agree** to remove the ability for Ministers to direct the regulator to take proceedings against a consent holder, but still allow Ministers to revoke the standing consent if they consider the modified benefits test was not met for land acquired using the standing consent.

Agree / Disagree.

- l **Refer** a copy of this report to the Deputy Prime Minister, the Minister for Crown/Māori Relations, the Minister for Māori Development, the Minister of Forestry, the Minister for Climate Change and the Minister for Land Information.

Refer / Not referred

Thomas Parry
Team Leader, Overseas Investment

Hon Grant Robertson
Minister of Finance

Hon David Parker
Associate Minister of Finance

Treasury Report: Overseas Investment in Forestry - Technical Amendments to Supplementary Order Paper No.19

Purpose of Report

1. This report recommends a number of technical changes to Supplementary Order Paper No.19 to the Overseas Investment Amendment Bill (the SOP). The amendment brings overseas investment in sensitive land that involves forestry rights or certain other profits à prendre within the scope of the Overseas Investment Act (OIA). These technical changes have been raised by submissions to the Select Committee, in consultation hui with iwi/Māori, and identified by officials.
2. Due to the technical nature of the changes recommended in this report Cabinet approval is not required.

Background

3. A Supplementary Order Paper has been introduced to the Overseas Investment Amendment Bill, which was originally introduced to Parliament on 14 December 2017. The amendment brings overseas investment in sensitive land that involves forestry rights or certain other profits à prendre within the scope of the Overseas Investment Act (OIA).
4. We provided you with a briefing seeking preliminary decisions from you on ways to address substantial issues with the SOP. These substantial issues were raised by submissions to the Select Committee, in consultation hui with iwi/Māori, and identified by officials (T2018/987 refers). In that report we stated that we would report back on technical issues not requiring Cabinet approval. This paper is that report back.

Technical changes to the SOP

5. In this section we outline the technical issues that we recommend addressing through changes to the SOP. The technical issues discussed are:
 - A. Protection of wahi tapu sites under the special benefits test
 - B. Changing the use of land acquired under the new consent pathways to non-forestry use
 - C. Investments that are a minority interests in a land- or rights-holding entity
 - D. Accessing the new tests for a combination of forestry and non-forestry activities
 - E. Provisions regarding “special land” (seabed, foreshore, riverbed and lakebed)
 - F. Standing consents and the modified benefits tests - ability to direct the regulator to take enforcement action.

6. When addressing the above issues in this paper, we have undertaken to use three criteria for assessing the effectiveness of different options. These three criteria were originally used in the main design report which underpinned much of the new screening regime [T2018/31 refers]. These criteria were also utilised in the briefing discussing substantial policy issues raised with the SOP [T2018/987 refers]. The criteria are:
- **Policy effectiveness:** is aligned with other forestry policy, as well as broader economic, social and environmental goals, while maintaining consistency with overall purpose of the OIA that investing in New Zealand is a privilege, and minimises any unintended consequences.
 - **Compliance with New Zealand's international obligations:** the revised screening regime comply with obligations in existing trade and investment agreements [1.5]
 - **Minimising compliance and administration costs:** there is more certainty for applicants about what tests they need to meet, the regime is easier for the Overseas Investment Office (OIO) to operationalise and there is reduction in the time taken to make decisions.

A Protection of wahi tapu sites under the special benefits test

Submitter

7. This was raised in consultation hui with iwi/Māori.

Submission / issue identified

8. The current legislative drafting for the special benefits tests only mentions wahi tapu sites entered on the New Zealand Heritage List/Rārangī Kōrero under the Heritage New Zealand Pouhere Taonga Act 2014. To obtain consent under the test, an overseas investors would need to maintain existing arrangements in place on, or in respect of, the land regarding such sites.
9. As currently drafted, this would only cover a narrow range of wahi tapu sites, as we were told in the hui that many wahi tapu sites are not include on that List.

Analysis

10. Māori landowners (and others) can, and currently do, identify wahi tapu sites in their forestry rights agreements with rights-holders (or leases with lessees) and agree special terms regarding those sites. If those sites identified in contracts are also included in the special benefits test, then those contractual obligations would become "existing arrangements" that the overseas investor would be required to maintain. That is, the overseas person would be obliged to respect the agreed arrangements under both the contract and as part of the OIA consent conditions.
11. However submitters have advised us that the list of wahi tapu sites currently allowed for is too narrow. We have therefore identified two additional specific categories of wahi tapu sites that can be included in the special benefits test. These are:
- Land that is set apart as Māori reservation under section 338 of the Te Ture Whenua Māori Act because it is wahi tapu. This land can be identified in Gazette

notices made under that Act. Cabinet also decided to include this land in the OIA's definition of "sensitive land" (CAB-18-MIN-0118 refers).

- Any wahi tapu sites identified in the agreement between the overseas person (i.e. lessee or rights holder) and the landowner.
12. We do not recommend extending the drafting to simply refer to "wahi tapu sites", as to maintain the policy intent of the special benefits test, an overseas investor should be able to know where to look to determine the presence of any wahi tapu sites on the relevant land.

Recommendation

Agree to include two additional specific categories of wahi tapu sites in the special benefits tests in the regulations:

1. Land that is set apart as Māori reservation under section 338 of the Te Ture Whenua Māori Act because it is a wahi tapu.
2. Any wahi tapu sites identified in the agreement between the overseas person and the landowner.

B Changing the use of land acquired under the new consent pathways to non-forestry use

Submitter

13. This was raised in consultation hui with iwi/Māori, and identified by officials.

Submission / issue identified

14. An issue has been identified whereby a person wants to change the use of forestry land at some point in the future, after consent had been obtained under the new forestry consent pathways (the modified benefits test and special benefits test).
15. In this situation an overseas person may use one of the new consent pathways to acquire forestry land (freehold or leasehold) and the consent would include a condition that the land is re-planted, i.e. kept as a forest. In the future those overseas owners/lessees may want to change the land use. To do this they may apply to obtain a new consent under the existing benefits test. However, under the current proposed legislative drafting, they could not get a new consent unless there was a new "transaction" (e.g. transfer of freehold or leasehold). This is a technical issue with how the legislation has been drafted.

Analysis

16. The fact that an overseas investor first utilised the new pathways to gain consent should not restrict them from utilising the existing benefits test in the future, if they wanted to change the use of the land. However, under the current proposed legislative drafting this is not possible.
17. We recommend including a new provision in the OIA allowing a consent holder under the modified or special benefits test to apply to change the land use from forestry using the existing benefits test. The consent holder could only change the land use from forestry if they met the existing benefits test. If they could not meet that test they would have to keep the land as forest or divest their interests in the land.
18. We note that Ministers were recently considering replacing the existing benefits test with the new consent pathways. There are a number of specific technical

circumstances, including this issue, that will require overseas investors to use the existing benefits test. Another example of a technical circumstance requiring use of the existing benefits test is when an investor acquires an interest in land that involves forestry and non-forestry activities (section D below). Accordingly, we will amend the draft Cabinet paper to clarify that the existing benefits test will need to be available for some specific fact situations.

Recommendation

Agree to include a new provision in the Act allowing a consent holder under the modified or special benefits test to apply to change the land use from forestry by using the existing benefits test.

Note that the draft Cabinet paper *Overseas Investment in Forestry – Further Design Details following Select Committee Public* submissions proposes to remove the existing benefits test.

Note that officials will amend the draft Cabinet paper to clarify that the existing benefits test will need to be available for some specific fact situations involving non-forestry land or conversions from forestry land.

C Investments that are a minority interests in a land- or rights- holding entity

Submitter

19. This was raised in consultation hui with iwi/Māori.

Submission / issue identified

20. Attendees of the consultation hui have queried how joint ventures with foreign investors will work in light of the proposed changes.

Analysis

21. The new forestry consent pathways are designed primarily for cases where an overseas investor is buying a direct interest in land or a 100% effective interest in land, for example they will directly hold the forestry rights, or wholly own a company that holds forestry rights.
22. The OIA also screens the acquisition by overseas persons of other direct interests in entities with interests in land covered by the regime and also indirect interests in those entities (interests owned through multiple layers of entities). Those interests may be small; consent is required:
 - for an overseas person to acquire or increase an interest of 25% or more; and
 - for acquisitions of smaller interests where the particular investment, however small, takes the land- or rights-holding entity over the 25% overseas ownership threshold.
23. Joint ventures are an example where the consent requirements above come into play. Rather than sell forestry rights outright to an overseas investor, a joint venture company might be formed with the company owning the forestry rights and two parties sharing control of the joint venture 50:50. The JV company would own the land, but the transfer of either control interest to an overseas person joint venture partner would require consent. Later, another company buying 25% or more of that joint venture partner would also require consent.

24. In other cases, the forestry rights could be owned by a company that simply has a mix of shareholders, ^[1]
25. Where overseas investors are acquiring indirect or minority interests in a land- or rights-holding entities and require consent as above, the investor test will apply. The issue raised is how the special benefits test should be applied. Crucially:
 - The special benefits test focuses on the investor maintaining existing arrangements on the land, such as protecting wahi tapu sites. These obligations are designed to apply to the person in control of the actual interest in land itself (e.g. an overseas investor acquiring an outright interest in land or a majority interest in the land- or rights-holding entity.
 - However sometimes the acquirer will take only a minority or indirect interest and have no effective control of the land- or rights-holding entity. The special benefits test would require the outcomes with the land discussed above, even where the acquirer is unable to control decisions of the company and therefore ensure fulfilment of those requirements.
26. There is a discretion currently in the special benefits test that we believe can be used to fix this problem: Ministers can dis-apply or modify aspects of the test where the overseas investor does not have “sufficient rights” in the land to meet the requirements of the special benefits test. The discretion is designed for two scenarios:
 - (a) where maintaining an existing arrangement on the land would be impossible for the investor, for example by requiring a freehold interest where the overseas investor is only acquiring forestry rights; and
 - (b) where the overseas investor is acquiring only a minority or indirect interest.
27. For this latter category, we envisage the discretion would be used as follows:
 - Where the overseas investor takes a majority interest (50% or more) in the ^[1] itself (i.e. a direct interest), we expect consent conditions would require the investor to procure the entity to maintain existing arrangements.
 - In the cases of:
 - i minority (smaller than 50%) direct interests; or
 - ii any level of indirect interests (e.g. the acquisition of shares further upstream than shares in the ^[1] entity itself) where the Minister or OIO is satisfied the investor is unlikely to exercise control over the ^[1]
28. Ministers or the OIO could use their discretion on whether or not the overseas investor needs to maintain existing arrangements or the overseas investor procure the entity to do so. In effect, if the Ministers or OIO used their discretion, the overseas investor would only need to pass the existing “investor test” to obtain consent and the new elements of the special benefits test would be dis-applied.
29. We recommend clarifying the discretion in the special benefits test to more expressly provide for that treatment. Specifically, we would include a discretion to relax the screening criteria and conditions in cases of an indirect or minority direct interest. A similar discretion is being included in the Bill in respect of indirect and minority direct interests in residential land.

30. A broader discretion would also remain in place to deal with the scenario where maintaining an existing arrangement on the land would, for example, require a freehold interest and the overseas investor is acquiring forestry rights.

Recommendation

Agree to clarify the discretion to relax the screening criteria and conditions under the special benefits tests in cases of an overseas investor taking an indirect or minority direct interest in an entity that owns land or rights.

D Accessing the new tests for a combination of forestry and non-forestry activities

Submitter

31. This was identified by officials, and by Kaingaroa Timberlands.

Submission / issue identified

32. An issue has been raised about how a transaction that requires OIA screening will work if the transaction involves different types of land or land use, being both forestry and non-forestry. For example, if a transaction included 50% forestry land and 50% farmland, how can the applicant utilise the new forestry consent pathways?

Analysis

33. The new consent pathways are only intended for investments in forestry (whether by acquiring freehold, leasehold or forestry rights). The pathways are not being developed for use for other types of investments, such as farmland.
34. We understand that transactions may occur that involve the purchase of more than one type of land, or where the land is intended for multiple uses. In such situations we recommend allowing the overseas investor to choose one of two approaches:
- using the existing benefits test for the whole transaction, or
 - creating two separate transactions that become two applications for consent, where the investor could:
 - i apply through one of the new tests (modified benefits test or special benefits test) for the transaction involving forestry, and
 - ii apply through the existing benefits test for transaction dealing with the remainder of the assets.
35. The second approach involves the overseas investors accepting a level of risk, as one application could be approved and the other declined. However, they do retain the ability to utilise the existing benefits test for the whole transaction (i.e. the first option) if they consider the risk too large.
36. We consider that alternative arrangements would add significant complexity and require fundamental redesign of the existing benefits test. This is because the existing benefits test involves an overall assessment of all the relevant benefits and costs (by reference to the 21 factors) of a transaction as a whole. Alternative arrangements would require the investor to identify and ascribe certain benefits to certain pieces of land or land use activities, and agree these with the OIO. This would represent a significant change to the regime, and be complex and difficult to do in practice.

37. Our recommended approach is also consistent with our approach to a similar issue on the residential land aspect of the Overseas Investment Bill. In that Bill, for commercial transactions involving both residential land and other types of sensitive land, the investor can put all the land through the existing benefits test, or split out the transactions to put the residential land transactions through the new residential land consent pathways.

Recommendation

Note that for transactions involving both forestry and non-forestry land or land use, the overseas investor can put the whole transaction through the existing benefits test, or split it into two transactions and utilise the new pathways only for the forestry land.

E Provisions regarding “special land” (seabed, foreshore, riverbed and lakebed)

Submitter

38. This was raised at consultation hui with iwi/Māori, and identified by officials.

Submission / issue identified

39. In the Act there are specific provisions related to seabed, foreshore, riverbed and lakebed (“special land”). In consultation hui with iwi/Māori a question was raised about how the special land provisions work for an overseas investor investing in leasehold land which includes seabed and foreshore rights.
40. In addition, officials have identified that the current empowering provisions related to special land in the SOP may be interpreted as broader than intended by the policy.

Analysis

Issue raised in consultation – special land provisions for an overseas investor investing in leasehold land

41. The special land provisions in the draft regulations only apply to investments in freehold land, not leasehold land.
42. We also wish to reiterate that an overseas investor in freehold land would only be required to offer the special land to the Crown. It does not have to surrender it to the Crown; it is only divested if the Crown accepts the offer.

Issue raised by officials – narrowing the empowering provisions

43. The current empowering provision in the SOP suggests that overseas investors could be required to offer any part of the land to the Crown (the provision refers to “relevant land” rather than “special land”). Whilst the draft regulations are clear, the draft empowering provision could be interpreted much broader than intended by the policy. We therefore recommend narrowing the empowering provision to refer specifically to special land.
44. In addition to these two issues, the OIO has raised concerns that the current process in the current regulations for the offer of special land is inefficient and difficult to administer. This is because it is difficult to identify whether special land exists in some cases (e.g. where large areas of land are involved), and the process can significantly extend the processing time for applications. It believes problems will be exacerbated with the coming into force of the SOP. Issues include:

- [4]

[4]

- [4]

- The process in the regulations for Crown acquisition can also be complicated and costly particularly in the case of riverbeds. Rivers are rarely surveyed and it can be unclear whether a landowner has rights under common law to riverbeds bordering a property.

45. The OIO would like the special land regulations reviewed, either as part of the next phase of Overseas Investment Act reform, or separately in advance. Treasury agrees that there are problems with the special land regulations and considers this could be an issue to be looked at as part of the next phase of reform. However, whether this issue is included as part of that review will need to be considered against other issues raised, including those that are identified after the changes come into effect.

Recommendation

[4]

Agree to narrow the empowering provision in the SOP (new section 16E(8)) to only refer to special land, as originally intended.

F Standing consents and the modified benefits tests - ability to direct the regulator to take enforcement action

Submitter

46. This was identified by officials.

Submission / issue identified

47. The current drafting of the SOP allows standing consents to be used alongside the modified benefits test (and the special benefits test). This issue is only relevant if Cabinet continues to allow standing consents alongside the modified benefits test, as recent advice to Ministers outlined a number of issues with this. At the time of drafting this report, Ministers are yet to make decisions on this matter, so we have included this analysis for completeness.

Analysis

48. Under the current drafting of the SOP, after an overseas investor acquires land using a standing consent alongside the modified benefits test they then report the purchase to the OIO. The OIO then considers whether the modified benefits test is satisfied for the land. That is, the standing consent regime proposed in the SOP emphasises post-transaction review.
49. In that context, Ministers are able to direct the regulator (i.e. the OIO) to take proceedings against a consent holder, seeking a Court order to require disposal of the land under section 47 of the Act.

50. We recommend removing that feature, as it is not appropriate for Ministers to be involved in enforcement decisions. Under the current regime, Ministers are not able to direct the OIO in this manner.
51. Instead, if Cabinet retains a standing consent with the modified benefits test that emphasises post-transaction review, we recommend that Ministers could be able to revoke the standing consent if they consider the modified benefits test was not met for land acquired using the standing consent.
52. The OIO has also expressed concern over the provision. Its concerns include:
- That the provision does not maintain the accepted separation between the Executive and a regulator.
 - [4]
 - [4]

Recommendation

If Cabinet retains a standing consent with the modified benefits test that emphasises post-transaction review: **agree** to remove the ability for Ministers to direct the regulator to take proceedings against a consent holder, but still allow Ministers to revoke the standing consent if they consider the modified benefits test was not met for land acquired using the standing consent.

Next Steps

53. Given the technical nature of the recommendations in this report, these will not go to Cabinet. Officials will provide this report to PCO to make the necessary adjustments to the SOP to give effect to these changes.