

The Treasury

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

March 2019

This document has been proactively released by the Treasury on the Treasury website at <https://treasury.govt.nz/publications/information-release/overseas-investment-act-review-phase-one>

Information withheld

Some parts of this information release would not be appropriate to release and, if requested, would be withheld under the Official Information Act 1982 (the Act).

Where this is the case, the relevant sections of the Act that would apply have been identified.

Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Key to sections of the Act under which information has been withheld:

- [1] 6(a) - to avoid prejudice to the security or defence of New Zealand or the international relations of the government
- [2] 9(2)(a) - to protect the privacy of natural persons, including deceased people
- [3] 9(2)(f)(iv) - to maintain the current constitutional conventions protecting the confidentiality of advice tendered by ministers and officials
- [4] 9(2)(g)(i) - to maintain the effective conduct of public affairs through the free and frank expression of opinions
- [5] 9(2)(h) - to maintain legal professional privilege
- [6] 9(2)(k) - to prevent the disclosure of official information for improper gain or improper advantage

Where information has been withheld, a numbered reference to the applicable section of the Act has been made, as listed above. For example, a [1] appearing where information has been withheld in a release document refers to section 6(a).

Copyright and licensing

Cabinet material and advice to Ministers from the Treasury and other public service departments are © **Crown copyright** but are licensed for re-use under **Creative Commons Attribution 4.0 International (CC BY 4.0)** [<https://creativecommons.org/licenses/by/4.0/>].

For material created by other parties, copyright is held by them and they must be consulted on the licensing terms that they apply to their material.

Reference: T2018/1169 IM-5-8

Date: 27 April 2018

To: Associate Minister of Finance (Hon David Parker)

Deadline: None
(if any)

Aide Memoire: Further Advice on Overseas Investment in Forestry

Purpose

The purpose of this Aide Memoire is to respond to your queries regarding Treasury Report: Overseas Investment in Forestry – Further Design Details following Select Committee Public Submissions (T2018/987).

1) Does the existing benefits test need to continue to be an option now that there are two other tests forestry users can choose?

Provided that the modified benefits test applies to all types of forestry applications and therefore no investor is worse off than they are currently, the existing benefits test does not need to continue to be an option. This means, should you choose to adopt recommendation “e” in the Treasury Report (allowing the modified benefits test to be used for forestry rights), you do not need to keep the existing benefits test.

In practice, if you maintain the existing benefits test, we think few investors will use it, given the options of the modified and special benefits tests. Maintaining the existing benefits test will add some complexity to the regime, in the sense there will be three options for investors, and OIO will need to provide information on their website and in materials on all three. However, it will not significantly increase OIO’s workload as investors will choose which of the three tests they wish to use. It will require some careful drafting to remove it, and will add further complexity to the legislative provisions.

On balance, we recommend removing the existing benefits test, if you choose to allow the modified benefits test to be used for forestry rights as well as freehold and leasehold.

2) How does the special benefits test work if there are no existing commitments relating to the land?

The Minister is correct that where there are no existing commitments, an investor would be able to use the special benefits test.

However, there are potentially scenarios where it will not be possible for investors to use the special benefits test because there are current commitments that are not appropriate to maintain. These would occur where the land is being converted from another use, and the existing land-use enabled certain commitments that are not possible if the land is used for forestry. Examples of these might include:

- Pasture or land in natives that has walking access on it at all times. This access would not be possible for a forester to maintain, as due to health and safety requirements there are likely to be certain areas or times at which full public access is not possible;
- A mechanism allowing a farm's airstrip to be used by neighbouring farmers for top dressing. If the land were to be converted to forestry, the airstrip would no longer be possible to be used (this is a real life example from OIO).

In this scenario, the investor would be unable to pass the special benefits test because they are not maintaining existing commitments even though the changes they are making would probably be considered reasonable. It is in scenarios like these that the modified benefits test may be the more appropriate option.

Agreeing recommendation "e" in the Treasury Report resolves this potential issue for investors, and we recommend this.

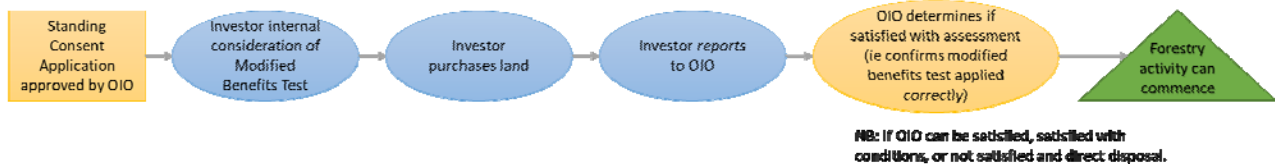
3) How will standing consents work in practice?

The below flow charts show how the standing consents regime will operate under the special benefits test, and modified benefits test as it currently stands (ie status quo).

Standing Consents alongside Special Benefits Test



Standing Consents alongside Modified Benefits Test



In practice, standing consents are a test of confidence in the investor (that they have a strong track record in the forestry sector, and that they can be relied upon to apply the test appropriately). In the case of the special benefits test, both the OIO and submitters to the SOP consider this to be possible because the special benefits test will be relatively straightforward to apply. However, in the case of the modified benefits test, both OIO and submitters are concerned about the level of complexity in the test, and the ability of investors to be able to apply it (in particular the requirement for Ministers to be satisfied that the transaction will bring substantial and identifiable benefits in comparison with the counterfactual, even when the counterfactual is the existing vendor). This is a new test, and there are therefore no examples for investors to use to consider how this test has been applied in practice. The OIO is also concerned about applicants' ability to apply the test in an impartial way, particularly with respect to weighing public interest and strategic matters.

Further, for the modified benefits test, Ministers need to be satisfied an investor can properly apply the counterfactual test in the absence of information about the nature and characteristics of specific land purchases that will rely on this consent. Ministers' confidence may be higher if they knew ahead of time that specific purchases would be of low complexity.

Also, given concerns that investors may struggle to properly apply the modified benefits test, the report (following purchase) from an investor will need careful scrutiny. At least in complex cases, the OIO will need to effectively repeat the application of the test. Such rigour will be necessary given the possibility of having to justify court action to dispose of a property and to minimise the (probably small) risk of judicial review (for example, where communities face loss of iconic landscapes following conversion of farm land)

Recommendation I in the Treasury Report may address this concern to the extent that under this option, investors would apply to the OIO for a standing consent alongside the modified benefits test, but relating to specific homogenous areas. OIO would therefore be able to say with more confidence whether it believes the investor has the ability to conduct a modified benefits test because the test would likely be limited to a particular type of land or circumstance. This means the standing consent is operating

more like a purchasing plan approval, but it may increase the number in investors likely to obtain standing consents.

Finally, while the intention in the SOP is that investors do not take any action on the land until OIO has approved their purchase, it is possible that investors could. In this situation, while most of the risk is on the investor (if the OIO is not satisfied the test has been properly applied, or adds additional conditions to the standing consent) we take some risk as the investor could take action on the land that can't be undone easily (such as changing land-use, removing native bush, etc.) This risk is reduced under recommendation "l" where standing consents are given in more limited scenarios, and reduced further under recommendation "k" where standing consents are only allowed alongside the special benefits test.

On balance, Treasury's first preference is for recommendation "k", that standing consents are only allowed alongside the special benefits test. Treasury's second preference is for recommendation "l", where standing consents are allowed alongside the modified benefits test, but only applying to a specified and homogenous area, and with specific conditions.

Carrie Cooke, Contractor, International, ^[6]

Dasha Leonova, Manager, Financial Markets and International, International, ^[6]