

Departmental Disclosure Statement

Overseas Investment Amendment Bill

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by The Treasury

The Treasury certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

16 March 2018

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Part One: General Policy Statement

Introduction

This Supplementary Order Paper (the **SOP**) proposes amendments to the Overseas Investment Amendment Bill (the **Bill**) that was introduced into Parliament on 14 December 2017. The Bill contains amendments to the Overseas Investment Act 2005 (the **OIA**).

The OIA requires consent to be obtained for overseas investments in sensitive New Zealand assets. In particular, the OIA requires consent to be obtained for overseas investments in sensitive land (see Schedule 1 of the OIA) and sets out criteria that must be met for consent to be given.

Purpose of SOP

The purpose of the SOP is, first, to bring overseas investments in sensitive land that involve forestry rights or certain other *profits à prendre* within the scope of the OIA and, secondly, to set out new tests for consent where an overseas investment in sensitive land relates to forestry.

A *profit à prendre* is a type of interest in land that gives the holder of the interest the right to take part of the land, for example, to cut and remove timber from the land or to remove parts of the soil such as coal, gravel, or stone.

General policy statement

Forestry is a sector of strategic importance to New Zealand. Forestry accounts for around 3 percent of New Zealand's GDP and is New Zealand's third-largest export product earner behind dairy and meat. Forestry is a long term investment. Security of tenure and the ability to realise investment are both crucial to investment. The three main types of ownership are: freehold, leasehold and forestry rights.

A proprietor of land may create a forestry right under the Forestry Rights Registration Act 1983 (the **1983 Act**) that permits the holder of the right to carry out forestry activities on the land, for example, a right to establish, maintain, and harvest a crop of trees on land. The 1983 Act deems a forestry right created under it to be a *profit à prendre*. Rights related to trees in forests may also be created as *profits à prendre* on a non-statutory basis.

Just about any forest that can be sold as a freehold or leasehold in the land can alternatively be sold as a forestry right. Forestry rights can be for longer than one rotation of trees. While freehold and leasehold purchases of forests are screened under the OIA, purchases of forestry rights are not.

The forestry sector is reliant on direct overseas investment in a way that neither other rural land nor residential land are. Although current information on overseas investment in forestry is not definitive, research suggests that up to 70 percent of the plantation forest trees (including long term control of, but not always freehold ownership, of the underlying land) are in overseas ownership. Further detail on plantation forests in New Zealand is available at <http://www.treasury.govt.nz/publications/informationreleases/overseasinvestment>

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.

The one billion trees programme is an important component of this Government's strategy for driving regional economic growth. Encouraging high quality overseas investment is crucial to achieving the one billion trees programme.

Stakeholders have provided feedback that the existing screening regime for overseas investment in freehold and leasehold land involves lengthy delays and expense; investors complained of processes taking many months, with application fees of up to \$49,000 per transaction or up to \$54,000 where significant business assets are also included. They will also incur substantial legal

costs in preparing their applications. The changes proposed in the SOP are designed to streamline and speed up processing of applications regarding forestry compared to using the current tests.

The SOP also removes a gap in the current screening regime where some interests in land, specifically easements and *profits à prendre*, are currently exempted from the OIA screening regime as an interest in land. Forestry rights (included those created under the 1983 Act) are a type of *profit à prendre* and are currently not screened. This is despite the fact that forestry rights can grant a high degree of control over large parcels of New Zealand land for large periods of time.

It is important that forestry rights are included within the screening regime prior to the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) entering into force. It will be possible to tighten or further loosen the criteria applied to forestry investment in the future if required.

Forestry rights brought within scope of OIA

Overseas investments in sensitive land that involve forestry rights, whether created under the 1983 Act or as *profits à prendre* on a non-statutory basis, are currently ex-empted from the scope of the OIA. This is because forestry rights fall within the definition of exempted interest in section 6(1) of the OIA. The SOP proposes replacing the definition of exempted interest with a new definition of that term (see *new clause 5A(1)*). Excluded from the new definition of exempted interest are regulated *profits à prendre*, which are defined to include forestry rights (see the new definitions of forestry right and regulated *profit à prendre* inserted by *new clause 5A(2)*).

The SOP proposes inserting *new Schedule 1A* into the OIA (see *new clauses 5B and 5C*). *Part 1 of new Schedule 1A* provides that consent for an overseas investment in sensitive land that involves a forestry right is not required if the area of land covered by the forestry right is less than 1 000 hectares (see *clause 2(1) of new Schedule 1A*). However, this threshold rule may be disapplied in a calendar year if, during the calendar year, the overseas investor (and any associated investors) invest (directly or indirectly) in forestry rights covering a combined area of 1 000 hectares or more (see *clause 3 of new Schedule 1A*).

Other profits à prendre brought within scope of OIA

Overseas investments in sensitive land that involve *profits à prendre* that are not forestry rights are also currently exempted from the scope of the OIA because they fall within the definition of exempted interest in section 6(1) of the OIA. As mentioned above, the SOP proposes replacing the definition of exempted interest with a new definition of that term (see *new clause 5A(1)*). Excluded from the new definition of exempted interest are regulated *profits à prendre* (see the new definition of that term inserted by *new clause 5A(2)*). A *profit à prendre* (that is not a forestry right) is a regulated *profit à prendre* if the area of land covered by the *profit à prendre* is (or will be) used exclusively or principally for the purposes of the *profit à prendre*. But a *profit à prendre* is not a regulated *profit à prendre* if it consists only of rights to take minerals.

The new definition of regulated *profit à prendre* also includes a power to provide, by regulations, that classes of *profits à prendre* (other than forestry rights) are not to be treated as regulated *profits à prendre*.

Part 2 of new Schedule 1A (see *new clauses 5B and 5C*) provides that consent for an overseas investment in sensitive land involving a regulated *profit à prendre* (that is not a forestry right) is not required if the area of land covered by the *profit à prendre* is less than 5 hectares (see *clause 5(1) of new Schedule 1A*). However, this threshold rule may be disapplied if the overseas investor (and any associated investors) hold (directly or indirectly) regulated *profits à prendre* in respect of the land in question, or any associated land, covering a combined area of 5 hectares or more (see *clause 6 of new Schedule 1A*).

Criteria for consent where overseas investment in sensitive land relates to forestry

The SOP proposes amending *new section 16E*, as inserted by *clause 11* of the Bill as introduced into Parliament. *New section 16E* sets out the benefit to New Zealand test that must potentially

be met in order for consent to be given for an overseas investment in sensitive land. The SOP's proposed amendment does 2 things.

First, the amendment allows a modified benefit test to be applied in certain circumstances where the overseas investment in sensitive land relates to land that will be used for forestry (see *new section 16E(2) and (3) and (9) and (10)*). The modified benefit test provides for a comparison of the expected result of the overseas investment in sensitive land against what is expected to occur if the investment is not made and there are no future changes to the ownership or control of interests in the land. This is different to the counter-factual analysis that is currently applied for the purposes of the benefit test, which requires a comparison of the expected result of the overseas investment in sensitive land against what is expected to occur if the investment is not made. In some cases, this can involve a comparison against an alternative New Zealand investor, rather than assuming no future changes to the ownership or control of interests in the land.

Secondly, the amendment allows a special benefit test to be applied in certain circumstances where the overseas investment in sensitive land relates to forestry (see *new section 16E(4) to (10)*). Some of the requirements of the special benefit test will be set out in regulations. The requirements set out in regulations may include requirements that must be met after the overseas investment in sensitive land is made, including requirements about the following:

- activities that must, or must not, be carried out on the land that is the subject of the overseas investment in sensitive land:
- the maintenance or protection of things that exist when the overseas investment in sensitive land is made:
- outcomes that must result from the overseas investment in sensitive land.

There is also a power to modify these requirements if the overseas investor will not have sufficient rights over the land in question to ensure that the requirements are met.

The SOP proposes amending *new section 16F*, as inserted by *clause 11* of the Bill as introduced into Parliament. The amendment will require any consent granted under the special benefit test to be granted subject to conditions that attach to the requirements that must be met after the investment in sensitive land is made.

The SOP proposes amending *clause 14* of the Bill as introduced into Parliament to insert *new sections 23B and 23C* into the OIA. *New sections 23B and 23C* will enable standing consents to be granted in advance to overseas investors under the modified benefit test or the special benefit test, subject to certain conditions.

Consequential amendments

The other amendments proposed by the SOP are consequential on the amendments described above.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this SOP?	NO
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Relevant international treaties

2.2. Does this SOP seek to give effect to New Zealand action in relation to an international treaty?	NO
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Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this SOP?	YES
<i>Amendment to the Overseas Investment Act: Forestry land and other profits à prendre, The Treasury, February 2018</i> The RIS is yet to be released as the SOP and related advice is still being considered by Ministers. It will likely be published on the Treasury website along with other public EQC Act review documents at http://www.treasury.govt.nz/publications/informationreleases/overseasinvestment	

2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	YES
The Regulatory Impact Analysis Team has considered this Regulatory Impact Statement (RIS) because it relates to an amendment to the Overseas Investment Act 2005, which was introduced as part of the Government's 100-day plan. The RIS shows that alternative approaches to achieve the Government's objectives have been considered, and clearly sets out how the adopted approaches are intended to work. However, the analytical and time constraints, in particular the lack of opportunity to consult with forestry and other holders of profits à prendre rights, mean that it has not been possible to fully consider the likely impacts of the proposals in practice. These have been acknowledged in the RIS. This includes impacts on the relative attractiveness of different ways of investing in New Zealand forestry and the willingness of overseas investors to invest, and therefore their potential ability to help achieve the Government's broader objectives in forestry. It would be desirable, as far as possible, to consult further with a broader range of stakeholders before the new requirements are finalised and in due course to monitor their impact, for example by looking for evidence of a change in the level and nature of screening applications received after the new arrangements are introduced.	

2.3.2. Are there aspects of the policy to be given effect by this SOP that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	NO
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Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this SOP?	NO
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2.5. For the policy to be given effect by this SOP, is there analysis available on:	
(a) the size of the potential costs and benefits?	NO
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO

2.6. For the policy to be given effect by this SOP, are the potential costs or benefits likely to be affected by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	YES
(b) the nature and level of regulator effort put into encouraging or securing compliance?	YES

The RIS (see above) includes information on compliance and regulator effort. It will likely be published on the Treasury website at:
<http://www.treasury.govt.nz/publications/informationreleases/overseasinvestment>

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this SOP is consistent with New Zealand's international obligations?

The Ministry of Foreign Affairs and Trade has been involved in the development of the changes this SOP gives effect to, to ensure that the changes are consistent with policy space preserved in trade agreements for the operation of our overseas investment screening regime.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this SOP is consistent with the principles of the Treaty of Waitangi?

Treasury officials consulted with Te Puni Kōkiri and the Office of Treaty Settlements in the development of the changes the SOP gives effect to.

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

The process saw the sharing of a consultation document and facilitation of four hui in regions across New Zealand. This feedback received has informed the development of the policy.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this SOP appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?

NO

No advice has been provided to the Attorney-General on the SOP. However, in relation to the introduction copy of the Bill, advice provided to the Attorney-General by the Ministry of Justice is available on the Ministry of Justice's website. It is available at: <https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/>

Offences, penalties and court jurisdictions

3.4. Does this SOP create, amend, or remove:

(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?

NO

(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?

NO

The SOP does not include any such provisions (but the introduction copy of the Bill does).

Privacy issues

3.5. Does this SOP create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?

NO

The SOP does not include any such provisions (but the introduction copy of the Bill does).

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this SOP, or on a draft of this SOP?	YES
Targeted consultation with iwi/Māori is described in 3.2 above. Some other forestry industry participants also provided submissions to the Treasury as part of that process, which also informed the development of the policy.	

Other testing of proposals

3.7. Have the policy details to be given effect by this SOP been otherwise tested or assessed in any way to ensure the SOP's provisions are workable and complete?	YES
These changes were developed in close consultation with the Overseas Investment Office (the regulator under the Overseas Investment Act) with the aim of trying to ensure that they are workable. We note the changes have been developed in a very short timeframe.	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this SOP contain any provisions that could result in the compulsory acquisition of private property?	NO
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Charges in the nature of a tax

4.2. Does this SOP create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO
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Retrospective effect

4.3. Does this SOP affect rights, freedoms, or impose obligations, retrospectively?	NO
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Strict liability or reversal of the burden of proof for offences

4.4. Does this SOP:	
(a) create or amend a strict or absolute liability offence?	NO
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO
The SOP does not include any such provisions (but the introduction copy of the Bill does).	

Civil or criminal immunity

4.5. Does this SOP create or amend a civil or criminal immunity for any person?	NO
The SOP does not include any such provisions (but the introduction copy of the Bill does).	

Significant decision-making powers

4.6. Does this SOP create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	YES
<p>The SOP provides the relevant Ministers with new decision making powers – in particular, a key threshold for the new checklist test for forestry-related activities is that the relevant Ministers are be satisfied that various requirements set by regulations will be, or will likely be, met. That is consistent with the approach currently taken in the OIA, where the ultimate decision making rests with the relevant Ministers (such as under section 14 of the Act).</p> <p>The SOP also provides that the relevant Ministers may decide not to apply, or may modify, a requirement in the new test, but only if satisfied that the overseas person will not have sufficient rights in respect of the relevant land to ensure that the requirement is met.</p>	

Powers to make delegated legislation

4.7. Does this SOP create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	YES
<p>The SOP creates new powers to make delegated legislation to exclude certain profits à prendre from the definition of “regulated profits à prendre”, and thereby remove them from the OIA screening regime.</p> <p>The regulation-making power will 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.</p>	

4.8. Does this SOP create or amend any other powers to make delegated legislation?	YES
<p>The SOP creates new powers to make various regulations regarding the new checklist test for forestry related activities, being:</p> <ul style="list-style-type: none"> • regulations to create the new test; • 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 test, including: <ul style="list-style-type: none"> ○ 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; ○ requirements regarding activities that must, or must not, be carried out on the relevant land; ○ requirements regarding the maintenance or protection of things that exist when the investment is made; and ○ requirements regarding outcomes that must result from investment; • 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 • further regulations to set requirements for making such offers to the Crown. <p>Those requirements could be technically complex and potentially subject to change, which are factors that weigh in favour of locating them in regulations.</p> <p>These new regulation-making powers would allow a wide range of requirements to be set. However, those requirements only apply when seeking consent under the new test, which is only available for forestry related activities, as defined in the Act (as it would be amended by the SOP). An overseas person can still obtain consent for forestry related activities under the existing benefit to New Zealand test in the Act, which means that requirements set by regulations will not be the only way an overseas person can obtain consent.</p>	

Any other unusual provisions or features

4.9. Does this SOP contain any provisions (other than those noted above) that are unusual or call for special comment?	NO
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