

Overseas Investment (Forestry) Amendment Bill

Government Bill

As reported from the Finance and Expenditure Committee

Commentary

Recommendation

The Finance and Expenditure Committee has examined the Overseas Investment (Forestry) Amendment Bill and recommends that it be passed. We recommend all amendments unanimously.

Introduction

This bill seeks to amend the Overseas Investment Act 2005. It is narrowly focused. The main change would be to remove the ability for overseas investors to rely on a simplified, and more permissive, consent process under the Act when they seek to convert land into production forestry land.

The current Overseas Investment Act

The Act is New Zealand's main tool for regulating foreign investment. Its two purposes are to:

- acknowledge that it is a privilege for overseas persons to own or control sensitive New Zealand assets, and therefore require them to meet certain requirements or adhere to certain conditions when investing in those assets
- manage certain risks, such as national security and public order risks, associated with transactions by overseas persons.

Section 10 of the Act requires overseas persons to obtain consent before investing in "sensitive land". Schedule 1 defines sensitive land as including any non-urban land of more than 5 hectares. This covers most agricultural land in New Zealand.

The "benefit to New Zealand" test

Generally, investments in sensitive land must satisfy the "benefit to New Zealand" test in section 16A(1). The relevant Ministers (or their delegates in Toitū Te Whenua—

Land Information New Zealand) must consider whether the overseas investment is likely to:

- result in economic benefits for New Zealand
- result in benefits to the natural environment
- continue or improve access to that land by the public
- continue or improve protection of historic heritage on that land
- give effect to or advance a significant Government policy
- involve oversight of, or participation in, the investment by New Zealand individuals or entities
- have consequential benefits to New Zealand.¹

When applying the test, Ministers compare the proposed investment to a “counterfactual” (the current state of the land).² They must also “take a proportionate approach”, which means that greater benefits must be demonstrated for investments in land that has greater sensitivity.³

The special forestry test

Section 16A(4) contains a special test relating to forestry activities (the special forestry test). Simplified, the special forestry test currently applies if the land:

- will be used almost exclusively for forestry activities⁴
- is not solely residential land
- will not be used, or held for future use, for residential purposes (except providing lodgings for the forestry activities).

If the special forestry test applies, the “counterfactual” and “proportionate approach” components of the benefit to New Zealand test do not apply. Instead, a prescribed list of other regulations apply. In practice, the special forestry test is applied as a “tick-box” test that does not allow for discretion by decision makers. Because of these differences, it is more permissive than the general benefit to New Zealand test.

What the bill would change

The bill would remove the ability for overseas investors to rely on the special forestry test when seeking to convert farm land or other land to forestry. Instead, these applications would be assessed under the benefit to New Zealand test, which is less permissive.

¹ Section 17(1).

² Section 16A(1A)(a).

³ Section 16A(1A)(b).

⁴ Forestry activities means establishing, maintaining, or harvesting a crop of trees. See section 16A(9).

Legislative scrutiny

As part of our consideration of the bill, we have examined its consistency with principles of legislative quality. We have no issues regarding the legislation's design to bring to the attention of the House.

Proposed amendments

We recommend four minor and technical amendments to clarify how some mechanisms in the bill would work:

- Amend clause 4(8) to amend the definition of “forestry activities” in section 16A(9) to include “maintaining the land during the period between harvesting a crop of trees and establishing a new crop of trees”.
- Insert clause 8A to clarify that, in line with the Act's current exemption to the restriction on residential use, forestry workers may continue to occupy land acquired under the special forestry test.
- Amend clause 9 to ensure that any forestry rights that are acquired under an exemption in the Act (for example, following a business merger or corporate restructure) do not contribute to the Act's 1,000 hectare screening threshold for forestry rights.
- Insert clause 10 to fix a discrepancy between applications for forestry standing consents and residential standing consents by confirming that the regulator can consider the applicant's associates (and individuals with control of the overseas person) when assessing the applicant's compliance record.

Further comments on the bill

We heard several constructive and well considered submissions from the public. Although not specifically linked to any changes in the bill, we wish to make some general comments on the bill and the operation of the Act in response to some of the issues raised.

Guidance on the benefit to New Zealand test

Some submitters were concerned that the benefit to New Zealand test is more complex, and less certain, than the special forestry test. They told us that this could discourage productive investment in New Zealand forestry. They suggested that the regulator should be required to produce clear guidance about the factors they will have regard to, and the way in which they will apply those factors, when assessing an application under the benefit to New Zealand test.

Although we agree that clarity is important, we have not recommended a specific requirement be added to the primary legislation. Instead, we have been assured by Toitū Te Whenua–Land Information New Zealand that it will review its online guidance. We note that the Overseas Investment Office (OIO) has plenty of experience applying the benefit to New Zealand test to other investments. It will consider how that guidance could better reflect the assessment process for forestry under the benefit

to New Zealand test. We also heard that it holds pre-application meetings with investors, and will use these to ensure investors understand the requirements.

Differential treatment between farm land and forestry land

The Act currently contains another test relating to applications involving farm land (the farm land benefit test). The farm land benefit test is stricter than the general benefit to New Zealand test. It requires Ministers, when considering an overseas investment, to give more weight to whether the investment would create economic benefits, or include participation or oversight by New Zealanders.

Some submitters recommended that the special forestry test be replaced by the farm land benefit test. They told us that using a stricter test with a higher threshold would better achieve the bill's goal of managing risks in conversions from farm land to forestry.

Although the bill would remove the special forestry test for forestry conversions, it would replace that test with the general benefit to New Zealand test. Therefore, applications involving conversion from farm land to forestry would continue to be treated differently than applications relating to farm land. Some of us are concerned that this would preserve incentives for foreign investors to convert farm land to forestry.

We received advice on this issue. We heard that the benefit to New Zealand test will reduce the risk of losing highly productive farm land to forestry because it requires investors to demonstrate benefits that are proportional to the land's sensitivity. For example, highly productive farm land would require a correspondingly high benefit.

We also heard that forestry applications may struggle to satisfy the farm land test because of its focus on economic benefits. For many forestry investments, the investor makes long-term projections about economic benefits. However, these could only be realised several years after a crop of trees was planted. The regulator often discounts long-term projections because they are less certain.

We note that removing the special forestry test for forestry conversions (in favour of the benefit to New Zealand test) may reduce the forestry sector's ability to attract foreign capital. We heard that subjecting forestry investments to the stricter farm land benefit test could exacerbate this further. We also heard that the benefit to New Zealand test would still impose the same advertising requirements across all consent pathways.

Some of us believe that the bill balances these competing objectives.

Information gathering about exempt forestry interests

Schedule 3 of the Act lists several circumstances in which investors would not need to apply for consent. One such circumstance is where the investor would acquire a "forestry right" that covers an area of less than 1,000 hectares. An example of this is the landowner granting an overseas investor the right to harvest 999 hectares of forest (so-called "cutting rights").

We agree, in principle, that there should be a simplified consent process for smaller investments, especially where land ownership does not change. However, because investors are not required to notify the OIO about exempt land, there is no data showing the total area of land that is subject to exemptions.

We are concerned that the total area of exempted forestry rights is unknown. This figure would provide a better picture of the total land area owned or controlled by overseas persons, and the relative market power of different entities. We think this context would be helpful for decisions makers when making decisions under the Act.

Although this is outside the direct scope of this bill, we encourage the Minister to consider whether the exemption settings, and the 1,000 hectare threshold, remain appropriate. To facilitate this, we suggest that Te Tai Ōhanga—The Treasury and Toitū Te Whenua—Land Information New Zealand explore how these transactions could be accurately recorded.

Appendix

Committee process

The Overseas Investment (Forestry) Amendment Bill was referred to the committee on 7 June 2022.

We called for submissions on the bill with a closing date of 20 June 2022. We received and considered 25 submissions from interested groups and individuals. We heard oral evidence from 7 submitters.

We received advice on the bill from the Treasury and Toitū Te Whenua—Land Information New Zealand (Overseas Investment Office). The Office of the Clerk provided advice on the bill's legislative quality. The Parliamentary Counsel Office assisted with legal drafting.

Committee membership

Barbara Edmonds (Chairperson)

Andrew Bayly

Glen Bennett

Ingrid Leary

Anna Lorck

Greg O'Connor

Damien Smith

Chlöe Swarbrick

Simon Watts

Helen White

Nicola Willis

Hon Eugenie Sage replaced Chlöe Swarbrick for this item of business.

Ian McKelvie replaced Nicola Willis for this item of business.

Key to symbols used in reprinted bill

As reported from a select committee

text inserted unanimously

~~text deleted unanimously~~

Hon David Parker

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Government Bill

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The Parliament of New Zealand enacts as follows:**1 Title**

This Act is the Overseas Investment (Forestry) Amendment Act **2022**.

2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent. 5

3 Principal Act

This Act amends the Overseas Investment Act 2005.

Part 1**Amendments to Part 2 (consent and conditions regime) 10****4 Section 16A amended (Benefit to New Zealand test)**

(1) In section 16A(1AA), table,—

(a) item relating to the modified benefit test if land is or includes farm land, second column, after “(1D)”, insert “, (1E), (2)”:

(b) repeal the item relating to the modified benefit test for forestry activities. 15

(2) In section 16A(1B), delete “(3) or”.

(3) Replace section 16A(2) and (3) and the cross-heading above section 16A(2) with:

(2) Subsection (1C) does not apply if the relevant Ministers are satisfied—

(a) that, as a result of the overseas investment, the farm land will, or is likely to, be used exclusively, or nearly exclusively, for forestry activities; and 20

(b) that, whenever a crop of trees is harvested on the farm land, a new crop will be, or is likely to be, established on the farm land to replace the crop that is harvested (subject to subsection (7)); and 25

(c) that the non-occupation outcome will, or is likely to, occur in relation to the farm land (where that outcome in clause 17(3) to **(5)** of Schedule 2 applies with necessary modifications as if the reference to residential land were a reference to the farm land). 30

(4) Replace section 16A(4)(a) with:

(a) that the relevant land is already used when the transaction is entered into, and will continue to be used, exclusively, or nearly exclusively, for forestry activities; and

(5) Replace section 16A(4)(c) with:

- (c) that the non-occupation outcome will, or is likely to, occur in relation to the relevant land (where that outcome in clause 17(3) to **(5)** of Schedule 2 applies with necessary modifications as if the reference to residential land were a reference to the relevant land); and
- (6) After section 16A(4), insert: 5
- (4A) To avoid doubt, the reference in **subsection (2)(a)** to the use of the farm land and the reference in subsection (4)(a) to the use of the relevant land mean the use that arises under the estate or interest referred to in section 12(1)(a).
- (7) In section 16A(7)(a) and (b), replace “(2)(d)” with “**(2)(b)**”.
- (8) In section 16A(9), replace the definition of **forestry activities** with: 10
- forestry activities** means any of the following activities in respect of any trees (whether exotic or native) that are to be harvested to provide wood:
- (a) maintaining a crop of trees:
- (b) harvesting a crop of trees:
- (ba) maintaining the land during the period between harvesting a crop of trees and establishing a new crop of trees: 15
- (c) establishing a crop of trees.
- 5 Section 16B amended (Conditions for consents relating to sensitive land that is residential land: benefit to New Zealand test)**
- (1) Replace section 16B(2) with: 20
- (2) However, this section does not apply (and *see* instead section 16C)—
- (a) to the extent that the relevant land is farm land and the relevant Ministers are satisfied in accordance with **section 16A(2)**; or
- (b) where the application is being considered in accordance with section 16A(4). 25
- (2) In section 16B, example, replace “section 16A(1)(c)” with “section 16A(1)(b)”.
- 6 Section 16C amended (Conditions for consents relating to sensitive land that will be used for forestry activities)**
- (1) Replace section 16C(1) and (2) with:
- (1) **Subsection (2)** applies if an application for consent for an overseas investment in sensitive land is being considered under the benefit to New Zealand test, to the extent that the relevant land is farm land and the relevant Ministers are satisfied in accordance with **section 16A(2)**. 30
- (2) If granted, the consent must be made subject to conditions for the purpose of ensuring that the requirements set out in **section 16A(2)** will be met, subject to section 16A(7). 35
- (2) In section 16C(5), replace “16A(2)(d)” with “**16A(2)(b)**”.

7 Section 17 amended (Factors for assessing benefit of overseas investments in sensitive land)

In section 17(2), delete “(including where section 16A(3) is being applied)” in each place.

Part 2
Other amendments

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8 Schedule 1AA amended

In Schedule 1AA,—

- (a) insert the Part set out in the **Schedule** of this Act as the last Part; and
- (b) make all necessary consequential amendments.

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8A Schedule 2 amended

In Schedule 2, after clause 17(4), insert:

- (5) For the purposes of **section 16A(2)(c) and (4)(c)**, subclause (3)(c) does not apply to the extent that—

- (a) accommodation is being provided for the purpose only of supporting forestry activities (as defined in section 16A(9)) being carried out on the farm land (in the case of **section 16A(2)(c)**) or the relevant land (in the case of **section 16A(4)(c)**); and
- (b) all the buildings being used for that accommodation are located on land on which some or all of those forestry activities are being carried out or on land that adjoins land on which some or all of those forestry activities are being carried out.

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9 Schedule 3 amended

- (1) In Schedule 3, clause 6(4)(b), replace “the combined area of all other forestry rights” with “the combined area of all ~~other~~ unconsented forestry rights”.

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- (1A) In Schedule 3, clause 6(5), replace “(4)(b)(i)” with “(4)(b)”.

- (2) In Schedule 3, after clause 6(6), insert:

- (7) In this clause, **unconsented forestry right** means a forestry right that is acquired otherwise than in reliance on ~~a consent~~ any of the following:

- (a) a consent;
- (b) an exemption in, or an exemption granted under, this Act or the regulations (other than an exemption under this clause).

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10 Schedule 4 amended

- (1) In Schedule 4, clause 3(2)(d), replace “applicant has” with “persons referred to in **subclause (2A)** have”.

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(2) In Schedule 4, after clause 3(2), insert:

(2A) For the purposes of subclause (2)(d), the persons are the following (viewed as a group):

(a) the applicant:

(b) the applicant's associates:

(c) the individuals with control of the relevant overseas person.

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Schedule

New Part 7 inserted into Schedule 1AA

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Part 7	
Provisions relating to Overseas Investment (Forestry) Amendment Act 2022	5
52 Interpretation in this Part	
(1) In this Part, unless the context otherwise requires,—	
commencement means the day after the date on which the Overseas Investment (Forestry) Amendment Act 2022 receives the Royal assent	10
new Act means this Act as it reads immediately after commencement	
old Act means this Act as it read immediately before commencement.	
(2) Part 1 of this schedule applies when determining whether a transaction is entered into before commencement or on or after commencement (<i>see</i> clause 1(4) and (5)).	15
53 Existing transactions and applications, etc	
(1) This clause applies for the purposes of applying a provision of this Act that relates to—	
(a) determining when consent is required and the criteria for consent under subpart 1 of Part 2 of this Act; and	20
(b) the making of applications for consent and for granting consent under subpart 2 of Part 2 of this Act.	
(2) Except as provided in this Part, the old Act continues to apply to—	
(a) any application for consent (including for standing consent) received by the regulator before commencement (regardless of when the transaction is or was entered into or whether it has been given effect to); and	25
(b) any transaction entered into before commencement; and	
(c) any other matter that relates to events or circumstances before commencement.	
(3) In other cases, the new Act applies.	30
(4) Subclause (2)(b) does not apply to a transaction that is given effect to before commencement without consent in breach of this Act.	
Compare: Schedule 1AA, cls 15(2)(c), 38	
54 Standing consents granted in respect of forestry activities	
(1) This clause applies to a standing consent—	35

- (a) that is granted before commencement under clause 3 of Schedule 4; or
 - (b) that is granted after commencement pursuant to an application described in **clause 53(2)(a)**.
- (2) The standing consent and the old Act continue to apply in respect of any overseas investments in sensitive land that are given effect to in reliance on the standing consent. 5

Legislative history

31 May 2022
7 June 2022

Introduction (Bill 134–1)
First reading and referral to Finance and Expenditure Committee