

Overseas Investment (Forestry) Amendment Bill

Government Bill

Explanatory note

General policy statement

Bill aims to ensure that overseas investment in forestry benefits New Zealand

The Overseas Investment Act 2005 (the **Act**) is New Zealand's principal tool for regulating foreign investment. It seeks to balance the need to support high-quality investment with the need to ensure that the Government has tools available to manage risks.

The main objective of this Bill is to ensure that overseas investments that result in the conversion of farm land (or other land) to forestry benefits New Zealand and that any risks can be better managed.

Drivers for investment in forestry have changed

Under current legislation, overseas investors wishing to acquire an interest in production forestry can seek approval for the investment via a relatively permissive special forestry test, which was introduced in 2018. This reflected the need at the time to support the forestry sector and achieve the Government's goal of stimulating forestry investment.

Since then, the economics of investing in forestry have changed and it has become more attractive. This change has been primarily driven by the increasing price of carbon credits, by emissions trading scheme reforms, and by Government afforestation schemes.

New Zealand has consequently seen an increase in forestry investment. This includes increasing conversions of productive farm land to forest (by both domestic and overseas investors). However, as economic and regulatory contexts change, it is important to consider the environmental, social, economic, and other impacts of investment in forestry to ensure that all stakeholders continue to benefit.

Bill provides stronger tools to manage concerns that arise from overseas investment

Several regulatory systems have a role to play in mitigating those concerns, including the Act. However, the Act's current (relatively permissive) special forestry test does not always provide sufficient flexibility to enable those concerns to be managed. The Bill remedies this by applying the Act's existing, but more stringent, benefit to New Zealand test to overseas investments that will result in converting land-use to production forestry.

The benefit to New Zealand test is a more complex test than the special forestry test; it requires in-depth consideration of the benefits the investment brings relative to the current use of the land, and involves greater discretion for decision-makers. Applying this test will ensure that overseas investment in forestry genuinely benefits New Zealand, and that any risks can be better managed.

Finally, the Bill makes some minor and technical changes to the Act's forestry provisions to ensure their workability and clarity.

Departmental disclosure statement

The Treasury is required to prepare a disclosure statement to assist with the scrutiny of this Bill. The disclosure statement provides access to information about the policy development of the Bill and identifies any significant or unusual legislative features of the Bill.

A copy of the statement can be found at <http://legislation.govt.nz/disclosure.aspx?type=bill&subtype=government&year=2022&no=134>

Regulatory impact statement

The Treasury produced a regulatory impact statement on 9 February 2022 to help inform the main policy decisions taken by the Government relating to the contents of this Bill.

A copy of this regulatory impact statement can be found at—

- <https://treasury.govt.nz/publications/informationreleases/ris>

Clause by clause analysis

Clause 1 is the Title clause.

Clause 2 provides for the Bill to commence on the day after it receives the Royal assent.

Clause 3 provides that the Bill amends the Overseas Investment Act 2005 (the **Act**).

Part 1

Amendments to Part 2 (consent and conditions regime)

Clause 4 amends section 16A of the Act, which relates to the benefit to New Zealand test. That section currently provides for 3 pathways as follows:

- 1 the general benefit to New Zealand test (in section 16A(1) and (1A) of the Act). This test involves assessing the benefit to New Zealand by comparing the likely result of the overseas investment against the existing state of affairs (a **counterfactual analysis**). Changes to the test that took effect on 24 November 2021 mean that the test is now considerably different from the test that applied in 2018 when the forestry rules were enacted. One of those changes was to remove the old counterfactual analysis (which was to compare what a hypothetical alternative investor might do with the land). Also, it was confirmed in 2021 that the regulator will generally only be able to take into account negative impacts of an investment where these are directly comparable to aspects of the same benefit factor (for example, the loss of jobs against the gain of jobs) but not against non-directly comparable aspects of a factor (for example, the loss of jobs against the gain of technology):
 - 1A the rules that apply to farm land (in section 16A(1C) of the Act). These are part of the first pathway (so involve a counterfactual analysis) but have a higher threshold. Changes that took effect on 24 November 2021 were designed to lock in a higher benefit threshold for farm land than the threshold that applies under the general benefit to New Zealand test. The farm land rules in the Act now require the relevant Ministers to give the economic benefits factor and the oversight or participation factor high relative importance and to ensure that the applicant has demonstrated, in relation to 1 or more of those factors, that the benefits of the investment are of a size or nature that represent a substantial benefit to New Zealand:
- 2 the modified benefit test for forestry activities (in section 16A(2) and (3) of the Act). This test was enacted in 2018 to provide an alternative to the general benefit to New Zealand test. The modified benefit test for forestry activities involves a counterfactual analysis that assesses the benefits of what an overseas investor proposes to do with the land against what the current owner would do if they continued to own the land. This test is largely redundant (because of the special forestry test and now that the counterfactual analysis for the general benefit test has changed), and so is not discussed further:
- 3 the special test relating to forestry activities, commonly known as the special forestry test (in section 16A(4) of the Act). This test is currently available if the relevant land will be, or is likely to be, used exclusively, or nearly exclusively, for forestry activities. This wording allows the relevant land to be either land where forestry activities are already carried out or, alternatively, land that is not currently used for forestry but that will be converted to that use as part of the overseas investment (a **forestry conversion**). This special test assesses an investment against a checklist of requirements and does not involve a counter-

factual analysis. This means that the current settings for investing in land to be converted to forestry do not require overseas investors to demonstrate the benefits of their proposed investment in the same way as the Act does for other land-based investments.

The main changes proposed in *clause 4* are as follows:

- forestry conversions are removed from the special forestry test. *See clause 4(4)*. As a result, the special forestry test will in future only be available for the acquisition of land that is already being used exclusively, or nearly exclusively, for forestry activities (in effect, land that is already being used for production forestry). Forestry conversions will in future instead be considered under the general benefit to New Zealand test (except for forestry conversions that rely on standing consents granted or applied for before commencement, *see new clause 54* of Schedule 1AA):
- the higher threshold for farm land will not apply to forestry conversions if Ministers are satisfied that certain conditions apply. *See clause 4(3)*, *new section 16A(2)*. The 2 main conditions are carried over from section 16A(4)(a) of the Act (that relevant land will be, or is likely to be, used exclusively, or nearly exclusively, for forestry activities) and section 16A(4)(e) of the Act (that, whenever a crop of trees is harvested on the relevant land, a new crop will be, or is likely to be, established on the relevant land to replace the crop that is harvested). The latter condition remains subject to ministerial power to not apply, or to modify, certain requirements (*see section 16A(7)* of the Act):
- the modified benefit test for forestry activities is removed. *See clause 4(3)*:
- the no-residential-use condition in section 16A(4)(c) of the Act is replaced. It will apply to investments in existing forestry that are considered under the special forestry test. The current condition prohibits land that is acquired for forestry activities from being used, or held for use, for residential purposes (except in certain circumstances), and was designed to complement the restrictions on overseas persons acquiring residential land. In practice, this condition currently means that dwellings on land acquired under the special forestry test cannot be lived in or tenanted, unless for forestry worker accommodation. The replacement widens the options for using the forestry land for residential purposes. There will be no restrictions for New Zealanders. The new condition will provide that overseas person investors and their associates will be restricted from occupying existing or new dwellings, and that other persons may occupy the land for residential purposes provided that the occupation is on arm's-length terms (for example, at market rent):
- clarification that activities unconnected to the interest being acquired by the overseas investor are excluded. *See clause 4(6)*:
- changes to the definition of forestry activities, which applies for the requirements in the Act that the land must be used exclusively, or nearly exclusively, for forestry activities. After the Bill is passed, this requirement would apply if

investments in existing forestry are considered under the special forestry test and if forestry conversions are to be exempt from the higher farm land threshold. The changes confirm the 2018 intention, namely, that the forestry activities must be in respect of trees that are to be harvested to provide wood (and not, for example, in respect of a permanent carbon forest). The definition now also clarifies that all varieties of trees, including native and exotic trees, may be planted, so long as they are planted and maintained for harvesting for wood. *See clause 4(8).*

Clause 5 makes an amendment to section 16B that is consequential on the repeal of the modified benefit test and on the exemption of forestry conversions from the higher farm land threshold. The second amendment corrects a drafting error.

Clause 6(1) makes consequential amendments to section 16C resulting from the removal of the modified benefit test.

Clause 6(2) makes an amendment to section 16C(5) that is consequential on the removal of the modified benefit test and on the exemption of forestry conversions from the higher farm land threshold.

Clause 7 makes a consequential amendment to section 17 resulting from the removal of the modified benefit test.

Part 2

Other amendments

Clause 8 amends Schedule 1AA of the Act, which contains transitional and savings provisions. The amendments are set out in the *Schedule* of the Bill.

Clause 9 relates to the existing exemption from the requirement for consent that applies if the area of the relevant forestry right is less than 1,000 hectares. *See* clause 6 of Schedule 3 of the Act. Currently, that exemption does not apply if, immediately after the relevant forestry investment is given effect to, the sum of the following areas is 1,000 hectares or more:

- the area of the relevant forestry right;
- the combined area of all other forestry rights that related forestry investors acquire in the same calendar year as that in which the relevant forestry investment is given effect to and that are for a total term of 10 years or more.

The amendment provides that consented forestry rights are not included in the calculation of the 1,000-hectare annual cap.

The *Schedule* inserts a new Part into Schedule 1AA of the Act.

New clause 53 of Schedule 1AA provides that the old Act continues to apply to—

- most applications received by the regulator before commencement (for example, most existing applications for forestry conversions under the special forestry test); and

- most transactions entered into, or given effect to, before commencement (including those that are entered into before commencement but conditional on receiving consent after commencement).

New clause 54 of Schedule 1AA relates to standing consents. See section 23A and clause 3 of Schedule 4 of the Act, which provide for standing consents for future transactions (to be notified later to the regulator) in respect of overseas investments in sensitive land for which the benefit to New Zealand test will be met in accordance with the special forestry test. *New clause 54* provides that the old rules continue to apply to both standing consents granted before commencement and standing consents applied for before commencement. The effect is that the standing consents can continue to be utilised on the terms upon which they were, or are to be, granted. This may include additional forestry conversions, as if the special forestry test were still available for conversions after commencement.

Hon David Parker

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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.

3 Principal Act

This Act amends the Overseas Investment Act 2005.

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Part 1**Amendments to Part 2 (consent and conditions regime)****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)”:

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

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

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

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(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

(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

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(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) of Schedule 2 applies with necessary modifications as if the reference to residential land were a reference to the farm land).

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(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

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(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) of Schedule 2 applies with necessary modifications as if the reference to residential land were a reference to the relevant land); and

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(6) After section 16A(4), insert:

- (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: 5
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:
 (c) establishing a crop of trees 10
- 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:
 (2) However, this section does not apply (and *see* instead section 16C)— 15
 (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).
 (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)** 20
- (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)**. 25
 (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).
 (2) In section 16C(5), replace “16A(2)(d)” with “**16A(2)(b)**”. 30
- 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

8 Schedule 1AA amended

In Schedule 1AA,—

- (a) insert the Part set out in the **Schedule** of this Act as the last Part; and 5
- (b) make all necessary consequential amendments.

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”.
- (2) In Schedule 3, after clause 6(6), insert: 10
- (7) In this clause, **unconsented forestry right** means a forestry right that is acquired otherwise than in reliance on a consent.

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 new Act means this Act as it reads immediately after commencement old Act means this Act as it read immediately before commencement.	10
(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 (b) the making of applications for consent and for granting consent under subpart 2 of Part 2 of this Act.	20
(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 (b) any transaction entered into before commencement; and (c) any other matter that relates to events or circumstances before commencement.	25
(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. <small>Compare: Schedule 1AA, cls 15(2)(c), 38</small>	
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