

Coversheet: Amendment to the Overseas Investment Act: Forestry land and other profits à prendre

Advising agencies	<i>The Treasury</i>
Decision sought	<i>Amendment to the Overseas Investment Act 2005 relating to forestry land and other profits à prendre</i>
Proposing Ministers	<i>Hon David Parker (Associate Minister of Finance)</i>

This version was prepared for consideration by the Cabinet Economic Development Committee on 28 February 2018. Note that further policy changes were made subsequent to this meeting. The Treasury has not had an opportunity to assess the impacts of these changes.

Summary: Problem and Proposed Approach

Problem Definition: What problem or opportunity does this proposal seek to address? Why is Government intervention required?

The Labour Party's pre-election policy included screening overseas investment in forestry rights of more than 50 hectares (ha).

Forestry investments can be made via purchases of freehold land, leasehold land or forestry rights (a right to grow and harvest forestry on the land). The current screening regime under the Overseas Investment Act 2005 (OIA) includes freehold and leasehold land but excludes forestry rights. This reduces the effectiveness of the screening regime as it can be easily avoided through the purchase of a forestry right.

Introducing forestry rights into the screening regime after the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) enters into force would likely breach our obligations under that agreement, therefore, if screening of forestry rights is to be introduced into the OIA this should be done prior to the CPTPP entering into force.

Officials were asked to consult stakeholders on a proposal to bring transactions of forestry rights (of more than 50 ha and 3 years duration) into the OIA with a view to using the Overseas Investment Amendment Bill (a 100-day proposal), currently before Select Committee, as a vehicle which could be used to enact any reforms that were proposed.

During the consultation on the forestry rights proposal stakeholders raised issues with the broader forestry screening regime. Those concerns are reflected in the current proposals.

Officials were also asked to consider the screening of overseas investments in *profits à prendre* generally. Certain types of *profits à prendre* can allow similar use of land to that permitted by a lease (including *profits à prendre* over forestry created outside of the Forestry Rights Registration Act).

Proposed Approach: How will Government intervention work to bring about the desired change? How is this the best option?

It is expected that these proposals would streamline and speed up processing of OIA consent applications compared to using the current tests, providing a more certain environment for investors. Streamlining the screening of forestry investments is important as ongoing high quality foreign investment in forestry is crucial to the success of the sector.

The Government considers that a strong forestry sector contributes to multiple Government priorities, including regional development and employment, and climate change policy.

Profits à prendre are not currently screened as 'overseas investments in sensitive land' under the OIA even though they are an interest in land. Including *profits à prendre* relating to the dominant use of the land, particularly forestry rights, would create greater consistency with how leases are treated. *Profits à prendre* that are not connected to a main use of the land would not be subject to screening as overseas investments in sensitive land.

Evidence certainty and quality assurance

Agency rating of evidence certainty?

The Treasury has assessed the proposed approach against the criteria of policy effectiveness and minimising compliance and administrative costs. However, due to the short timeframe, detailed analysis has not been undertaken on all options.

Quality Assurance Reviewing Agency:

The Treasury¹

Quality Assurance Assessment:

Not applicable for 100 day plan priorities

Reviewer Comments and Recommendations:

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.

¹ Regulatory Quality Team

Impact Statement: Amendment to the Overseas Investment Act: Forestry land and other profits à prendre

Section 1: General information

Purpose

The Treasury is solely responsible for the analysis and advice set out in this Regulatory Impact Statement, except as otherwise explicitly indicated. This analysis and advice has been produced for the purpose of informing key policy decisions to be taken by Cabinet.

Key Limitations or Constraints on Analysis

The key limitations and constraints applying to this analysis are as follows:

Time constraints: Ministers have directed officials to prepare this policy within the timeframe for Select Committee consideration of the Overseas Investment Amendment Bill and prior to the entry into force of the CPTPP. Accordingly, this analysis has been prepared under tight time constraints. General consultation has not been undertaken. Targeted consultation was undertaken with Māori and iwi groups that would likely be impacted by the proposal to screen overseas investments in forestry rights under the OIA. Submissions were received from a number of these groups in response to this targeted consultation, as well as from other interested stakeholders such as domestic wood processors, forest owners and investors.

Range of options considered: Consideration of the options and the analysis is constrained by the short timeframe available in which to consider and make policy decisions as directed by Ministers.

Assumptions underpinning impact analysis: Analysis of the likely impact of these legislative changes has been limited by the timeframe available for policy development and the availability of underlying data on the current forestry screening regime, and on use of *profits à prendre* by overseas investors.

Responsible Manager (signature and date):

Thomas Parry
International, Economic System
The Treasury
27 February 2018

Section 2: Problem definition and objectives

2.1 What is the context within which action is proposed?

The Overseas Investment Act 2005 (the OIA) regulates overseas investments in New Zealand's sensitive assets. The purpose of regulating these overseas investments is to reflect that it is a privilege for overseas persons to own or control sensitive New Zealand assets.

There is currently a Bill before Select Committee which implements the Government's 100-day commitment to restrict overseas buyers from purchasing existing homes by bringing 'residential land' within the category of 'sensitive land' under the OIA.

If agreed to by Cabinet, a Supplementary Order Paper will be brought before the House to propose additional amendments to the current Bill to amend the screening regime applied to forestry land and *profits à prendre*. The SOP will be referred to Select Committee.

Under the OIA, sensitive land includes, amongst other land, interests in rural land of more than 5 hectares (ha). Overseas persons seeking to *purchase or lease* (for a term of three years or more) forestry land over 5 hectares must normally be screened under the OIA to get consent for the investment. Consent will only be granted if a proposed investment meets a set of criteria which includes determining that the transaction will, or is likely to, substantially and identifiably benefit New Zealand. This often involves a counterfactual assessment.

The OIA screens any interest in land other than easements and *profits à prendre* (a right to take some part of the soil or the "natural produce" of the land such as minerals, timber, or flax). The OIA specifically lists them as exempted interests that fall outside the screening regime. Forestry rights² created under the Forestry Rights Registration Act 1983 (FRRRA) are deemed to be *profits à prendre* and therefore are currently not screened as an overseas investment in sensitive land (though could still be screened as a significant business asset). This is despite the fact that forestry rights under the FRRRA can grant a high degree of control over large parcels of New Zealand land for large periods of time (pine forests can take more than 25 years to grow). There is also the risk of regulatory avoidance occurring which may undermine the effectiveness of the overall screening regime.

Certain types of *profits à prendre* can allow similar use of land to that permitted by a lease (including *profits à prendre* over forestry created outside of the FRRRA). *Profits à prendre* are also interests in land that provide the rights holder with property rights in relation to the land. This creates concerns around avoidance and a lack of consistency.

Feedback from stakeholders suggests that the current process is compliance-heavy and complex for overseas forestry investors, particularly for investments in relatively small parcels of land and it is deterring investment from overseas investors.

It will be more difficult to add further interests in land or other assets to the OIA screening regime after the CPTPP enters into force.

² Forestry rights, separate the ownership of the standing forest from the ownership of the land. For the avoidance of doubt, when the term forestry rights is used throughout the RIS, this is in reference to both statutory and non-statutory forestry rights.

2.2 What regulatory system, or systems, are already in place?

Overseas Investment Screening Regime

Overseas investment in New Zealand is regulated by the OIA. The purpose of regulating these overseas investments is to reflect that it is a privilege for overseas persons to own or control sensitive New Zealand assets. Overseas persons must obtain consent through the Overseas Investment Office (OIO) before they can invest in New Zealand's sensitive land, significant business assets and fishing quota. Proposed investment must meet criteria set out in the Act related to the relevant type of investment. The OIO, or Ministers, assess applications to make sure they meet the criteria and consent is granted if all of the criteria are met. Consent is granted subject to conditions that are monitored to ensure compliance, and enforcement action can be taken for non-compliance.

Ministerial Directive Letter to the Overseas Investment Office

The Directive Letter directs the OIO on the Government's policy approach to overseas investment in sensitive New Zealand assets and the relative importance of benefit factors for different types of overseas investment in sensitive land, as well as other matters. The new Directive Letter came into force on 15 December 2017 and applies to all applications currently being assessed after that date by the OIO and any new applications received.

Forestry Rights Registration Act

The Forestry Rights Registration Act 1983 allows a proprietor of land to grant a right to "establish, maintain and harvest" or to "maintain and harvest" a crop of trees on that land. The FRRRA states that these rights are deemed to be profits à prendre and may be registered under the Land Transfer Act 1952.

Profits à Prendre

Investment in forestry can also take place through *profits à prendre* over forests. A *profit à prendre* confers a right to take part of another's land. It creates an interest over the parcel of land which is binding on future purchasers of the underlying land. It also provides the holder with rights that come from having an interest in land, such as the right to bring an action in nuisance where there is substantial interference with their enjoyment of the *profit à prendre*. However, it does not confer a right to exclusive possession. Things that are part of the land, and capable of being owned, may be the subject of a *profit à prendre*. Some examples are *profits à prendre* to cut and remove timber or flax and remove parts of the soil such as coal, gravel, sand clay or stone.

Crown Forest Licences

Some of New Zealand's exotic forests are subject to Crown Forest Licences under the Crown Forests Assets Act 1989. Licences were granted to the buyers of Crown forests when the Crown's forest assets were sold in the early 1990s. A Crown Forest Licence allowed the Crown to sell the forest (the trees), while retaining ownership of the underlying land in case the land was the subject of a claim in the Waitangi Tribunal.

2.3 What is the policy problem or opportunity?

As outlined previously, the Government has introduced a Bill to amend the OIA. The primary intent of the Bill is to provide a pathway to allow overseas persons to buy sensitive land that is residential land in certain circumstances. For example, individuals not “ordinarily resident in New Zealand” can buy such land if they hold an appropriate visa and demonstrate they have a commitment to reside in New Zealand or intend to add to the supply of housing.

The Government is also seeking to make further changes to the OIA to address two issues related to how forestry land is treated under the Act prior to the entry into force of the Comprehensive and Progressive Agreement for Trans Pacific Partnership (CPTPP):

1. Forestry rights are currently exempted from screening as an ‘overseas investment in sensitive land’ under the OIA (though they may be screened as a significant business asset e.g. if they are over \$100m). This is despite the fact that forestry rights can grant a high degree of control over large parcels of New Zealand land, often for long periods of time, in a manner that would be comparable to a lease of such land, which are currently screened.
2. Stakeholders provided strong feedback that the current regime is time consuming, uncertain and costly to comply with, and, due to the nature of investments in existing commercial forests, can be difficult for an overseas investor to demonstrate the benefit to New Zealand that is likely to be “substantial and identifiable”, which is necessary to obtain OIA consent.

Forestry is an important sector for New Zealand. In the year ending June 2017, forestry accounted for around 3% of New Zealand’s GDP and is New Zealand’s third largest export product earner behind dairy and meat. Forestry also has environmental and social significance.

The Government has committed to a planting programme of one billion trees over the next 10 years. The programme seeks to encourage regional economic growth, build more resilient forestry and wood processing industries.

The current screening regime for overseas investment in forestry is not well aligned with this proposal in that the existing tests are seen to deter investors.

Certain types of *profits à prendre* can involve similar use of land to that permitted by a lease (including *profits à prendre* over forests that are created outside of the Forestry Rights Registration Act). *Profits à prendre* are also interests in land that provide the rights holder with some property rights in relation to the land (e.g. rights are binding on future purchasers of the underlying land, and the right to bring an action in nuisance). This creates concerns around avoidance and a lack of regulatory coherence.

2.4 Are there any constraints on the scope for decision making?

Any consideration of reforms to make it easier for overseas persons to obtain OIA consent was limited to forestry.

Only options that comply with New Zealand’s obligations in existing trade and investment agreements have been adopted. Australian investors will be exempted from the new screening requirements for forestry rights and other *profits à prendre*.

2.5 What do stakeholders think?

The following agencies were consulted: Land Information New Zealand; Ministry of Justice; Ministry of Foreign Affairs and Trade; Ministry of Primary Industries; Te Puni Kōkiri; Ministry for the Environment; Department of Conservation. The Department of the Prime Minister and Cabinet (Policy Advisory Group) was informed.

There was previously targeted consultation undertaken with Māori and iwi groups that would likely be impacted by the proposal to include forestry right under the OIA. Submissions were received from a number of these groups as well as other interested stakeholders such as domestic wood processors, forest owners and investors.

At a high level, feedback from Māori and iwi groups included:

- Concerns that the consultation process was too short and did not give rise to meaningful or informed discussions about the proposal
- Concern that not all affected groups were invited to make submissions or attend hui
- Concern that the proposal to include forestry rights into the OIA screening regime would deter much needed overseas investment in forestry
- Concern that the proposal would affect the value of forestry investments by iwi/Māori and their ability to realise their investments
- An appreciation for the small window of opportunity to include forestry rights in the OIA and the need to weigh up that risk against the uncertainty that the proposed regime may impose
- A preference that protections from the risky overseas investment be built into mechanisms other than changes to primary legislation.

Forest growers, investors, forestry rights holders and wood processors provided written submissions to the Treasury highlighting their frustrations with the current screening regime for leasehold and freehold land under the OIA. At a high level, this feedback included:

- A key difficulty for the forestry sector is that the net benefit test, and/or the way it is applied, is not fit for purpose, given unique characteristics associated with the asset class
- Unlike farmland, there is limited scope for overseas forestry owners to invest further to create significant economic benefits from their ownership of forestry, given forests are mature assets
- As the counterfactual test is currently applied, and the benefit test assessed, it is becoming increasingly difficult for overseas persons to obtain consent to purchase freehold land used for forestry purposes
- The current tests lend themselves to uncertainty and delay, which impacts liquidity and potential investors are deterred
- For an acquisition of a well-managed forest, it can be very difficult to satisfy a number of the existing criteria, as for an existing forest there is little development or additional employment expenditure that can be undertaken.

Domestic wood processors have raised the concern that under current settings there is not a sustainable log supply for domestic wood processors, which risks the security of timber supply for local markets. They note that woodlots are being purchased by overseas persons specifically for the export of timber to their home country and there is no opportunity for local discretion or opportunity to bid on them. The Wood Processing and Manufacturers Association has for some time raised the issue that higher trade barriers for more highly processed products make New Zealand processed and manufactured wood product exports less competitive, and discourage New Zealand exporters moving up the value chain from raw logs.

The feedback provided has been considered when developing the Options.

Section 3: Options identification

The following section examines the two sets of issues with respect to meeting the policy objectives.

Amending the current screening process for all of forestry land

The first set of issues considers different components of the forestry land screening regime that could be amended

- A. Basis on which forestry transactions are assessed
- B. How should different types of forestry investments be screened

Including forestry rights and other profits à prendre under the Overseas Investment Act

This set relates specifically to the treatment of forestry rights or other profits à prendre under the OIA

- C. Types of *profits à prendre* under the OIA
- D. Size and duration of forestry rights screened under the OIA

We identify and discuss options to address each issue, and then evaluate these options against the following criteria:

Criteria

- **Policy effectiveness:** is aligned with other forestry policy, as well as broader economic, social and environmental goals. Maintains consistency with overall purpose of the OIA that investing in New Zealand is a privilege, minimises any unintended consequences and creates screening consistency where appropriate.
- **Minimising compliance and administration costs:** there is more certainty for applicants about what tests they need to meet, the regime is easier for OIO to operationalise and there is reduction in the time taken to make decisions.

II. Amending the current screening process for all forestry land

A. Basis on which forestry land transactions are assessed

Issue: Applicants for consent to acquire sensitive land must satisfy a number of criteria. In addition to the core criteria (the investor test), consent will only be granted if either:

- i. In the case of an individual, the relevant overseas person intends to reside in New Zealand indefinitely
- ii. In the case of a non-individual (i.e. a business), all the individuals with control of that overseas person are New Zealand citizens, ordinary New Zealand residents or are intending to reside in New Zealand indefinitely, or
- iii. The transaction will, or is likely to, benefit New Zealand or any part of it or group of New Zealanders (and if the land is non-urban land over 5 hectares, that benefit is substantial and identifiable), as assessed against 21 factors

Most transactions will seek approval under (iii) by demonstrating substantial and identifiable benefit to New Zealand against a selection of the 21 factors. The factors are a combination of economic, environmental and other factors.

Stakeholders have submitted that the current regime is time consuming, uncertain and costly to comply with, and, due to the nature of investments in existing commercial forests, often very difficult for an overseas investor to demonstrate the “substantial and identifiable” benefit to New Zealand necessary to obtain OIA consent. The OIO have confirmed that forestry applicants can find it difficult to demonstrate the current benefit to NZ test for already high performing plantations, however they confirm that by far the majority of applications are approved.

The following provides information on forestry applications approved by the OIO or Ministers in the 2013 to 2017 calendar years. Some of the applications could involve consideration of very small changes in ownership or control but are included for completeness.

Year	Approved		Withdrawn		Declined	
	Consents	Range (ha)	Consents	Range (ha)	Consents	Range (ha)
2013	12	23 – 80,074	-	-	-	-
2014	17	10 – 1,790	-	-	-	-
2015	13	224 – 14,101	1	332 – 739	-	-
2016	13	10 – 151,884	2	174	-	-
2017	7	83 – 32,889	1	28,380	-	-

Option A1: Forestry land investment must demonstrate “substantial and identifiable” benefit – **STATUS QUO**

- Under this option the current regime would continue and forestry investment must continue to meet the screening test of a substantial and identifiable benefit to New Zealand from the investment.
- This is consistent with the screening regime applied to other non-urban land over 5 hectares.
- There is a broad range of pathways available for applicants, as they can demonstrate benefit using different combinations of the 21 factors.
- Stakeholders hold the view that it is challenging for forestry investments to meet given the transactional nature of the investment. This could impact on achieving the government’s forestry objectives.

<p>Option A2: Forestry land investment must demonstrate “benefit to New Zealand”</p>	<ul style="list-style-type: none"> • Under this option the legislation would be amended so that forestry investment was no longer required to demonstrate a “substantial and identifiable” benefit but rather meet the lesser test of demonstrating benefit to New Zealand. • This is the test required for other types of sensitive land under the OIA (urban, and non-urban of 5 hectares or smaller) and is likely to be easier for forestry investors to demonstrate. However, investors may consider that it would still be difficult for well-run forestry blocks to demonstrate benefit. • May result in screening times similar to those applications for sensitive land that are subject to the same test by the OIO. • Retains regulatory coherency.
<p>Option A3: A bespoke set of benefit factors are put in place for forestry investment.</p>	<ul style="list-style-type: none"> • A bespoke set of benefit factors is created to assess forestry land investment applications. Under this option benefits with specific applicability to forestry would be available for investors to apply on. • Could be combined with either Option A1 or A2. • May result in screening times similar to those under the current benefits test. • Creates more complexity for the OIO because they are operating different benefits factors for different types of rural land.
<p>Option A4: Forestry land investment that satisfies a set of mandatory pre-conditions would not be subject to the benefits test.</p>	<ul style="list-style-type: none"> • Under this option forestry investment would be considered to meet the benefits screening test if it met an alternative approach whereby investors are required to satisfy a number of mandatory requirements. If the requirements are met then the investment is approved. • The criteria could be placed in primary legislation or an alternative approach would be to define the areas to look at through the criteria in the primary legislation but provide further detail about how it is assessed in regulation. • Provides a more certain pathway for investors. The more black and white the requirements are, the less verification required by OIO and the screening times are likely to be shorter. • Forestry land would be subject to a different screening regime than for other types of land, reducing regulatory coherency. • Flexibility in the regime is maintained and no one is made worse off as investors for whom the mandatory requirements are not appropriate could elect to use the existing benefits test.

Option A4 has been adopted.

Option **A4** provides:

- *Policy effectiveness*: this approach is most aligned to the Government’s objectives of significantly growing the forestry sector through the one billion trees programme. As forestry is currently dominated by overseas investment (up to 70% of plantations are overseas owned) it is important that the screening regime is supportive of overseas investment and does not place unnecessary barriers on this. This option aims to sets a base requirement for forestry investment to maintain current environmental and conservation outcomes, and continuing to recognise it is a privilege for overseas persons to own sensitive New Zealand assets. There are however risks that this option may provide lower environmental and conservation protection than under the current regime as there will no longer be a requirement to demonstrate benefits (biodiversity, historic, public access and recreation). A mandatory list that provides certainty does remove decision making discretion.
- *Minimizing compliance and administrative costs*: given the timeframe available it has been difficult to definitively assess the reduction in compliance and administrative costs that are likely to be saved from the status quo. In the short to medium term there may be delays caused by implementing a new regime. In general, the more black and white the mandatory criteria are the less verification OIO are required to do, the more streamlined the application process should be. There will however be a need to increase monitoring and compliance work.

B. How should different types of forestry investments be screened

Issue: Under the OIA, the acquisition of an interest in land by an overseas person is screened if the land is classified as sensitive land. This includes interests in rural land of more than 5 ha. Freehold and leasehold investments are screened. However, easements and *profits à prendre* (a right to take some part of the soil or the “natural produce” of the land such as minerals, timber, or flax) are “interests in land” but are currently specifically exempted from screening as an “overseas investment in sensitive land”.

Forestry rights (often called cutting rights, and defined under the Forestry Rights Registration Act 1983) are a type of *profit à prendre* and are currently not screened. Forestry rights can grant a high degree of control over large parcels of New Zealand land, and the associated domestic wood supply, often for long periods of time, in a manner that would be comparable to a lease of such land.

<p>Option B1: All forestry land investment is subject to the same screening regime</p>	<ul style="list-style-type: none"> • All types of forestry land would be subject to the same screening regime under the OIA and on the same basis e.g. size, length of time and assessment criteria. • Creates coherence within forestry land screening for investors.
<p>Option B1a Investment in forestry rights are subject to the same screening regime as other types of forestry land investment but with a higher hectare threshold.</p>	<ul style="list-style-type: none"> • Creates a degree of coherence within forestry land screening. • A higher hectare threshold is adopted for forestry rights compared with that for freehold and leasehold land, to reflect commercial realities of this type of right.
<p>Option B2: Investments in forestry rights are not screened – STATUS QUO</p>	<ul style="list-style-type: none"> • There is an inconsistency between forestry rights and leases.

Preferred – Option B1a: On balance, we favour Option B1a as best meeting the assessment criteria.

We consider that Option **B1a** provides the best balance against the criteria:

- *Policy effectiveness*: Forestry rights over large areas are very similar in intent to leases which are already subject to screening under the OIA, therefore adopting this approach creates greater regulatory coherence. However, there are a significant number of forestry rights in existence, some which are very small in size where the rationale for screening under the OIA is limited given their value and impact on the amount of NZ assets owned overseas hence Option B1a is preferred over B1.

- *Minimizing compliance and administrative costs:* Making all forestry rights subject to screening by the OIO will significantly increase the compliance burden on sellers of small forestry rights and is likely to discourage overseas investors from this part of the market. Adopting a different screening threshold for forestry rights based on size or length would be more appropriate.

III. Including forestry rights and other profits à prendre under the Overseas Investment Act

C. Types of profits à prendre under the OIA

Issue: The recent changes to screening of non-urban non-forestry land under the most recent Ministerial Directive Letter to the OIO may increase investors' incentives to invest in alternative interests in land that avoid OIO screening, such as *profits à prendre*.

A *profit à prendre* confers a right to take part of another's land. It creates an interest over the parcel of land which is binding on future purchasers of the underlying land. It also provides the holder with rights that come from having an interest in land, such as the right to bring an action in nuisance where there is substantial interference with their enjoyment of the profit à prendre. However, it does not confer a right to exclusive possession. Things that are part of the land, and capable of being owned, may be the subject of a *profit à prendre*. Some examples are rights to cut and remove timber or flax and remove parts of the soil such as coal, gravel, sand clay or stone.

Crown Forestry Licences would not be captured because the Crown Forests Assets Act expressly provides that a Crown Forest Licence does not transfer to, or confer on, the licensee an estate or interest in land.

<p>Option C1: All types of <i>profits à prendre</i> are included under the screening regime</p>	<ul style="list-style-type: none"> • Would be implemented by removing the current exemption provided in the Act for profits à prendre so that all would be screened. • Would be over-inclusive in capturing profits à prendre that are not connected to the main use of the land.
<p>Option C2: Include those <i>profits à prendre</i> that relate to the dominant use of the land – including statutory and non-statutory forestry rights.</p>	<ul style="list-style-type: none"> • Would allow for the screening of forestry rights and other <i>profits à prendre</i> where overseas investors are acquiring <i>profits à prendre</i> relating to the dominant use of the land and should be the subject of screening by the OIO. • Adopts a policy principles approach to including all forestry rights that fall within the intent of the reforms regardless of their statutory basis. <i>Profits à prendre</i> that are not of policy concern would be exempted from screening.
<p>Option C3: <i>Profits à prendre</i> other than forestry rights remain exempt from screening under the OIA</p>	<ul style="list-style-type: none"> • Would provide a certain approach to the screening regime without requiring interpretation of what other <i>profits à prendre</i> are subject to the screening regime.

Preferred – Option C2: On balance, we favour option C2.

We consider that Option C2 provides the best balance against the criteria:

- *Policy effectiveness:* this approach best meets the policy objectives of closing off ways to avoid OIA screening by having forestry rights as well as all other types of *profits à prendre* that relate to the dominant use of the land subject to screening under the OIA. However there is limited data available on profits outside of forestry to understand how much of an impact this may have on investment.
- *Minimizing compliance and administrative costs:* limiting the *profits à prendre* captured by the screening regime to those relating to the dominant use of the land will avoid over-inclusion of *profits à prendre* and reduce the number of applications relating to *profit à prendre* OIO will have to assess.

D. Size and duration of forestry rights to be included

Issue: Including forestry rights within the OIA regime requires a balance to be struck between ensuring that significant investments are subject to review but not creating an unduly high regulatory burden for small operators and investors.

Many submitters argue that the proposed 50 hectare minimum size is far too small, as it would expose small, barely commercial forestry rights agreements to costly OIO approval processes. Submitters typically suggest that forestry rights should be exempt from OIO screening if they were smaller than either 500 or 1,000 hectares.

Forestry right sizes are skewed. As the table below shows, about half of forestry right agreements are for areas of 80 hectares or more, capturing over 95 percent of the area held in forestry rights, while the 5 percent of forestry rights representing agreements of more than 1,000 hectares capture almost 70 percent of the area held in forestry rights.

The table is based on the area of the legal parcel of land. This means that, for example, if the same investor owns forestry rights over six 200 hectare parcels of land that are all adjoining, this will show as six entries in the “100-250 ha” row (and not one entry in the “Over 1000 ha” row).

For consistency between similar interests in land the size and duration thresholds for forestry rights under the FRRA (“statutory forestry rights”) and other *profit à prendre* over forestry - i.e. outside of the FRRA – (“non-statutory forestry rights) would be the same.

Table 1: Distribution of forestry rights registered with Land Information New Zealand

Forestry right size	Number of forestry rights registered	Total Area (ha) in this Size Range	Matching Potential Threshold	Percentage of Rights Captured at this Threshold	Percentage of Area Covered at this Size threshold
Less than 50 ha	2428	45,897	zero (5 ha)	100.0%	100.0%
50 - 100 ha	872	63,853	50 ha	57.8%	97.9%
100 - 250 ha	1116	180,560	100 ha	42.6%	95.1%
250 - 500 ha	606	211,804	250 ha	23.2%	86.9%
500 - 750 ha	192	115,888	500 ha	12.7%	77.4%
750 - 1000 ha	100	85,496	750 ha	9.3%	72.1%
Over 1000 ha	303	1,514,119	1000 ha	7.6%	68.3%
No Area / Shared Area with another Title	134				

Source: Land Information New Zealand

<p>Option D1: Forestry rights has the same 5 hectare screening threshold as freehold and leasehold land and other profits à prendre</p>	<ul style="list-style-type: none"> The screening regime for forestry would not differentiate based on area of land. Will capture nearly all forestry rights for screening which will place a high compliance burden on small investments, stakeholders are concerned that this will make some transactions uneconomic. Would likely have an impact on overseas investment in forestry rights. Will significantly increase the amount of screening undertaken by the OIO.
<p>Option D2: Forestry rights greater than 50 hectares in size is subject to screening under the OIA (non-forestry profits à prendre remain subject to the 5 ha threshold).</p>	<ul style="list-style-type: none"> This threshold would capture almost 60 percent of all rights issued, and 98 percent of the land subject to registered forestry rights. Would likely significantly increase the amount of investments screened through the OIO. Could deter overseas investment in forestry rights.
<p>Option D3: If an investor acquires 1000 hectares or more of forestry rights within a calendar year then it is subject to screening under the OIA (non-forestry profits à prendre remain subject to the 5 ha threshold).</p>	<ul style="list-style-type: none"> This threshold would capture a small percentage of forestry rights, but the majority of land area subject to registered forestry rights. Would capture investment in significant sized forestry blocks and investors that are investing in multiple blocks during a particular period.

Preferred – Option D3: Option D3 has been adopted.

- Policy effectiveness:** The range of options considered all require different levels of trade-offs between the number of rights captured, compliance costs, the likelihood of unintended consequences occurring through the changes and coherence with other forestry investments subject to screening by the OIA. Overall the policy intent is to create a more permissive forestry screening regime that is supportive of overseas investment while still making them subject to screening under the OIA. Setting the threshold at the same as freehold and leasehold transaction, or even adopting 50 hectares, is not likely to best facilitate the achievement of the overarching policy objective.

- *Minimizing compliance and administrative costs:* this option will minimise the number of forestry rights acquisitions to be screened under the OIA so will reduce compliance and administrative costs faced by owners and investors in smaller holdings and by the OIO in the number of applications they screen. OIO will need to further modify its current practices to monitor and enforce compliance with the 1000 ha per calendar year criteria.

Section 4 is intentionally omitted.

Section 5: Conclusions

5.1 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

The following is a summary of the options adopted to achieve the Government's objectives for amendments to the screening of forestry land and *profits à prendre* under the OIA:

1. The screening regime for forestry land will be amended so that forestry investors buying forestry freehold land, leases or rights are able to utilise a similar screening test, designed to protect existing benefits associated with the forest land being transferred.
2. Forestry rights will now be screened under the OIA however there will be a different hectare threshold than that for freehold and leasehold transactions – if an investor acquires 1000 hectares or more of forestry rights within a calendar year then it is subject to screening under the OIA.
3. *Profits à prendre* that relate to the dominant use of the land and that are of policy concern will be screened under the OIA.

Summary of costs and benefits of the preferred approach, compared to taking no action

Affected parties	Costs/Benefits	Impact	Evidence certainty
Overseas investors in forestry	<u>Benefit</u> – simplified approval regime. <u>Cost</u> – Forestry rights are now subject to screening under the OIA.	For those already subject to OIA likely reduced cost of developing application and time saving in OIO processing. For investments not previously subject to screening there will be costs to investors to comply.	Medium
Owners of forests	<u>Benefit</u> – investors are subject to a modified approval regime with greater certainty. <u>Cost</u> – Forestry rights are now subject to screening under the OIA.	Less administrative compliance with selling to overseas purchasers. For investments not previously subject to screening there will be costs to investors to comply.	Medium
Overseas Investment Office	<u>Cost</u> – Requirement to implement a new screening regime for forestry and additional screening required of forestry rights and other profits à prendre.	Cost of making the changes, processing, monitoring and enforcement are still being developed, as is the fee structure. The scale of any fiscal implications are still being estimated.	Low – in relation to what the cost implications are.

Section 6: Implementation and operation

6.1 How will the new arrangements work in practice?

Giving effect to the preferred option

Legislative process: The preferred options will be given effect to through primary legislation and regulation to provide further detail as needed.

Commencement: The intended commencement date for these amendments is at least ten days after receiving Royal Assent. The new screening requirements will not have a retrospective effect.

Education: The OIO will provide information to potential investors and other interested parties about the changes to the OIA as it relates to forestry and the screening of *profit à prendre*.

Role of the Overseas Investment Office

Once implemented, the OIO will hold the primary responsibility for the ongoing operation and enforcement of the new arrangements with respect to sensitive land.

To support the design and implementation of new screening, monitoring and enforcement models the OIO will need to update their current IT system to accommodate the increased volume of applications and to improve functionality. The OIO will likely need additional resourcing to undertake this expanded role. There are three key components of this expanded role:

Detailed screening regime: Applications for this pathway will be screened to ensure that the investments are limited to forestry and consideration will need to be given to the nature of any general conditions that should be attached to approvals under the streamlined forestry process. Applicants will need to be supported by appropriate education and guidance, and industry and others impacted by the changes will need to be made aware of the changes – amongst other things this will help support increased awareness and thus compliance.

Compliance and monitoring regime:

OIO need to develop a targeted compliance and monitoring regime based on the final qualifying criteria and any other expectations that may be set by the Minister through the Directives letter. OIO will need to gather intelligence of industry activity to help identify non-compliance. The compliance and enforcement activity will need to provide confidence that transactions do not breach the screening regime, and that practices aimed at avoiding or undermining the screening process are understood and, as far as practicable, accounted for in the design of the streamlined assessment process, monitoring and enforcement.

Enforcement regime: In order for the integrity of the OIA regime to be maintained, the OIO must have the tools and resources available to investigate possible breaches. Monitoring and enforcement will need to take into account the more flexible nature of the forestry regime under the OIA and this will generate some complexity in the Regulators role.

6.2 What are the implementation risks?

As noted, this analysis has been prepared under very tight timeframes. The Government has also indicated that it wants this regime to come into effect relatively quickly. As a result, there are several implementation risks. These include:

- some of the design choices may have unintended consequences. For example, there is limited information about the type or quantity of profits à prendre that might be captured under the new screening regime or any conflicts that might be created with other regulatory regimes, and the criteria against which forestry applications will be assessed have been developed with limited consultation with industry and other stakeholders.
- the OIO will only have limited time to operationalize the policy alongside having to also implement changes to screening of residential housing purchases (this will involve recruiting and training staff, designing application forms and systems, and upgrading IT systems);
- there could be a lag in forestry investments while applicants assess the new screening regime and how to comply with it.

- limited time to educate investors and others about the inclusion of forestry rights and the new screening approach to forestry land.

Where possible, the OIO will seek to mitigate some of these risks by commencing the work required to operationalize the policy as soon as possible. Implementation within the proposed 10 days presents significant risks, in particular when being done alongside the other changes to the OIA.

Preliminary analysis indicates that the OIO expects to manage the set-up costs for this proposal from within the OIO's existing funding. The OIO is assessing costs associated with screening forestry rights, creating a new test for forestry investments more generally, and designing and implementing an appropriate approach to monitoring and enforcement. Costs of processing applications and monitoring conditions are expected to be recovered from applicants. There is a potential need for ongoing funding for enforcement costs as these cannot be met from third party fees as set out in the current fees guidelines.

Section 7: Monitoring, evaluation and review

7.1 How will the impact of the new arrangements be monitored?

The OIO will monitor the revised regime through the applications it receives, the investments approved, as well as information it gathers through enhanced compliance, monitoring and enforcement functions.

Enhanced compliance and enforcement functions will be one mechanism which the OIO can use to monitor whether the revised regime is having its intended effect.

It will be harder to evaluate, particularly in the short term, whether there will be broader system-level impacts from this policy around the amount of overseas investment being made in forestry and the impact this is having on the government's objectives for forestry.

7.2 When and how will the new arrangements be reviewed?

It is intended to undertake a review of the changes two years after they come into effect to assess whether the approach adopted is having the intended result.