



Submission to:

Overseas Investment Act Reforms

The Treasury

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## Overseas Investment Act: Including forestry rights as sensitive land

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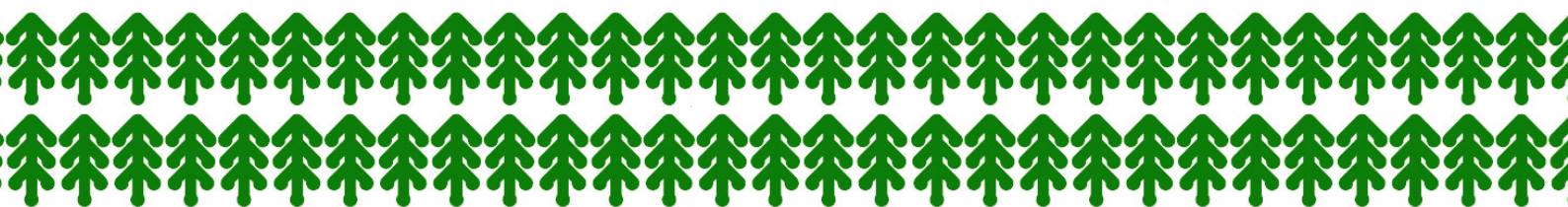
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## Introduction

1. The New Zealand Forest Owners Association Incorporated (FOA) is the representative membership body for the commercial plantation forest growing industry. FOA members are responsible for the management of approximately 1.2 million hectares of New Zealand's plantation forests and more than 80% of the annual harvest.
2. The Forest Grower Levy Trust (FGLT) is the body responsible for collecting the harvested wood products levy from forest growers. Forest growers via the FOA and the NZ Farm Forestry Association (FFA) manage the levy funds allocated to industry good projects by the Trust.
3. Investment by the industry via the harvested wood products levy, in research and technology, fosters innovation in the plantation forestry sector. This is reflected in the commitment of the FOA and its members to the highest standards of sustainable silviculture, environmental practice and workforce safety.
4. FOA is submitting on behalf of our national membership. While we have consulted internally, we wish to express disappointment in the extremely short submission period provided on what is for the industry a very important issue, and also the fact that we only received notification of this third-hand. At the time of preparing this submission we had not received any formal notification that this process was underway.

## Comments on Forestry Rights Registration Act 1983

5. The Forestry Rights Registration Act 1983 (the FR Act) is an exemplary arrangement that doesn't need fixing.
6. The FR Act was promoted and largely drafted in 1983 for a group of senior foresters frustrated with the complexity of leasing land to grow commercial tree plantations. The FR Act has been instrumental in the establishment of many hundreds of thousands of commercial plantations in New Zealand by making it a simple process to legally separate ownership of trees on land from the land itself. The defining features of the Act are:
  - a. Its simplicity – it is only eight sections long
  - b. There is no need for a formal boundary survey. Good clear maps are a low-cost alternative for Forestry Rights (FRs or cutting rights) registered on land titles under the FR Act
  - c. It is registerable on the land title giving notice to anyone dealing with the land of the FR encumbrance
  - d. It does not create any interest in the land itself but is a profit-à-prendre

## Comments on the Overseas Investment Office

7. The Overseas Investment Office (OIO) is currently a serious impediment to legitimate and desirable investment.
8. The experience of our members with the OIO has been a long way from desirable. Its process has been unreasonably protracted, high cost, inflexible and lacking sufficient policy clarity. The FOA has been involved in a number of meetings with those having to negotiate the tortuous process and has consistently made these points previously. Application processes are:
  - a. Lengthy (more than 12 months or longer in some cases)
  - b. Expensive – often more than \$100,000 in OIO fees and legal/consultant costs
  - c. Uncertain in outcome. For forestry the counterfactual test is difficult to meet in many cases as a similar domestic investor is typically hypothetical because the sums of money involved and being tied up for decades requires pockets of the depth usually only found offshore.
9. The OIO gives effect to the Overseas Investment Act 2005 (the OIA). Section 3 of the OIA specifies the purpose of the OIA is ‘to acknowledge that it is a privilege for overseas persons to own or control sensitive New Zealand assets ...’ In the context of the Ministerial Directive Letter and recent government policy statements, as outlined below, it appears by a focus on cutting rights, the government wishes to extend this stated purpose of the OIA to a misplaced and quite inappropriate mechanism for what it perceives will provide for the needs of domestic timber processors.

## Our Submission

### A. Cutting rights are an arrangement that needs encouragement not impediments

10. If Government was looking for a mechanism which facilitated capture of the benefits of foreign investment, and hard cash that New Zealand is short of, while still retaining control of the land, there is no need to look further than cutting rights as a model solution.
11. Unlike purchase of land by an overseas investor, cutting rights arrangements with an overseas investor necessarily involve a partnership with a local landowner. They are almost always for a single rotation after which the domestic landowner is free to determine whether they wish to repeat the arrangement, modify the terms, or they have sufficient capability to continue alone.

## **B. Forestry rights allow the separation of land from produce and long-lived forest assets**

12. A transaction in forests under FRs can be separated from a transaction in land. This is beneficial for forests on Māori land where the land is not for sale and not all investors in trees wish to be investors in land. It also improves liquidity.
13. Conversely, a perverse outcome could occur. Previously, overseas investors could have entered into a less favoured cutting rights agreement to avoid what they knew would be a protracted and expensive process if they had opted to apply to purchase the land. The suggested inclusion of cutting rights into the OIO regime, in the form proposed, puts applications for cutting rights and land purchase at the same level of difficulty, and could therefore discourage both forms of investment.

## **C. Introducing such change now on the basis that it might be needed in the future is unjustified**

14. The concern that if cutting rights are not included in the OIA now then finalisation of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) will preclude the ability to introduce it at a later date is acknowledged. This would be a legitimate concern if there were reasonable grounds for wanting to introduce such a change, or the pros and cons were uncertain. We do not consider this is the case. There are no reasonable grounds to expect that the current lack of need for including cutting rights will change.

## **D. Including cutting rights in the OIA is a solution in search of a problem**

15. In many areas of New Zealand, including some of the key areas in need of regional development such as Northland and the East Coast, we already know that capital and expertise is lacking. There are no viable alternatives, including amongst local processors, to contemplate cutting rights on the scale needed to secure supply.
16. An example currently exists of a foreign investor using the cutting rights option to build a pool of forests supplying logs which can then be managed in a way that smooths supply to the market and thus also ensures that the timber is harvested at an optimal age for local processors to utilise.
17. Similarly, we are aware of negotiations involving a foreign investor to plant forests as a second crop on cutover Māori land returned to the iwi. Inclusion of cutting rights in the OIO process will almost certainly kill off these initiatives.

## **E. Domestic landowners will be the group most badly affected by this change**

18. Foreign investors have global options. The group that will be most negatively impacted by this will be domestic landowners – notably farmers and iwi who have an interest in establishing

trees, but need help with financing and expertise. Requiring such investment to go through the OIO will immediately reduce the value of a forest asset suitable for such an arrangement.

#### **F. Government policy goals will be put at risk**

19. Tree planting, and specifically fast growth plantation forestry, has been identified by numerous independent authorities as a fundamental requirement of meeting New Zealand's climate change mitigation goals.
20. In particular, the beneficial role of plantation forestry was identified by the then Parliamentary Commissioner for the Environment, Dr Jan Wright in her 'Climate Change and Agriculture' Report of October 2016, and similarly by the Globe-NZ commissioned Report 'Net Zero in New Zealand' in March 2017.
21. It is also widely recognised that forestry is well suited to erosion control and regional employment. NZIER in March 2017 reported the value of plantation forestry in ecosystem services, such as erosion control and enhanced water quality, could approach \$10 billion annually.
22. The challenge of achieving the government goal of a billion trees planted in ten years is one that the industry wants to help government achieve, but it is also one that is already ambitious. This proposal will immediately reduce the level of new planting that might otherwise have been possible, and it will also send a negative signal to domestic parties who might have had an interest in developing forestry.

#### **G. Restraint on Free Trade**

23. The Treasury invitation for submissions requires those submissions to assist in the development of policy in the context of providing transparency and certainty for an entry of New Zealand into the CPTPP. The government may consider comprehensive trade benefits in the CPTPP will outweigh the cost of any potential market access issues which may arise as a result of imposing restrictions on investment in New Zealand forestry through incorporation of cutting rights sales into the OIO regime.
24. It should also be noted that of the current top-ten forest product export destinations for the New Zealand industry, only three; Australia, Japan and Viet Nam, are among the 11 participants in the CPTPP.
25. While we have no knowledge or evidence that the extension of cutting rights sales into the OIO would be connected in a negative manner by China or India in impending negotiations with these two countries over a transition to an alternative log fumigant to methyl bromide, our industry strongly makes the point that this log trade is absolutely vital for New Zealand and it is

imperative that New Zealand is in a strong negotiating position with China and India in this matter.

#### **H. Uncertainty created by inclusion**

26. Cutting rights derive from the FR Act and therefore are easily definable and categorised. However, the legal bright lines which apply to land ownership in the OIO context are not obvious in relation to cutting rights. Contract law allows all sorts of arrangements to be reached which could approximate cutting rights as defined in the FR Act, but which will fall outside the strict terms of the FR Act. There is no doubt were these options to be explored the government would wish to broaden the scope of what cutting rights are, to close what it would perceive as 'loopholes'. Potentially very protracted investor and forest industry uncertainty would continue while the issues awaited resolution by legislation or litigation. This uncertainty would not be healthy for our industry or New Zealand.

#### **I. The proposal simplistically equates land and cutting rights**

27. The proposal as circulated clearly and specifically targets cutting rights, and in the absence of any explanation to the contrary, directs the OIO to consider a cutting right application and a land purchase application on the same basis. This would not make sense. As outlined elsewhere in this submission, the intrinsic nature of cutting rights is a partnership of domestic landowner and New Zealand rights holder into which all forms and terms of domestic arrangements are made. These options would not be possible, or would be most unusual, under a land purchase agreement.

#### **J. Foreign investor interest in purchasing cutting rights will be close to zero under this proposal.**

28. The time (up to a year), cost (up to \$100,000) and uncertainty of success involved with going through the OIO process is a significant enough impediment when the purchase also includes land. It will become prohibitive if also applied to the right to harvest small woodlots, particularly at the lower limit proposed in the Treasury document.

#### **K. The proposal creates a consequential contradiction of government policy on forestry**

29. On 28 November the Minister of Finance Hon Grant Robertson released a Ministerial Directive Letter (the letter) pursuant to section 34 of the OIA outlining the government's general policy approach to overseas investment and directing the OIO on the relevant importance of different factors under which it is responsible for considering overseas investment applications.

30. The letter contained a rural land directive, stating five criteria of 'high relative importance' for the OIO to consider (para 16).

31. The letter stated the rural land directive 'does not apply to land covered by the 'forest land' directive in paragraphs 18 to 19' (para 17).
32. The letter directed the OIO to consider two criteria as high relative importance for applications for forest land. The first was for applications which result in 'increased processing of primary products', derived from section 17(2)(a)(vi) of the OIA. The other criteria was for applications which would 'advance significant government policy or strategy', criteria derived from the Overseas Investment Regulations 2005.
33. On 29 November 2017 the Forestry Minister Hon Shane Jones issued a media statement (the first statement) emphasising a number of reasons why forestry expansion was important for the new government and how overseas investment in forestry finds favour with the government to achieve its planting goals. (Statement attached as Appendix 1).
34. The Forestry Minister Shane Jones issued another media statement (the second statement) on 20 December in which he said "*The ambitious one billion tree planting programme is one of the Government's cornerstone policies.*" One billion trees equates to about one million hectares of forest planting, albeit that half of this area is understood to include replanting of present forests as they are harvested, with the further qualification that the remaining area is to include so far unquantified non-harvestable plantings.
35. The letter and two statements can be taken together for it to be understood that it is government policy for an expanded tree planting programme, the success of that programme in part relies on overseas investment and that the letter is legal instrument to assist achieving that aim.
36. The letter separated rural land and forest land applications. The OIO considerations of high relative importance for investment in rural land related to 'jobs', 'technology', 'exports', 'participation by New Zealanders' and 'increased processing'. Only 'increased processing' was also included in the forest land list (Clause 19.1).
37. The OIO was therefore instructed to in a practical sense to separate the two categories of applications and consider applications for ownership or lease of forest land more sympathetically than it would for rural land since there were fewer factors of 'high relative importance' to take into account for forest land.
38. The Prime Minister Rt Hon Jacinda Ardern was quoted by Stuff on 20 August 2017 when she launched the Labour Party election campaign that climate change '*is my generation's nuclear free moment and I am determined that we tackle it head on*'.
39. This indicates the reference to 'reducing carbon emissions' in the statement is a 'significant government policy or strategy' relating to forest land as specified in 19.2 of the letter.

40. A measure of the significance of the plantation forest estate in sequestering carbon from the atmosphere can be perceived through the assessment by the New Zealand Greenhouse Gas Inventory that the volume of carbon in this estate in 2015 stood at 283 million tonnes, more than double the volume in 1990. In 1990, at the start of an extensive planting period similar to that now envisaged for the next ten years, the trees in the forestry sector were responsible for nearly halving New Zealand's total greenhouse gas emission volume.
41. The first statement refers to 'high-quality overseas investment' to help the government achieve its forestry goal.
42. Applications for overseas investment in New Zealand land are generally determined on the criteria being assessed against the merits of a particular application, as found in section 17 of the Overseas Investment Act 2005 and clause 28 of the Overseas Investment Regulations 2005. However, with applications for investment in forest land the merits of trees providing carbon sequestration to fulfil a government policy of 'high relative importance' are universal to all applications.
43. In other words, all applications for forest land investment meet this high relative importance criterion.
44. The letter therefore should be seen as a clear signal from the government, as a matter of significant policy, that the OIO will consider the carbon sequestration ability of trees as a high relative importance when considering all applications made by overseas investors in forest land.
45. In reviewing the forgoing, it is clear that to include forestry rights at this point as proposed would contradict the government's clear stated policy to rely on and encourage overseas investment in forest land. A muddled message would be received by potential overseas investors in plantation forestry in New Zealand.
46. Internationally as well, the government would be charting a course contrary to efforts to enhance afforestation, be it plantation or non-harvested, to enable countries to meet reduction of greenhouse gases targets under the Paris Agreement on Climate Change. The World Bank, in its June 2017 Report 'The Potential Role of Enhanced Bond Strategies in Forest Climate Finance', highlighted the lack of capital in many countries that would be necessary to facilitate large scale afforestation.
47. In summary, in late 2017, by statement and through giving effect to guidance provisions in the OIA through the letter, the government was encouraging direct overseas investment in the New Zealand plantation industry. Were it now, two months later, to extend the scope of the OIO to include a considerably lesser investment interest than that of ownership of forest land, then even potentially enthusiastic investors in our industry would be given good reasons to reconsider the stability and security of the New Zealand environment their investment would be exposed to.

## Summary

48. On the basis of the above arguments:

- lack of rationale
- contradiction with the recently announced Ministerial Directive Letter on forestry
- need for the cutting rights model to flourish
- negative impact on the forest sector and the governments' wider policy objectives

we strongly argue against implementing the proposal put forward by Treasury and reiterate that the inclusion of cutting rights in the OIO regime will adversely affect investment in the New Zealand forestry sector. We are aware of significant support for the views expressed here amongst other landowners, smaller woodlot owners, processors and iwi.

49. The submitter wishes to be heard in support of its submission.

## Note on making this submission public

50. The FOA is happy for this submission to be made public.



David Rhodes  
Chief Executive

## Appendix 1

*“Forestry Minister Shane Jones says overseas investment in forestry that brings genuine benefits to New Zealand’s economy and its environment will be welcomed by the Government.*

*Mr Jones says he is pleased with the inclusion of a Forestry Directive in the new Ministerial Directive Letter issued to the Overseas Investment Office, which sets out the Government’s policy approach to overseas investment in sensitive New Zealand assets.*

*“The inclusion of a specific directive for forestry recognises the importance of forestry to the New Zealand economy and regional communities,” Mr Jones says.*

*“As part of the coalition agreement, this Government has committed to an ambitious tree planting programme that will require a partnership between the Crown and the sector itself. High-quality overseas investment can certainly help us achieve this goal.*

*“Forestry, and the processing of forest products, are significant sources of employment in our regions and we want to build on that to get more people into a sustainable workforce.*

*“I’ve heard first-hand from the industry the value of good overseas investment and the Forestry Directive recognises there is a role for overseas investors to play. However, we want to encourage value-added wood processing to generate jobs and other benefits for our regions.*

*“The new directive for forestry directs the Overseas Investment Office to place high importance on increased processing of primary products and the advancement of the Government’s policies when assessing applications for consent.*

*“It also emphasises that Ministers expect the Overseas Investment Office to impose conditions on consent where appropriate – for example, a requirement for the overseas investor to enter into a supply arrangement with a local processor,” Mr Jones says.*

*The letter recognises that conditions imposed on forest land may need to be for longer periods given the often long-term nature of these investments.*

*“Forestry has an important role to play in many of the Government’s priority areas – enhancing regional development, improving water quality, reducing carbon emissions and creating jobs – and I’m looking forward to seeing the sector prosper in the coming years,” Mr Jones says.”*