

# Update on forest regulation in New Zealand

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Figure 1: Export logs at Port Chalmers, Otago

## Abstract

This paper summarises the current state of the Log Traders and Forestry Advisers legislation that has now been incorporated into the Forests Act 1949. It also discusses the further proposed amendments under the Forests (Legal Harvest Assurance) Amendment Bill that was introduced last year. Relevant parties are required to register by 6 August 2023. Having a compliance programme in place will be important given the various obligations in the reform that are entirely new to the sector.

## Regulation of log traders and forestry advisers

In mid-2020, while a Member of Parliament, Shane Jones introduced the Forests (Regulation of Log Traders and Forestry Advisers) Amendment

Bill. The Bill aimed to establish a registration system for log traders and forestry advisers, with a view to strengthening the integrity of the forestry supply chain and supporting continuous, predictable and long-term supply of timber for domestic processing and export.

This was part of New Zealand First's election deal with the coalition Labour Government and the Bill was rushed through, receiving Royal Assent by 6 August 2020. At the time, there were some allegations of undercutting of domestic producers by foreign buyers of New Zealand logs, although the Bill did not address price. Much of the Parliamentary debate focused on creating jobs in the sector in the regions.

During the course of its Parliamentary passage the Bill changed significantly. Despite the main purposes of the Bill described above, its operative provisions

were quickly watered down to the point that it is questionable as to whether it in fact achieves any of its purposes. Many have described it as a solution looking for a problem. What we now have is regulation in an area of commerce that was largely unregulated, where most of the business is between established and often very experienced and sophisticated parties.

The Bill was passed and resulted in changes to the Forests Act 1949, which had otherwise largely been repealed, together with the introduction of the Forests (Regulation of Log Traders and Forestry Advisers) Regulations 2022. The key requirements are as follows.

### Log traders are required to register

Under the legislation, a ‘log trader’ is any person who, in trade:

- buys New Zealand logs, whether after harvest or as trees to be harvested at an agreed time – whether or not the person intends to on-sell any of the logs
- exports New Zealand logs
- processes logs that the person has grown themselves, subject to a minimum threshold of 2,000 m<sup>3</sup> per annum.

The term also captures agents for any person doing the above.

Entities or individuals can register and the registration process involves confirmation of being a fit and proper person. This includes a criminal record check (on the individual, if the individual is to be registered, or the decision-makers within the entity if an entity is to be registered), and a declaration that the person has no relevant civil liabilities.

Once registered, the log trader would need to keep records of all log trading transactions that are entered into, and any disputes that have arisen. There are registration fees and levies involving a few hundred dollars.

There will be an obligation to complete an annual report covering the financial year ending 30 June by the subsequent 1 December, for provision to the Ministry for Primary Industries.

### Comment

In the author’s view, this legislation is unusual in that there are generally no restrictions on the sale of products that are not inherently dangerous or restricted. There is a more principled basis for this in addressing concerns about illegally harvested timber, including under international obligations, which is discussed below. However, as it currently stands, it is not at all clear how this will strengthen the integrity of the forestry supply chain. Given the large proportion of forests in foreign ownership (circa 75%), and the fit and proper person requirements under the Overseas

Investment Act 2005, one would also hope that there would be some recognition of those who had already met the OIO’s fit and proper person assessment.

There are also a few matters that are not clear from the legislation. For example, those buying a large volume of logs (even as principally for their own use) fall within the regime, although legislation to be passed indicates that the regime should cease to apply beyond the point at which the logs have received their first processing.

The jurisdictional extent of the regime is not clarified in the legislation, so requires the common law interpretation to apply as an overlay. Normally, common law requires that there be a sufficient nexus to New Zealand for New Zealand legislation to apply. When you apply these common law principles, a sale of logs to a party offshore that is not solicited within New Zealand would arguably not capture the foreign buyer.

However, the position remains to be tested and it would be useful if the position could be clarified through legislation or an exemption. For example, it appears that it may be a more practical outcome where the vendor needs to be registered, but once the logs have been sold in the foreign market by a registered seller the offshore purchaser need not be registered.

### Forestry advisers

There is also a restriction on providing any ‘forestry adviser service’ for reward unless the person is either authorised to provide the service or is exempt.

‘Forestry adviser services’ include the giving of advice in the ordinary course of business that relates to:

- the establishment, management or protection of a forest
- the management or protection of land used in connection with a forest
- the appraisal harvest, sale or utilisation of timber of other forest produce
- appraisal of a forest
- the advice on the application of the New Zealand Emissions Trading Scheme (ETS) regime to forest activities
- advice on the beneficial effects of forests (e.g. environmental and economic outcomes).

For forestry advisers, only individuals can register. This is also based on a fit and proper person assessment, as well as meeting criteria set by the regulations. The particular criteria include the following:

- holding a forestry-related qualification at NZQA Level 5 or above (or an overseas equivalent qualification), and having two or more years of experience providing forestry advice in New Zealand, or

- having at least five years of experience providing forestry advice in New Zealand (this will be the provision that will likely grandfather most existing advisers), or
- there is a possible discretion to register the person where the person has five years' experience in the sector, a diploma and has been supervised for two years.

As one might expect, consistent with other legislation there are exemptions for those acting in a professional capacity in a regulated occupation. These include real estate agents, accountants, lawyers and registered financial advisers acting in the course of their role.

Once registered, the person will appear on a public register. There are also registration fees and levies involving a few hundred dollars.

Similar to the above, there are obligations to keep records of advice given. In particular, this should cover who provided the advice and to whom, when the advice was given and any recommendations you made as part of the advice, as well as assumptions. The adviser will also need to meet the forestry practice standards when conducting business, when these are published, and comply with the code of ethics for forestry advisers.

### Comment

The following comments about the regime are made in relation to forestry advisers.

There is a requirement going forward for experience, specific qualifications and supervision of advisers. It is important to consider implications for succession within organisations, implications for diversity, client choice and capacity and efficiency. For example, it would appear important to promote diversity from the time of course intake and at recruitment, as well as among those who fulfil the supervisory role.

More broadly, this legislation has the character of consumer protection legislation. Comparable regimes such as the Consumer Guarantees Act 1993 and the Financial Markets Conduct Act 2013 allow sophisticated parties to opt out of the protections the regime provides and therefore reduce the associated bureaucracy. There are no opportunities for this provided for in the regime, even when many of the transactions covered will be between highly sophisticated and financially significant parties.

Finally, the jurisdictional reach is also difficult and the regime appears to capture advice within the broad legal umbrella of an organisation. In this regard, a number of New Zealand forestry



Figure 2: Mechanised felling Tokoiti Forest, Otago

organisations are ultimately managed by large offshore timber investment organisations (TIMOs). These entities provide advice from offshore and often have no physical presence in New Zealand other than a limited presence through a subsidiary that fulfils a direct property management role.

It will be important to consider the position of these offshore TIMOs in relation to registration requirements under the regime. These organisations may ultimately decide to give the advice solely through their New Zealand subsidiary, which may require some restructuring of agreements on the management side – or directly to their offshore clients.

## Timing

Log traders and forestry advisers have been able to register since 6 August 2022. An important date is approaching. From 6 August 2023 it will be an offence to operate without being registered and there is generally no other transition contemplated under the regime.

## Further reform

However, it should be noted that the log traders regime is subject to review. In a further step that did not receive much publicity, the Forests (Legal Harvest Assurance) Amendment Bill was introduced in June 2022. The submissions to the Select Committee closed during 2022 and its report was provided in mid-December 2022.

The proposed reforms aim to establish a new regulatory system to provide legal harvest assurance for the forestry and wood processing sector, with a particular focus on:

- assisting in the prevention of international trade in illegally harvested timber
- strengthening the international reputation of the New Zealand forestry and wood processing sector
- safeguarding and enhancing the market for access to New Zealand forestry exports
- reducing the risk that timber imported into New Zealand is sourced from legally harvested timber.

This does have a more principled basis. It is consistent with steps many other jurisdictions are taking to reduce the risk of trade in illegally harvested timber. For example, the US, Canada, the European Union, Australia, China, Vietnam, the Republic of Korea and Japan have similar laws.

The implications of this are that forest owners and others with the right to harvest ‘regulated timber’ will need to comply with the legal harvest information requirements when supplying timber to another person in trade. ‘Regulated timber’ would be broadly defined to include roots, stumps, branches and leaves.

Log traders, primary processors of timber and importers and exporters of timber products will need to register with the Ministry of Primary Industries and maintain a due diligence system to demonstrate that the timber they have obtained has been legally harvested. This includes harvesting in compliance with resource consents and laws relating to the use of and access to the land the timber is harvested from.

Care will need to be taken in this regard, as it may only emerge after the fact that there has been a breach of the resource consent in harvesting timber, which may have been technical or inadvertent, even if there had been a good faith intention to comply. It seems odd that timber could not be sold in those circumstances.

The implementation of this reform is some way off, with most provisions in the Bill only coming into force three years after it receives Royal Assent. However, the log traders’ provisions will be moved to fit within that regime, but be substantively reproduced as described above.

## Concluding remarks

With the August 2023 registration date fast approaching, organisations and individuals will need to make sure to get their registrations in place in relation to their log trading and forestry advising activities.

It will also be prudent for organisations to set up a compliance checklist and compliance calendar. This will ensure that they are in a position to prepare the reports and meet the other compliance requirements on an expedited basis.

As noted, particularly on the forestry adviser side, the regime has implications for succession, diversity and capacity within the workforce, so steps should be taken now to plan for that.

At a broader level, it is expected that forestry regulation will only continue to increase over the next few years with the amount of scrutiny that is placed on permanent carbon forests, the tension between the farm lobby and those planting forestry both for plantation and climate change reasons, as well as the implications of climate change. Watch this space.

## Disclaimer

This paper is a general summary and is not legal advice, which should be sought from a qualified legal adviser. Legislation and regulation in this area are changing and should continue to be monitored.

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