

In Confidence

Office of the Minister for Climate Change

Chair, Cabinet Environment, Energy and Climate Committee

Delegating the power to make certain forestry-related decisions to a subgroup of Ministers for up to 12 months over the COVID-19 response period

Proposal

1. This paper seeks agreement from Cabinet to delegate policy decision-making for a small number of applications for deforestation exemptions made under the Climate Change Response Act 2002 (the Act) to a subgroup of Ministers for a limited period. This will free-up Cabinet's workload over the COVID-19 recovery period whilst ensuring applicants receive decisions in a reasonable timeframe.
2. The delegated authority would be for a maximum of 12 months for forestry deforestation exemption applications under:
 - 2.1 section 60 of the Act for pre-1990 forests; and
 - 2.2 the new section 60A for post-1989 forests following the passing of the Climate Change Response (Emissions Trading Reform) Amendment Bill (ETR Bill).

Executive Summary

3. Exemptions under section 60 and 60A of the Act are a procedural matter that enable operational flexibility when deforestation (i.e. a land use change away from forest cover) is unavoidable or desirable.
4. The typical decision making process for granting an exemption can take up to several months, during which affected landowners are unable to make business or land use decisions on their land. This usually involves the Minister for Climate Change seeking approval to consult from the relevant Cabinet Committee, endorsement by Cabinet, returning to the Committee and Cabinet for policy decisions, and then approval to make the Order in Council by the Cabinet Legislation Committee.
5. To speed up decision making on exemptions, and to free up Cabinet's time for priority decisions during the COVID-19 recovery period, I recommend that a subgroup of Ministers be stood up to make policy decisions on section 60 and 60A exemptions for a period of 12 months. The subgroup would act in lieu of the initial Cabinet Committee and Cabinet stages, with the Minister for Climate Change going direct to the Cabinet Legislation Committee with draft Orders in Council following policy decisions by the subgroup.

Background

6. Pre-1990 forest¹ landowners can harvest and replant their forest without any liability or obligations under the Act. However, if these landowners deforest (i.e. change land use), they become mandatory participants in the New Zealand Emissions Trading Scheme (NZ ETS). The Act places obligations on them to report the deforestation and pay for the emissions associated with that deforestation.
7. Post-1989 forest landowners can voluntarily become participants in the NZ ETS. Once registered, they can earn New Zealand Units for carbon stored as the forest grows and must pay back units if the carbon stock in the forest decreases.
8. The Act provides the ability for Orders in Council to grant exemptions for pre-1990 deforestation liabilities and, when amended by the ETR Bill, will also provide that ability for post-1989 forest liabilities.

Section 60 of the Act provides exemptions for pre-1990 deforestation liabilities

9. Section 60 provides the power for the Minister for Climate Change to recommend an Order in Council to exempt landowners from certain liabilities or participation. These exemptions provide some operational flexibility for situations where deforestation is largely unavoidable or is desirable.
10. Since 2008, three section 60 exemptions have been granted for pre-1990 forestry. These cover:
 - 10.1 A partial exemption where the forest had been affected by a pest that significantly stunted the forest's growth and adversely affected carbon storage levels. As a consequence, the Crown's estimate of deforestation emissions was approximately 200% higher than the actual emissions;
 - 10.2 An exemption of up to 46 hectares to the owners of a block of Māori freehold land who were unable to access the 'under 50 hectares' exemption in the Act, due to the large number of owners of the block and the impracticality of getting all owners to make the statutory declarations²; and
 - 10.2 A class exemption to address any deforestation liabilities which result from adhering to heritage covenants or authorities entered into under Heritage New Zealand Pouhere Taonga Act 2014.
11. Before recommending the making of an Order in Council, the Minister for Climate Change must consult with substantially affected persons. The Minister must also be satisfied that the environmental integrity of the NZ ETS will not be undermined and that the costs of the exemption do not exceed the benefits.

¹ Pre-1990 forest land is land that was forest land on 31 December 1989, remained forest land on 31 December 2007 and contained mostly exotic forest species on 31 December 2007.

² The ETR Bill is making amendments to the application process to make it easier for Māori land under Te Ture Whenua Maori Act to access this exemption.

12. In making the recommendation, the Minister must have regard to the following matters:
 - 12.1 the need to maintain the environmental integrity of the NZ ETS;
 - 12.2 the desirability of minimising any compliance and administrative costs associated with the NZ ETS;
 - 12.3 the relative costs of giving the exemption or not giving it, and who bears the costs;
 - 12.4 any alternatives that are available for achieving the objectives of the Minister in respect of giving the exemption; and
 - 12.5 any other matters the Minister considers relevant.
13. These considerations place a high test on any exemption being granted.
14. The Act also provides exemptions for pre-1990 deforestation liability for other specific types of deforestation activities. This includes class exemptions for:
 - 14.1 landowners who held less than 50 hectares of pre-1990 forest land on 1 September 2007³; and
 - 14.2 landowners whose forest land is a specified type of tree weed⁴.

New section 60A will also provide the ability for exemptions for post-1989 forestry

15. New section 60A of the Act, as amended by the ETR Bill, will enable exemptions to be made for certain obligations of post-1989 forestry participants. New section 60A is similar to the existing section 60, but provides greater flexibility to meet the different needs of voluntary participation. For example, exemptions could be granted to allow longer timeframes for meeting obligations, or partial data to be provided in particular circumstances.
16. Section 60A will come into force on the day after the Bill's enactment.

Timely decisions on section 60 and 60A exemptions will be important to enable impacted landowners to make future business decisions

There are three existing section 60 decisions to be made

17. There are three active requests to exempt individual landowners from deforestation liabilities under section 60 of the Act. These include:
 - 17.1 Two small and straightforward cases with discrete issues – both of these are highly likely to meet the criteria for an exemption under section 60⁵ and could be resolved quickly; and
 - 17.2 One larger case where a landowner has been unable to complete offsetting of deforested pre-1990 land because of an issue with the Act

³ Under section 183 of the Act.

⁴ Under section 184 of the Act.

⁵ s9(2)(f)(iv)

that will be addressed through the Bill (although this change will not be implemented until 2023).

18. These landowners face ongoing restrictions on how they transact with their land and delays in resolving these cases will have a significant impact on the individuals.

The disruptions to planting as a result of COVID-19 may require the use of section 60 and/or 60A exemptions

19. Officials have indicated that they are working through the implications of the COVID-19 response for pre-1990 and post-1989 participants' ability to comply with some of their NZ ETS obligations. A key concern is the disruption to the planting supply chain from the later start to the planting season and potential issues with seedling availability⁶. Some participants may be put into a position of being technically deforested if they cannot replant this winter, even if that was not their intention.
20. It is difficult to know the scale of these disruptions at this stage as the planting season is not yet fully underway. However, the proactive use of section 60 and/or section 60A exemptions for individuals or classes of participants may be an appropriate intervention should some be unable to comply with their NZ ETS obligations as a result of COVID-19. Applications from participants may also increase later in the year as the flow-on impacts of COVID-19 become more apparent.
21. Providing timely decisions regarding the proactive use or applications for section 60 and 60A exemptions is one way that Government can support forestry businesses during the COVID-19 recovery period.

Cabinet could delegate some policy decisions on section 60 and section 60A cases to a subgroup of Ministers

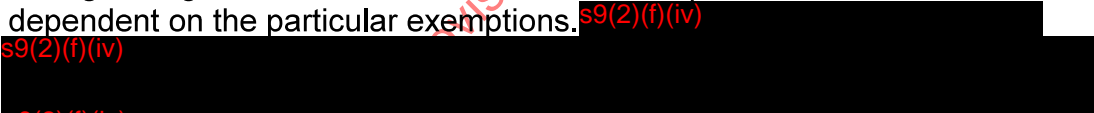
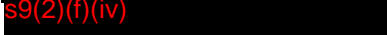
22. Cabinet's primary focus over the short-term will be on the COVID-19 recovery. This may impact the speed of decision making on relatively minor or technical matters such as deforestation exemptions, which can drop off full Cabinet and Cabinet Committee agendas.
23. The process for making an exemption could be fast-tracked by having the consultation and policy decision-making carried out by a subgroup of Ministers in lieu of the initial Cabinet Committee and Cabinet steps. This could save several weeks and free up Cabinet's agenda for higher priority matters.
24. I see this as being a practical measure to ensure decision-making on these exemptions is made in a timely manner to provide certainty for landowners.
25. The types of applications that would be considered by this subgroup would have discrete, well-defined issues which clearly meet the criteria for an exemption set out in the Act. Those applications where the criteria are more

⁶ Land preparation for planting, such as spraying for weed control, is likely to have been affected. If this is not completed in time for the planting season, then newly planted seedlings may fail.

finely balanced, or where an exemption would have significant impacts, would continue to be reviewed by Cabinet.

26. To ensure a robust process, officials would undertake the usual Regulatory Impact Analysis (RIA) and Climate Implications of Policy Assessment (CIPA) processes for any exemptions. All draft Orders in Council recommending an exemption would still be considered by the Cabinet Legislation Committee.
27. In addition, the subgroup could still also decide that any case they review undergo a normal Cabinet process if they consider it appropriate in the circumstances.
28. I recommend the subgroup include the Minister for Climate Change, the Minister for Forestry and the Minister of Finance (as any application to exempt participants from liability would result in the Crown foregoing revenue).
29. Decisions through the subgroup would be an interim measure during the immediate COVID-19 recovery period. I recommend that the powers be delegated for a maximum period of 12 months from the date of this Cabinet decision.

Financial Implications

30. There are no direct financial implications from the proposal to delegate decision making from Cabinet to a sub-group of Ministers. However any section 60 or section 60A exemption will have financial implications, either through foregone Crown revenue or increased operational cost. The scale is dependent on the particular exemptions. ^{s9(2)(f)(iv)} 
^{s9(2)(f)(iv)} . The financial implications of the exemptions is a key driver for including the Minister of Finance in the subgroup of Ministers reviewing the exemptions.

Legislative Implications

31. There are no direct legislative implications for this proposal.

Impact Analysis

32. RIA and CIPA are not required for this delegation, but will be completed for each application when they are put forward.

Population Implications

33. There are no population implications.

⁷ Based on a NZU price of \$25.

Te Tiriti o Waitangi

34. I acknowledge the significant interest that Māori have in climate change and forestry. Māori ETS participants who may be impacted by unavoidable deforestation and/or seek an exemption under section 60 or 60A will benefit from the faster decision making enabled by the subgroup.

Human Rights

35. There are no human rights implications.

Consultation

36. This paper was prepared by the Ministry for the Environment alongside Te Uru Rākau. The following agencies were consulted on this paper: The Treasury; the Department of Conservation; the Ministry of Business, Innovation, and Employment; the Ministry of Justice; and the Department of Prime Minister and Cabinet. The following agencies were informed: the Environmental Protection Authority; the Ministry of Transport; and Te Puni Kōiri.

Communications

37. No communications are planned for this decision as the matter is procedural.

Proactive Release

38. This paper will be published on the Ministry for the Environment and Ministry for Primary Industries' websites.

Recommendations

39. The Minister for Climate Change recommends that the Committee:
- 1 **Note** that the Climate Change Response Act 2002 (the Act) enables the Minister for Climate Change to recommend an Order in Council be made to exempt pre-1990 deforestation liabilities or participation, subject to considerations in section 60.
 - 2 **Note** that section 60 exemptions are typically considered by Cabinet but, given their procedural nature, it may be more appropriate to consider the more straightforward exemptions through a sub-group of Ministers while Cabinet focuses on the COVID-19 recovery.
 - 3 **Note** that the Climate Change Response (Emissions Trading Reform) Amendment Bill will introduce section 60A to the Act which will enable similar exemptions to section 60, but for post-1989 forests.
 - 4 **Note** that as a result of potential disruptions to replanting due to COVID-19 there may be a need to grant exemptions under section 60 and / or 60A, and that fast decision-making will assist participants to make timely business decisions.

- 5 **Agree** to delegate Cabinet's authority to approve policy decisions that would enable consultation and the drafting of Orders in Council granting exemptions under section 60 and section 60A of the Act, to a subgroup of Ministers, subject to the following limitations:
- 5.1 The exemptions granted can only be for forestry activities in the Act: Parts 1 and 1A of Schedule 3, and Part 1 of Schedule 4;
 - 5.2 The subgroup can only consider exemptions that have discrete, well-defined issues which clearly meet the statutory criteria in the Act;
 - 5.3 Exemptions that are more finely balanced or have significant impacts would continue to be considered by Cabinet instead of the subgroup;
 - 5.4 The power to make these recommendations lasts for a maximum period of 12 months from this decision.
- 6 **Agree** that the sub-group of Ministers comprises the Minister of Forestry, the Minister for Climate Change and the Minister of Finance.
- 7 **Agree** that the sub-group of Ministers can release consultation documents to meet consultation requirements in the Act for section 60 and section 60A.
- 8 **Note** that all draft Orders in Council recommending an exemption will still be considered by the Cabinet Legislation Committee.

Authorised for lodgement

Hon James Shaw

Minister for Climate Change