

Departmental Disclosure Statement

Climate Change Response (Extension of Penalty Transition for Forestry Activities with Low Volume Emissions Liabilities) Amendment Bill
--

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry for Primary Industries and the Ministry for the Environment.

The Ministry for Primary Industries and the Ministry for the Environment certify that, to the best of our knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

4 October 2022.

Contents

Contents.....	2
Part One: General Policy Statement.....	3
Part Two: Background Material and Policy Information	4
Part Three: Testing of Legislative Content.....	8
Part Four: Significant Legislative Features	11

Part One: General Policy Statement

The Climate Change Response (Emissions Trading Reform) Amendment Act 2020 introduced a revised penalties and compliance regime that came into force for most New Zealand Emissions Trading Scheme (**NZ ETS**) participants on 1 January 2021. The new regime included a new surrender or repayment penalty that applies to NZ ETS participants who fail to surrender or repay units to the Crown by the due date.

The application of the new surrender or repayment penalty was deferred for emissions before 1 January 2023 from NZ ETS forestry participants with a net liability of less than 25,000 units per year (**small forestry participants**). This deferral was due to the risk of serious hardship to small forestry participants if the penalty applied to them, given the size of the penalty (set at 3 times the price of carbon set in regulations for each unit not surrendered, with no discretion to reduce it), and the personal assets that they hold. The excess emissions penalty (set out in section 134 of the Climate Change Response Act 2002 as it read before 1 January 2021) has continued to apply to small forestry participants in respect of activities carried out before that date.

This Bill will extend the current deferral arrangement until the end of 2024 by amending the Climate Change Response Act 2002. This means the excess emissions penalty will continue to apply to activities carried out by small forestry participants before 1 January 2025. The risk of serious hardship identified in 2020 persists for small forestry participants. The extension will mitigate that risk while a new surrender or repayment penalty for small forestry participants is finalised and allows time for participants to be educated and informed of changes before the implementation of the new penalty, which is intended to be effective from 1 January 2025.

Part Two: Background Material and Policy Information

Published reviews or evaluations

2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?	YES
<p>Changing the surrender/repayment penalty for small forestry participants in the New Zealand Emissions Trading Scheme, Te Uru Rākau – New Zealand Forest Service, August 2022: https://www.mpi.govt.nz/dmsdocument/52387-Changing-the-surrenderrepayment-penalty-for-small-forestry-participants-in-the-New-Zealand-Emissions-Trading-Scheme (the Discussion Document)</p> <p>Interim Regulatory Impact Statement: Consultation on options to amend the surrender/repayment penalty for small forestry participants in the New Zealand Emissions Trading Scheme, Te Uru Rākau – New Zealand Forest Service, July 2022, https://www.mpi.govt.nz/dmsdocument/52462-Interim-regulatory-impact-statement-Consultation-on-options-to-amend-the-surrenderrepayment-penalty-for-small-forestry-participants-in-the-New-Zealand-ETS (the Interim Regulatory Impact Statement)</p> <p>Departmental Disclosure Document: Climate Change Response (Emissions Trading Reform) Amendment Bill, Ministry for the Environment and Ministry of Primary Industries, 19 September 2019, https://disclosure.legislation.govt.nz/assets/disclosures/bill-government-2019-186.pdf</p> <p>Approval of policy changes to the Climate Change Response (Emissions Trading Reform) Amendment Bill, Ministry for the Environment, 14 May 2020, https://environment.govt.nz/assets/publications/Approval-of-policy-changes-to-the-Climate-Change-Response-ETR-Amendment-Bill.pdf</p> <p>Climate Change Response (Emissions Trading Reform) Amendment Bill: Policy Approvals (ENV-20-MIN-0017), 19 May 2020, https://environment.govt.nz/assets/Publications/ENV-20-MIN-0017-Minute.pdf</p>	

Relevant international treaties

2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?	NO
--	-----------

Regulatory impact analysis

2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?	YES
<p>Interim Regulatory Impact Statement: Consultation on options to amend the surrender or repayment penalty for small forestry participants in the New Zealand Emissions Trading Scheme, Te Uru Rākau – New Zealand Forest Service, July 2022, https://www.mpi.govt.nz/dmsdocument/52462-Interim-regulatory-impact-statement-Consultation-on-options-to-amend-the-surrenderrepayment-penalty-for-small-forestry-participants-in-the-New-Zealand-ETS</p> <p>In 2020, when Cabinet made final policy decisions to change to the Climate Change Response Act 2002 (the Act) and was considering the first deferral, Treasury's Regulatory Quality Team determined that the proposal to delay application of the new surrender or repayment penalty for small forestry participants was exempt from the regulatory impact analysis requirements on the grounds that it was expected to have minor impacts on businesses, individuals and not-for-profit entities. It was noted that while the new surrender or repayment penalty would be delayed for small forestry participants, the existing penalty regime in the Act would continue to apply.</p>	
2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?	NO
<p>The Interim Regulatory Impact Statement was reviewed by a Quality Assurance Panel comprised of representatives from the Ministry for Primary Industries in July 2022. The panel assessment and comment were as follows:</p> <p><i>The MPI Regulatory Impact Analysis Panel has reviewed the Interim Regulatory Impact Assessment "Consultation on options to amend the surrender/repayment penalty for small forestry participants in the New Zealand Emissions Trading Scheme" produced by MPI, and dated July 2022. The review team considers that it meets the Quality Assurance criteria. The Interim RIA is clear and concise and complete. The Interim RIA clearly outlines the limitations placed on the analysis and is convincing within those limits. Adequate targeted stakeholder consultation has been undertaken, given that this Interim RIA is supporting a public consultation document.</i></p>	
2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?	NO

Extent of impact analysis available

2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?	NO
2.5. For the policy to be given effect by this Bill, is there analysis available on:	
(a) the size of the potential costs and benefits?	YES
(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?	NO

(a) the size of the potential costs and benefits:

In the process of developing this policy it was identified that the new surrender or repayment penalty in section 134 of the Act could impose significant costs on small forestry participants should they incur it. The analysis of the costs was undertaken at a general level due to limited detailed information being available and limitations on comparing previously applicable penalties. We are therefore unable to specifically estimate the number of people likely to be affected by the new surrender or repayment penalty, however a 25,000 unit liability is equivalent to approximately 36 hectares of pre-1990 *Pinus radiata* forest,¹ or 60 hectares of post-1989 *Pinus radiata* forest.²

For context around 70 percent of participants with post-1989 forest land³ registered in the NZ ETS hold less than 60 hectares of registered post-1989 forest land in total. However, these participants only hold around 10 percent of the total post-1989 forest land registered in the NZ ETS. Small forestry participants also include many of the 35,000 farmers and landowners who may own small amounts of pre-1990 forest land⁴ who become mandatory participants in the NZ ETS if they deforest.

In May 2020, when Cabinet made the initial decision to defer the new surrender or repayment penalty for small forestry participants, analysis was provided to support the decision based on the carbon price (\$26 per unit, as set in regulations) at that time.

Since then, the carbon price has increased significantly and the potential costs to small forestry participants being subject to the new surrender or repayment penalty is therefore expected to be even greater, increasing the risk of serious financial hardship, potentially putting personal assets such as their house or farm at risk. The price of carbon set in regulations (used for the purpose of calculating penalties) for 2022 is \$36.50. This price is updated annually based on the market price, which recently exceeded \$80 and has been increased to \$67.63 per unit for 2023.⁵ As the carbon price increases, the surrender or repayment penalty will increase, therefore increasing the risk of disproportionately impacting small forestry participants.

For example, a unit surrender obligation of 5,000 units would cost \$375,000 to meet (based on a market price of \$75 per unit). If this obligation is not met within 60 working days, the participant would incur the surrender or repayment penalty. This would amount to a penalty of around \$550,000 in 2022 (based on a prescribed carbon price of \$36.50 per unit), which will increase to just over \$1,000,000 in 2023 (based on a prescribed carbon price of \$67.63 per unit). Both the unit surrender liability and the penalty are due within 20 working days of receiving a penalty notice. If either of these are not paid on time, the full penalty amount will accrue interest until the owing units, penalty, and interest are paid in full.

More information about the size of the potential costs for small forestry participants *if* they do not surrender or repay units by the due date *and* are subject to the new surrender or repayment penalty, can be found in the following sources:

- Interim Regulatory Impact Statement at pages 10, 13 and 16:
<https://www.mpi.govt.nz/dmsdocument/52462-Interim-regulatory-impact-statement-Consultation-on-options-to-amend-the-surrenderrepayment-penalty-for-small-forestry-participants-in-the-New-Zealand-ETS>
- Discussion Document at pages 5 and 8:
<https://www.mpi.govt.nz/dmsdocument/52387-Changing-the-surrenderrepayment-penalty-for-small-forestry-participants-in-the-New-Zealand-Emissions-Trading-Scheme>

¹ Based on an average pre-1990 *Pinus radiata* forest at age 28.

2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:	
(a) the level of effective compliance or non-compliance with applicable obligations or standards?	NO
(b) the nature and level of regulator effort put into encouraging or securing compliance?	NO
This Bill retains the excess emissions penalty that currently applies for small forestry participants in the NZ ETS who fail to surrender or repay units by the due date from forestry activities occurring before the end of 2024. It does not create any new obligations or standards.	

² Based on an average post-1989 *Pinus radiata* forest at age 28; averaged across a stock change accounting forest (36 hectares) and an averaging accounting forest (81 hectares).

³ Post-1989 forests are considered to be new carbon sinks, additional to New Zealand's baseline carbon storage. Owners of post-1989 forests can voluntarily register their forest in the NZ ETS to earn units as their forests grow. They currently must pay back a portion of the units earned to the Crown if the forest is harvested (under stock change accounting) and all of the units if the forest is deforested.

⁴ Pre-1990 forests are considered part of New Zealand's baseline carbon storage. Owners of pre-1990 forests cannot register their forests in the NZ ETS to earn units but must register and surrender units if they deforest (i.e., change land use).

⁵ On 22 September 2022, Cabinet noted that using the methodology prescribed in regulations, the price of carbon for the 2023 levy calendar year is \$67.63 per tonne of carbon dioxide equivalent, LEG-22-MIN-0156 refers.

Part Three: Testing of Legislative Content

Consistency with New Zealand's international obligations

3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?

The Ministry for Primary Industries and Ministry for the Environment have consulted with the Ministry of Foreign Affairs and Trade to ensure that New Zealand is giving effect to its international obligations. Giving effect to New Zealand's obligations under climate change treaties is a focus of the existing legislation and of this Bill.

Specifically, this Bill extends the current transitional arrangement for small forestry participants in the NZ ETS who fail to surrender or repay units by the due date from forestry activities occurring before the end of 2024. This extension ensures a new penalty can be developed that is consistent with international practice and ensures that New Zealand has the option to link with international carbon markets in the future, whilst being proportionate and appropriate for small forestry participants.

Consistency with the government's Treaty of Waitangi obligations

3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

Māori have significant interests and opportunities in forestry and the NZ ETS. Forestry can support the social, environmental, and economic aspirations of Māori whānau, hapū and iwi.

The Ministry for Primary Industries and Ministry for the Environment consulted with iwi/ Māori as part of the policy development process. This involved an online webinar targeted at Māori with an interest in forestry during public consultation on two options for changing the surrender or repayment penalty for small forestry participants. Both of the options consulted on included deferring implementation of a new penalty until 1 January 2025. Submissions by Māori forest owners and organisations during that consultation indicated support for extending the transitional arrangement, to ensure the current excess emissions penalty will remain in place while a new penalty for small forestry participants is developed and implemented.

The extension of transitional arrangements proposed in this Bill upholds Te Tiriti o Waitangi by ensuring that ongoing engagement could occur with Māori with interests in forestry on the development of a new penalty for small forestry participants. The extension allows time to engage with Māori before 1 January 2025 through an education package about how the new penalty for small forestry participants will work in practice.

Consistency with the New Zealand Bill of Rights Act 1990

3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?

YES

The Cabinet paper seeking approval to introduce the Bill notes that the Bill is consistent with the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. The Ministry of Justice has been consulted on that paper.

Offences, penalties and court jurisdictions

3.4. Does this Bill create, amend, or remove:	
(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?	YES
(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?	NO
By extending the transitional arrangements in clause 17, Schedule 1AA of the Act, the Bill amends the penalty that will apply to small forestry participants who fail to surrender or repay units by the due date from forestry activities occurring between 1 January 2023 and 31 December 2024. Without this Bill, small forestry participants would be subject to the new surrender or repayment penalty in section 134 of the Act from 1 January 2023. Both forms of penalty are subject to the same review and appeal provisions within the Act.	

3.4.1. Was the Ministry of Justice consulted about these provisions?	YES
The Ministry of Justice was consulted on the proposal to extend the current transitional arrangement for small forestry participants in the NZ ETS until the 31 December 2024, until a new penalty will take effect. The Ministry of Justice had no concerns about this proposal.	

Privacy issues

3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?	NO
---	-----------

External consultation

3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?	YES
<p>The original decision to defer introduction of the new surrender or repayment penalty for small forestry participants was in response to feedback received by the Select Committee on the Climate Change Response (Emissions Trading Reform) Amendment Act 2020 (then a Bill). In Select Committee, submitters highlighted a potential issue whereby applying the penalty to small forestry participants may result in a substantial and disproportionate impact on individuals who unintentionally make errors leading to non-compliance. Stakeholders also raised similar concerns directly with officials.</p> <p>More recently, the Government released the Discussion Document and consulted from 2 August to 30 August 2022 on two options for a new penalty to apply to small forestry participants who fail to surrender or repay units by the due date (a strict liability penalty and a discretionary penalty). This was in recognition of persistent challenges with the size and proportionality of the new surrender or repayment penalty in section 134 of the Act should it be applied to small forestry participants.</p> <p>Consultation included two online webinars targeted at NZ ETS participants and people with an interest in forestry, including Māori with an interest in forestry. In total, 25 submissions were received. Submitters included individual forest owners, forestry consultants and key forestry industry membership organisations. Approximately 50 percent of submitters stated they represent Māori land and forest owners either solely, or as part of their membership.</p> <p>Both options consulted on included deferring implementation of a new penalty until 1 January 2025 and implementation of an education package to inform participants of their obligations and changes to the penalty. This was supported by most submitters who acknowledged the need to understand their obligations and ensure a smooth transition to a new penalty. A summary of submissions will be made available on the Ministry for Primary Industry's website.</p>	

Other testing of proposals

3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?	NO
<p>The Ministry for Primary Industries and the Ministry for the Environment have consulted with a number of Government agencies in the process of developing this Bill.</p> <p>We tested the policy in detail with:</p> <ul style="list-style-type: none">• Environmental Protection Authority• Ministry for the Environment• Ministry of Foreign Affairs and Trade• Ministry of Justice. <p>The other agencies consulted on the proposed Bill were the:</p> <ul style="list-style-type: none">• Department of Conservation• Ministry of Business, Innovation and Employment• The Treasury• Te Arawhiti• Te Puni Kōkiri. <p>The Department of the Prime Minister and Cabinet was informed.</p>	

Part Four: Significant Legislative Features

Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	NO
--	-----------

Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	NO
--	-----------

Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO
---	-----------

Strict liability or reversal of the usual burden of proof for offences

4.4. Does this Bill:	
(a) create or amend a strict or absolute liability offence?	YES
(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?	NO
<u>(a) create or amend a strict or absolute liability offence?</u> This Bill extends the date for when the new surrender or repayment penalty (which is an absolute liability penalty under clause 134 of the Act) will apply to small forestry participants in the NZ ETS. It does this by amending clause 17 of schedule 1AA of the Act to extend the transitional arrangement for small forestry participants until 1 January 2025. This extension is necessary to mitigate the risk of serious hardship to small forestry participants if the new surrender or repayment penalty applies to forest activities from 1 January 2023. The risk of serious hardship is detailed at 2.5 above.	

Civil or criminal immunity

4.5. Does this Bill create or amend a civil or criminal immunity for any person?	NO
---	-----------

Significant decision-making powers

4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?	NO
--	-----------

Powers to make delegated legislation

4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?	NO
---	-----------

4.8. Does this Bill create or amend any other powers to make delegated legislation?	NO
--	-----------

Any other unusual provisions or features

4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?	NO
--	-----------