



NEW ZEALAND  
LAW SOCIETY

NZLS EST 1869

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# Overseas Investment Amendment Bill

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*24/01/2018*

## Overseas Investment Amendment Bill

### Introduction

1. The New Zealand Law Society (Law Society) appreciates the opportunity to comment on the Overseas Investment Amendment Bill (Bill). This submission has been prepared with input from the Law Society's Property Law Section.
2. The Law Society notes the very limited time available to submitters on the Bill. It accepts that the intention is to implement changes to the Overseas Investment Act 2005 (Act) before the implementation of the Trans-Pacific Partnership. This has resulted in some abrogation of and changes to the usual select committee processes and an intention to implement the legislation 10 days after Royal assent, rather than the conventional 90 days. This is unfortunate as it does not allow adequate time for consideration of the various impacts of the legislation, by those who will be required to work with the Act as amended.
3. The Law Society has had the opportunity to consider only briefly the most obvious issues and makes the following submissions on the Bill.
4. The Law Society wishes to be heard on the Bill.

### Clause 31 – Provider of conveyancing services must give certificate

#### *Timing of certification*

5. Clause 31 inserts a new section, section 51A, into the Act. The Law Society is concerned that proposed section 51A as currently drafted does not reflect the reality of the majority of residential conveyancing transactions. It is unfortunate but common that the purchaser of a residential property will not seek legal advice before committing to an unconditional contract to purchase a property. Therefore, it is common that clients will first have contact with a lawyer only when they have already entered into an unconditional agreement for sale and purchase of real estate,<sup>1</sup> are legally committed to buying the property and would have already breached the Act if they are not eligible to purchase the property.
6. The point where a contract is formed is the critical time for assessment of a purchaser's entitlement to invest in New Zealand's sensitive land. This is when the breach occurs. After this point an innocent vendor could be disadvantaged if a transaction does not conclude (for

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<sup>1</sup> The comments on this issue in this submission focus on situations where a substantial interest in residential land, such as an estate in fee simple, is being acquired. However, it would appear the acquisition of *any* interest in residential land could be captured. "Interest" is defined broadly in section 6(1) of the Act as including "a legal or equitable interest". Interests in land in the nature of easements, profits à prendre and short-term leases are not excluded from the operation of proposed section 51A, although they are excluded from the operation of section 12(a), which defines the concept of an overseas interest in sensitive land. Section 51A operates on any transaction (including any arrangement or understanding) for the acquisition of any interest in residential land, imposing obligations on lawyers even in situations where the substantive restrictions on the acquisition of interests in land would not apply. The relationship between (proposed) s51A and existing ss12(a) and (b) therefore needs to be clarified.

example, settlement fails). A number of risks could be avoided by ensuring the purchaser's residency status is checked before an agreement becomes unconditional. However, as noted above, a lawyer is very unlikely to be involved with the transaction at this time.<sup>2</sup>

### ***Lawyer's role and obligations***

7. The Law Society opposes the lawyer certification requirement in proposed section 51A for the reasons set out below.
8. The effect of proposed section 51A is that a lawyer is required to certify that, to the best of their knowledge, their client *will not* contravene the Act, or commit an offence.
9. The current wording of the proposed section 51A potentially places lawyers in the untenable position of providing a certificate as to contingent future events or third party conduct they may have limited (or no) control over. For example, issues could arise in respect of nomination. It is not considered prudent or responsible for a lawyer to provide a personal undertaking that is partly dependent on the acts or omissions of a third party.<sup>3</sup> Yet this is the type of warranty envisaged by the current wording of section 51A.
10. The provision further provides that a failure to comply with the section amounts to an offence rendering the provider of conveyancing services liable on conviction to a fine of up to \$20,000. It appears that the main intended mischief targeted by the wording of section 51A(4) (in conjunction with section 51A(2)) is false or inaccurate certification. If so, it is not clear whether section 51A has that effect. Failure to comply with section 51A(2) may extend to failure to provide a certification to the required effect (or at all), rather than inaccurate certification.<sup>4</sup> There may be many situations in which a lawyer is simply unable to provide the type of certification required by the section.
11. If the current certification mechanism remains, consideration will need to be given to the wording of section 51A to clarify whether "failure to comply" captures failure to provide a certification in circumstances where certification cannot practically be given. There is a potential impact on the flow and progression of conveyancing transactions, together with a flow-on effect to the consumers.
12. The lawyer risks a significant penalty in terms of section 51A of the Act. Any lawyer who has been convicted of an offence must disclose that to the Law Society upon annual application

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<sup>2</sup> The term "lawyer" is used throughout this submission to denote a barrister and solicitor of the High Court of New Zealand. It is recognised that registered conveyancing practitioners also perform conveyancing work but this submission does not purport to speak for these practitioners.

<sup>3</sup> See G E Dal Pont *Lawyers' Professional Responsibility* (5<sup>th</sup> ed, Thomson Reuters, Pyrmont, New South Wales, 2013) at [22.65].

<sup>4</sup> Although an incorrect certification may give rise to civil or professional liability. An inaccurate certification may also give rise to liability under section 46 of the Act, which applies to knowingly- or recklessly-made false or misleading statements or material omissions in any "representation made for the purposes of" the Act.

- for renewal of their practising certificate. A conviction pursuant to this regime, even where the lawyer has no moral culpability, may affect their ability and right to practice law.
13. As the Bill is currently drafted, the risk to an unwitting lawyer or one who fails to provide certification for innocent reasons is high. Introducing a penalty for failure to comply would increase the exposure of all lawyers to additional risk, with a consequent likely increase in the cost of conveyancing services.
  14. The obligation imposed on the certifying lawyer by section 51A is qualified to an extent in that the certification is given “to the best of the provider’s knowledge”. However, there is no guidance given on what steps a lawyer might reasonably be expected to take to ensure he or she has the requisite knowledge to be able to certify that a client *will not* breach the Act, noting the future tense of the required certification. It is noted that the intention of the Bill as drafted is that lawyers should be entitled to rely on information provided by the purchaser (plus any knowledge they already have of the purchaser) when providing a certificate.
  15. In practice, a lawyer presented with an unconditional agreement in circumstances in which there are concerns about compliance with the Act would be unable to provide the required certification. To do so would be inconsistent with a lawyer’s ethical and professional obligations under the Lawyers’ Conduct and Client Care Rules.<sup>5</sup> In this situation, if a purchaser presents a lawyer with an unconditional agreement and the lawyer considers that the purchase breaches the Act and refuses to provide a certificate, then it is likely that the contract will fail.
  16. If a purchaser gives a fraudulent self-certification and this is not discovered by a lawyer, the transaction would proceed and the purchaser would become the registered proprietor of the property. If it is later found to be in contravention of the Act, the transaction can be examined and all involved parties (including the lawyer) are easily identified and located. If anyone involved in the transaction is found to be complicit, the Act provides for penalties. Only those found to be complicit in facilitating the purchase would then face liability, in line with the current Australian regime.<sup>6</sup> The Law Society considers that lawyers should not face additional liability for their involvement at a stage when a breach is likely to already have been committed.

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<sup>5</sup> Under rule 2.5 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (Lawyers’ Conduct and Client Care Rules) lawyers have professional and ethical obligations not to certify the truth of any matter to any person unless the lawyer believes on reasonable grounds that the matter is true having taken appropriate steps to ensure the accuracy of the certification.

<sup>6</sup> *Release of all advice provided by the Treasury to Ministers on the Overseas Investment Act Amendment for Overseas Home Buyers (Treasury Advice)*  
<http://www.treasury.govt.nz/publications/informationreleases/overseasinvestment/residential-land/res-land-release.pdf> at 227.

## **Recommendations**

17. The Law Society proposes the following alternatives to the proposed section 51A, in descending order of what it considers to be most appropriate.

### **Option 1: Self-certification by prospective purchaser (Law Society favoured option)**

18. The criteria for eligibility (and therefore ineligibility) in terms of the commitment to New Zealand test in proposed section 16A involves (for those ordinarily resident in New Zealand) a bright line test for residence class visa holders based on an objective assessment of their time spent in New Zealand. It is a test easily determined by a prospective purchaser and the Law Society submits it would not be unrealistic to obtain self-certification (“OIA self-certification”) from a prospective purchaser.
19. Residential Land Withholding Tax and the Automatic Exchange of Information and the Common Reporting Standard regimes are examples of client self-certification compliance regimes.
- 19.1. Residential Land Withholding Tax (RLWT)
- A self-certification is given by the client. The withholding agent (e.g. a lawyer) checks that the self-certification has been completed and checks whether accompanying documents can be reasonably relied upon.
- 19.2. Automatic Exchange of Information and the Common Reporting Standard (AEOI/CRS)
- A self-certification is given by the client. The reporting financial institution can reasonably rely on the information provided. The reporting financial institution must keep a record of self-certifications obtained, and a record of any failure to obtain a self-certification.
20. The Law Society recommends an approach consistent with the RLWT requirements described above: in determining the requirement to withhold RLWT, a withholding agent (e.g. a lawyer) is entitled to rely on the information supplied by the vendor, *unless the agent knows it to be false*. In other words, a lawyer is not obliged to undertake independent verification of a vendor's statement, nor to make an initial determination as to whether the bright-line period applies to the vendor. Section RL2(7) of the Income Tax Act 2007 provides that a lawyer is entitled to reasonably rely on the client form and accompanying documentation. The lawyer is required to retain the completed RLWT form and copies of supporting documentation provided by the vendor, along with records of the property transaction, for a period of 7 years.
21. The Law Society suggests an OIA self-certification could be incorporated into the Agreement for Sale and Purchase of Real Estate (ASP), a form used almost universally in residential property negotiations in New Zealand. The ASP already provides for a purchaser to indicate whether consent under the Act is required to purchase, and includes a deeming provision where this is not positively indicated.<sup>7</sup>

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<sup>7</sup> ASP, clause 10.4(2).

22. Exceptions to the use of the ASP would be few and an alternative form of self-certification could be developed to provide for these exceptions. (Alternatively, use of the ASP for conveyancing could be made mandatory.) A copy of the ASP containing a purchaser's positive OIA self-certification could be retained by the lawyer who performs the conveyance. A negative self-certification means negotiations would not proceed (or at least be suspended pending further consideration) at the point the purchaser's ineligibility is determined.
23. The Law Society considers this OIA self-certification on the ASP would satisfy the requirements for information-gathering relating to the residential ban. This would satisfy the objective of minimising the number of land transactions that would fail because of the ban, because it would default the ASP to a conditional status until a purchaser makes a positive declaration on whether the ban applies to them in relation to the subject property. This would protect the vendor also. It would stop a contract proceeding to the point where an innocent vendor is put at risk by accepting an offer from someone ineligible to purchase their property.
24. The Auckland District Law Society Inc. (owner of the intellectual property rights in the ASP) is currently undertaking a review of the ASP. Changes to incorporate an OIA self-certification could be addressed in this review.

### **Option 2: Certification by real estate agent**

25. In the majority of cases, the first steps in the purchase of a residential property involve a real estate agent facilitating negotiations between the parties.
26. As mentioned, the appropriate time to assess whether an intending purchaser is or will be in contravention of the Act is *before* a contract is enforceable between the parties. This is the stage at which no breach has yet been committed. In addition, from a practical perspective, it would be less costly for the focus to be on preventing persons who are not eligible from entering into unconditional contracts. However as noted above, lawyers are not likely to be involved at this stage.
27. The Law Society considers that, if the suggested prospective purchaser OIA self-certification is not an option, the next best option would be to require certification from a real estate agent. This is because a real estate agent will (in almost all cases of residential property negotiations) have contact with a prospective purchaser before a lawyer does. Although it is true that real estate agents are generally engaged by property vendors, there is no basis for the statement made in the Treasury design process document to the effect that "a property for sale can attract numerous purchase offers, sometimes entered into with little involvement with the real estate agent".<sup>8</sup> The Law Society submits that real estate agents who market a property for a vendor will do their utmost to ensure they present any purchase offers to the vendor, otherwise their ability to claim a commission is compromised.

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<sup>8</sup> *Treasury Advice* at 126, paragraph 87.

28. Treasury design proposals refer to the possibility of real estate agents becoming subject to obligations to advise prospective purchasers of the broad parameters of the residential ban, to reduce the likelihood of purchasers finding they are ineligible after they have entered into an agreement for sale and purchase.<sup>9</sup> The Law Society agrees with the view that real estate agents are well placed to either facilitate prospective purchaser self-certification, or provide certification themselves, at a point in time before a contract between parties becomes unconditional. Again, using the ASP (with appropriate amendments) would assist in ensuring compliance.

***Increased compliance will lead to increased cost to consumers***

29. If not amended, the proposed new section 51A will result in substantially greater administrative obligations for lawyers. There will be a need to implement processes and conduct training and auditing in relation to the new requirements. Retention provisions in proposed new section 51A(3) will increase physical or electronic storage requirements for lawyers. All these changes have a financial cost attached.
30. The conveyancing sector has been increasingly burdened with extra compliance since the 2015 implementation of the bright-line regime, including tax statements, RLWT, the Foreign Account Tax Compliance Act, Automatic Exchange of Information and the Common Reporting Standard, and Anti-Money Laundering/Countering Financing of Terrorism requirements. The cumulative effect of this extra compliance is that costs to consumers will almost certainly need to increase and are likely to do so quickly and significantly.

**Conclusion**

31. The Law Society has identified unintended consequences likely to result from this Bill. These can be eliminated simply by moving the eligibility assessment and certification to the start of the conveyancing process (i.e. to an earlier point in time *before* a contract becomes unconditional). However, given that in the case of residential conveyancing transactions lawyers are unlikely to be involved at this stage, it would be more appropriate for the certification obligation to be placed on the purchaser (as noted below), or alternatively the real estate agent.
32. Administration of the Act could be simplified significantly by implementing a procedure of prospective purchaser OIA self-certification, before a contract to purchase a property is made unconditional. This could be achieved by changes to the Agreement for Sale & Purchase of Real Estate (ASP), commonly accepted to be the “industry standard” document used in the sale and purchase of residential property in New Zealand.
33. Prospective purchaser OIA self-certification is a reliable method for obtaining the required information the Overseas Investment Office requires, because the information would be gathered regardless of whether the purchase is being negotiated privately, through a real estate agency-facilitated tender, auction or negotiation process, or through a lawyer, as long as the ASP is used. Use of the ASP could be made mandatory to ensure full compliance.

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<sup>9</sup> *Treasury Advice* at 72, paragraph 112.

34. If proposed section 51A is not amended, compliance consequences for lawyers, including:

- increased administrative and document retention obligations;
- increased burden of professional inquiry; and
- increased risk of civil and/or criminal penalty for provision of professional services where the lawyer is not complicit in a breach,

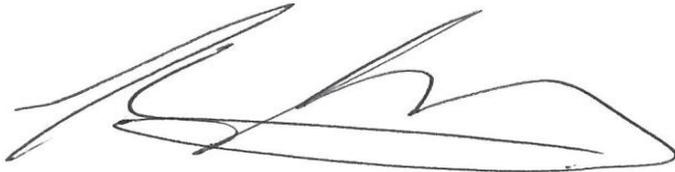
will almost certainly result in increased conveyancing fees for all consumers of conveyancing services. This is a needless consequence that can be avoided by placing the functions associated with eligibility assessment and certification as to eligibility to purchase where they should logically be, with the prospective purchaser.

35. Although section 51A as currently drafted may contribute to achieving the aim of ensuring compliance with a ban on foreign ownership of residential property, this comes at too high a cost to segments of the New Zealand population not targeted by the ban, including conveyancers and all New Zealand and Australian citizens who are eligible to buy property.

#### **Review**

36. The Law Society is happy to assist at short notice with any drafting changes that may result from this submission.

37. In any event, the Law Society suggests that there be a requirement for a post-implementation review of and report on the efficacy of the Amendment Act and any issues that have arisen.

A handwritten signature in black ink, appearing to read 'Kathryn Beck', with a large, sweeping underline.

Kathryn Beck  
**President**

24 January 2018