

Submission

to the

Government Administration Select Committee

on the

Land Transfer Bill

28 April 2016

About NZBA

1. NZBA works on behalf of the New Zealand banking industry in conjunction with its member banks. NZBA develops and promotes policy outcomes that contribute to a strong and stable banking system that benefits New Zealanders and the New Zealand economy.
2. The following fifteen registered banks in New Zealand are members of NZBA:
 - ANZ Bank New Zealand Limited
 - ASB Bank Limited
 - Bank of China (NZ) Limited
 - Bank of New Zealand
 - Bank of Tokyo-Mitsubishi, UFJ
 - Citibank, N.A.
 - The Co-operative Bank Limited
 - Heartland Bank Limited
 - The Hongkong and Shanghai Banking Corporation Limited
 - JPMorgan Chase Bank, N.A.
 - Kiwibank Limited
 - Rabobank New Zealand Limited
 - SBS Bank
 - TSB Bank Limited
 - Westpac New Zealand Limited.

Background

3. NZBA welcomes the opportunity to provide feedback on the Land Transfer Bill (**the Bill**), and commends the work that has gone into developing it.
4. NZBA would appreciate the opportunity to make an oral submission to the Committee on this Bill. NZBA has previously submitted in relation to this Bill, namely:
 - a. to the Law Commission on its 2009 Review of the Land Transfer Act 1952;
 - b. to Land Information New Zealand (**LINZ**) on the recommendations contained in Law Commission Report 116 “A New Land Transfer Act”; and
 - c. to LINZ on its 2013 Exposure Draft Land Transfer Bill.
5. If the Committee or officials have any questions about this submission, or would like to discuss any aspect of the submission further, please contact:

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Issue

6. NZBA would like to raise one concern in particular. The concern relates to clause 54 of the Bill and the obligations that would be imposed by it to verify the identity and the authority of the mortgagor. NZBA has previously submitted against the inclusion of such a clause.
7. Clause 54 requires a mortgagee to take 'reasonable steps', or ensure that 'reasonable steps' are taken, to verify the identity of the mortgagor and the identity and the authority of any person who executes the mortgage. It further allows the Registrar-General of Land (**Registrar**) to set standards for what constitutes reasonable steps. The mortgagee must keep records to show it has complied with the requirement for the prescribed period and the Registrar will have the power to require a mortgagee to produce this evidence.
8. If a mortgagee does not comply with this clause, the mortgagee may be liable to a fine (of up to \$25,000 in the case of a body corporate), or a Court may set aside the mortgage if the mortgagee failed to comply with the clause and, through fraud, the mortgage was executed by someone other than the mortgagor, or without the mortgagor's authority.

Executive summary

9. NZBA and its members consider that clause 54:
 - a. is inconsistent with the responsibilities imposed on conveyancers;
 - b. is unnecessary, because the relevant harm is rare and sufficient protections already exist;
 - c. is fraught with practical difficulties, including those relating to cost, the retention of records, securitisation and power of attorney; and
 - d. imposes an unjustified burden on mortgagees.
10. As such, clause 54 should be removed. Should this submission not be accepted, NZBA and its members ask that:
 - a. the Registrar consult with the banking industry on the standards and also the prescribed period referenced in clause 54(4) to help minimise any unnecessary or unduly onerous burden being imposed by the clause on the industry;
 - b. either the standards or the text of clause 54 clearly state that a mortgagee may verify the identity of its mortgagors by, in effect, delegating that responsibility to a conveyancing solicitor as agent of the Registrar;
 - c. clause 54(5) be removed;

- d. clause 54(7)(a) be amended to limit it to compliance with clause 54(1) only (as opposed to clause 54 generally).
 - e. the Bill be amended to clarify that compensation is available in the case of fraud where a mortgagee's title is held to be defeasible due to the person signing the mortgage not being the owner or having a lack of authority.
11. We understand that many of the banking industry's concerns regarding clause 54 are also shared by the New Zealand Law Society (**NZLS**), who will address these in its own submission.
12. Please see our substantive submissions below.

Substantive submissions

Clause 54 is inconsistent with the responsibilities imposed on conveyancers

13. The Bill imposes a more onerous obligation on mortgagees than on any other party dealing with transactions in land, and this unequal treatment is not justified, especially given the low risk of mortgage fraud (discussed further at paragraphs 19-21 below).
14. Clause 30 of the Bill imposes a general obligation on a person certifying an instrument, such as a conveyancing solicitor, to hold evidence supporting the assertions in the certificate.
15. The result of clause 30 is that a conveyancer must identify the party they are acting for, and must keep evidence of that authority. If the conveyancer fails to do this, they can lose their right to certify (clause 29). In such cases, however, unlike mortgagees who breach clause 54, they are not subject to a fine and the transaction will remain indefeasible (unless the manifest injustice provisions apply).

Clause 54 is unnecessary

16. NZBA and its members submit that clause 54 is unnecessary both because the harm it seeks to address is extremely rare and because sufficient protections already exist in other clauses of the Bill.
17. NZBA and its members assume that part of the rationale behind the proposed introduction of clause 54 is the suggestion that mortgage fraud is increasing in overseas jurisdictions, and in Australia in particular. While mortgage fraud may be increasing in Australia, there are a number of relevant factors that make processes in New Zealand more robust (for example, most states in Australia still operate a largely paper-based system and use duplicate paper titles as authority to register).
18. We note that indefeasibility of title has been the foundation of New Zealand property law for over 100 years, and this proposed change detracts from the certainty of the Torrens system of registration. NZBA and its members submit this should be avoided, especially given that actual instances of mortgage fraud are extremely rare and sufficient protections already exist.

The relevant harm is rare

19. Clause 54 attempts to mitigate situations where mortgages are registered against land due to fraud, for example by someone pretending to be the mortgagor. However, actual instances of this type of fraud remain extremely rare (we understand that there has been no successful mortgage fraud perpetrated in New Zealand since the electronic lodgement of mortgage instruments via Landonline was introduced) and there seems little need to change the law to penalise mortgagees.

20. Evidence from industry experience is that identity fraud is more likely to occur in relation to loan and guarantee agreements than mortgage agreements. Common examples of fraud include situations where a spouse obtains separate additional lending secured against the family home without their spouse's knowledge or consent, or instances where another party forges a signature on a loan agreement.
21. Issues involving the mortgage agreement more regularly involve arguments that a mortgagee should not be able to enforce its rights under a mortgage. Examples include cases where it is alleged that there was duress, undue influence, mistake, or poor advice about the nature and effect of the obligations the mortgagor entered into.

Sufficient protections already exist

22. NZBA and its members acknowledge that in rare cases actual mortgage fraud may still occur, but submit that other clauses of the Bill and the common law provide both sufficient safeguards against such fraud, and avenues for redress.
23. Clauses 27 to 30 of the Bill already impose an obligation on the person certifying an instrument to verify the identity and authority of the party who will be affected by the instrument. Imposing a separate, additional, obligation on a mortgagee creates unnecessary compliance costs. In most cases, it is the certifying solicitor who the bank relies on in respect of the mortgage (as there is usually no other solicitor involved). The proposed changes will likely require mortgagees to verify the work of the certifying solicitor to ensure the solicitor has done it to a sufficient standard (which is very hard to verify without having direct interaction with the mortgagor), or instruct additional lawyers (at further cost to the customer) to do so.
24. Where actual identity fraud has occurred, other clauses of the Bill already provide sufficient avenues for redress.
25. NZBA and its members consider making the indefeasibility of the mortgagee's title subject to identification requirements is unnecessary given the Court has the power under clauses 56 and 59 to alter the register in instances of manifest injustice, or award compensation for loss of an estate or interest in land respectively. These clauses already provide protection to mortgagors or land owners. It is not clear why mortgagees should be singled out by way of further requirements where transferees/lessees are not.
26. Clauses 56 and 59 are roughly in line with the provisions that currently exist in the Land Transfer Act 1952, and in the limited number of cases where this harm has occurred, the Courts have dealt with these situations appropriately and effectively. NZBA sees no reason why this will not continue in the future.
27. Rather than enacting clause 54 as proposed, the Bill should clarify that compensation is available in the case of fraud where the title of a mortgagee and of any subsequent purchaser of the mortgage is held to be defeasible due to the person signing the mortgage not being the owner or having a lack of authority. Without such a clarification, the mortgagee and any mortgage purchaser will suffer the full burden of

mortgage fraud despite being innocent parties, with the risk of mortgage fraud effectively being transferred from the public sector to the private sector. In particular, NZBA and its members submit that clause 61(1)(d) and (e) should be deleted to remove the restriction on Crown liability to pay compensation in this scenario.

Practical difficulties with clause 54

Cost

28. In addition to our concerns about the necessity of clause 54, there are also practical costs and risks to both banks and conveyancing solicitors associated with it.
29. Sound regulation ought not to impose compliance costs that are disproportionate to the risk being regulated against. Imposing unnecessary compliance costs will create inefficiencies and the extra costs will ultimately be borne by all mortgagors.
30. NZBA and its members submit that there may be an incorrect assumption that clause 54 will not impose additional compliance costs on mortgagees and their agents. The requirement for a mortgagee to verify the identity of the mortgagor in addition to verification by the certifying solicitor is clearly a new requirement that will require significant additional compliance steps to be taken. In addition, verifying the authority of a mortgagor imposes wider obligations and additional compliance costs on a mortgagee than are imposed under equivalent provisions simply requiring the identity of a party to be verified.
31. Obtaining and verifying authority information would appear to be a substantial undertaking. By way of example, where the mortgagor is a company, the mortgagee may be required to verify a number of matters including that appropriate shareholder or director resolutions are held and that there is appropriate notification on interest registers. Where the mortgagor is a trust, mortgagees may need to verify that the terms of the Trust Deed enable the trust to give a mortgage over its assets.
32. Practically speaking, the clause 54 identity verification responsibilities are likely to fall on conveyancing solicitors (where they already sit under clauses 27 to 30) acting as agents for mortgagees. In such cases, including this requirement will create unnecessary additional work for mortgagees (or additional solicitors) to double check what the conveyancing solicitor is already required to do. Solicitors will charge for this extra work, and this additional cost will be borne by mortgagors on each mortgage.

Retention of records

33. Regarding the retention of the records, clause 54 requires the mortgagee to ensure that a record of the steps taken and the documents obtained to comply are kept for the 'prescribed period'. A mortgagee who fails to comply is liable for a fine and possibly the loss of the registered mortgage.

34. Currently most mortgagees rely on the solicitor or conveyancer acting to verify that the documents or agreements being executed will be enforceable against the parties. Mortgagees also generally impose an obligation to verify that the parties have the necessary authority to act when entering or executing those documents or agreements. Mortgagees do not generally ask the solicitor or conveyancer to provide evidence of how they met those requirements (as they are not resourced to review, assess and second-guess such evidence), but instead rely on solicitors' certificates and undertakings. Requiring mortgagees, and by extension solicitors and conveyancers, to retain this type of evidence will most likely significantly increase compliance costs and would result in the need to make unnecessary changes to the way in which conveyancing and security transactions are generally carried out in New Zealand.
35. Indications from our membership are that if such verification is required, banks would be unlikely to want this information transferred to them due to the administrative burden, and so would seek to rely on the solicitor instructed to retain these documents on their behalf. This creates difficulties for both the bank and the solicitor. From the solicitor's point of view the requirement is likely to impose an additional administrative burden (and cost), which they may be unwilling to undertake. From the bank's perspective they will be relying on the solicitor to retain the documentation, and risk a fine (or loss of their mortgage) if the solicitor fails to do so. Alternatively, both parties will have to set up resource-intensive processes to transfer and store this information, which will be administratively and operationally burdensome and costly to both the bank and the solicitor.
36. The Bill should provide that, when registering, solicitors are agents of the Registrar. As registration is now carried out directly by solicitors/conveyancers without oversight, compensation should be provided for their errors provided there is no fraud on the part of the claimant.

Securitisation

37. In addition, the implementation of clause 54 of the Bill could give rise to additional issues for banks in respect of their securitisation arrangements. It is essential for the efficient functioning of a bank's securitisation activities that there is a clean transfer of the underlying assets.

Power of attorney

38. NZBA and its members note that the person creating the mortgage and the owner may be different where a power of attorney is being relied upon to execute a mortgage. We understand the NZLS will address the practical difficulties posed by clause 54 in a power of attorney situation in their own submission.

Possible amendments if clause 54 is retained

39. If clause 54 is to be retained, NZBA and its members request that all practicable steps are taken to ensure that the relevant standards are drafted, and the prescribed

period referenced in clause 54(4) is set in such a way as to minimise the additional burden and cost on the industry. As part of this exercise, NZBA and its members seek to be consulted on the drafting of standards and the determination of the prescribed period referenced in clause 54(4).

40. As there are no guidelines on the content of the standards, NZBA considers there is a real risk that the Registrar may not specify the same customer identification standards as required under the Anti-Money Laundering and Countering Financing of Terrorism Act 2009. If this were to occur, it would create inconsistency and uncertainty, and increased compliance costs. NZBA and its members submit that all steps should be taken to align the two customer identification standards.
41. NZBA and its members submit that either the standards or the text of clause 54 should clearly state that a mortgagee may verify the identity of its mortgagors by, in effect, delegating that responsibility to a conveyancing solicitor as agent of the Registrar.
42. NZBA and its members also submit that clause 54(5) should be removed. Under this clause, if a mortgagee fails without reasonable excuse to comply with clause 54(5) (i.e. retain the relevant records for the prescribed period), the mortgagee may be liable to a fine (of up to \$25,000 in the case of a body corporate). As noted at paragraph 15 above, no such fine is imposed on conveyancers.
43. Further, if clause 54 is retained, NZBA and its members submit that clause 54(7)(a) should be amended to limit it to compliance with clause 54(1) only (as opposed to clause 54 generally). It should be amended to read as follows:

"(a) the registered mortgagee fails to comply with section 54(1); and"

As currently worded in the Bill, a mortgagee will lose indefeasibility of title if it fails to comply with any part of clause 54. It would be unfairly onerous if a mortgagee were to lose indefeasibility of title where it undertook reasonable steps to verify the identity of the mortgagor (per clause 54(1)), but for some reason does not have a record of the steps undertaken under clause 54 (per clause 54(4)), even in cases where the defence of force majeure could apply.

44. Finally, for the reasons set out at paragraph 27 above, the Bill should clarify that compensation is available in the case of fraud where a mortgagee's title is held to be defeasible due to the person signing the mortgage not being the owner or having a lack of authority.