

# Submission

to the

## Finance and Expenditure Select Committee

on the

## Overseas Investment Amendment Bill

23 January 2018

## 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 seventeen 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
  - China Construction Bank
  - Citibank, N.A.
  - The Co-operative Bank Limited
  - Heartland Bank Limited
  - The Hongkong and Shanghai Banking Corporation Limited
  - Industrial and Commercial Bank of China (New Zealand) 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 to Finance and Expenditure Select Committee (**Committee**) on the Overseas Investment Amendment Bill (**Bill**) and commends the work that has gone into developing the Bill.
4. NZBA would appreciate the opportunity to make an oral submission to the Committee on this Bill.
5. If you would like to discuss any aspect of the submission further, please contact:

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## Summary

6. NZBA acknowledges that banning foreign speculators from buying existing New Zealand homes was one of the Government's key election promises and recognises the importance of this policy initiative.
7. NZBA has three primary submissions on the Bill:
  - (a) The Bill's transitional provisions are unworkable; they do not provide NZBA's members with sufficient lead-in time to implement compliance programs.
  - (b) The scope of third party liability should be reviewed and limited to those persons who are best placed to manage the risk of non-compliance.
  - (c) The regulator's power to dispose of property purchased in contravention of the Overseas Investment Act (**Act**) should be reviewed.
8. Finally, we set out other matters that require clarification.

### Transitional provisions are unworkable

9. The Bill provides that it will come into force on the 10<sup>th</sup> day after the date on which it receives Royal assent, except in respect of transactions entered into before its enactment (schedule 1AA).
10. NZBA submits that that timeline is unworkable for its members; it does not allow sufficient time for members to take the steps necessary to ensure compliance with the Act.
11. NZBA understands that the enactment of the Bill is a fundamental element of the Government's 100 day plan. However, NZBA submits that the spirit of the Bill can be given effect with a more flexible transitional arrangement. One way in which that could be achieved is by providing that the parts of the Bill dealing with liability for persons "involved in a contravention of [the Act]" come into effect at a later date (to be determined).
12. Additionally, NZBA considers that its submissions below in respect of third party liability and the regulator's power to dispose of property simplify the Bill and would be likely to help to lessen the compliance burden on members.

### Provisions relating to third party liability should be reviewed

13. Clause 28 of the Bill empowers a court to order a person to pay a civil penalty if they have been "involved in a contravention of [the Act]". Notably, cl 28 applies to any contravention of the Act, not just breaches of the new residential property requirements.
14. Clause 29 of the Bill provides defences for a person involved in a contravention, offence, or failure:
  - (a) if the involvement in the contravention was due to reasonable reliance on information supplied by another person (except where that other person is an employee, director or agent); or

- (b) if the person took all reasonable and proper steps to ensure that the primary contravener complied with the Act.
15. Part 3, cl 31 requires the provider of conveyancing services to certify that a person acquiring an interest in residential land, to the best of their knowledge, will not contravene the Act.
  16. NZBA understands the policy underpinning those provisions to be as follows (as ascertained from *Release of all advice provided by the Treasury to Ministers on the Overseas Investment Act Amendment for Overseas Home Buyers*, 14 December 2017):
    - (a) The purpose of cl 28 is to ensure compliance with the Act by creating a financial disincentive for breach. The provision is not intended to capture parties who innocently facilitate transactions that they are unaware may be a contravention of the Act, rather parties with a degree of knowledge or complicity.
    - (b) As conveyancing agents undertake the land title transfer process for almost all land transactions they are to act as gatekeeper by undertaking eligibility checks on housing transactions. An eligibility check would subject all prospective buyers to the same process, therefore the costs of the check would be borne by all buyers, not just overseas persons.
  17. For the reasons that follow, NZBA submits that:
    - (a) Clause 28 is not required to achieve the Bill's policy goals.
    - (b) If that submission is not accepted, the Committee should introduce an additional defence if a bank has acted in reliance on a conveyancer's certificate (by way of cl 29).
    - (c) The Committee should consider simplifying the definition of "ordinarily resident in New Zealand".

### Primary submission: cl 28 is not required to achieve the Bill's policy goals

18. NZBA submits that the extension of liability to persons "involved in a contravention of the Act" is unnecessary as it will not contribute to achieving the policy of deterring contraventions.
19. That is because conveyancers, as gatekeepers of eligibility by virtue of cl 31, are best placed to ensure that prospective purchasers are complying with the Act, in particular the residential property requirements. To ensure compliance, these gatekeepers will be subject to the new liability provision set out in new s 51A(4).
20. The corollary is that, when considering lending to prospective purchasers, banks (as "involved persons") will not be required to undertake due diligence to ensure that the Act's eligibility requirements have been met. Rather, banks will be entitled to act in reliance on the certificates produced by conveyancers as proof of eligibility. Consequently, any contravention of the Act would be the responsibility of the person issuing the certificate, rather than the bank. In that way, cl 28 does not add to the Act's existing liability provisions and therefore does not contribute to achieving the Bill's policy goal of encouraging compliance.

## Alternative submission: absolute defence for reliance on conveyancer's certificate

21. If the Committee does not accept that submission, NZBA submits that proposed s 48A(2)(a) (cl 31 of the Bill) should be extended to provide an absolute defence for third parties that have received, and relied on, a conveyancer's certificate produced in accordance with the Act as proof of eligibility.
22. Such a defence would provide certainty for organisations involved in property transactions while also being consistent with the Bill's underlying policy; attributing liability to parties who are complicit in a contravention, not parties innocently facilitating transactions.

## Definition of "ordinarily resident in New Zealand" should be revised

23. NZBA submits that the proposed new definition of "ordinarily resident in New Zealand" should be revised. That is because whether someone is "ordinarily resident in New Zealand" may be very difficult to ascertain. We consider that instead permanent residency should be the sole criterion for being "ordinarily resident in New Zealand". A definition linked to permanent residency status would minimise the cost and expense of compliance while also upholding the policy intent of the Bill.

## Proposed definition will create a significant compliance burden

24. The requirement to have been residing in New Zealand for at least a year may require extensive investigation and resolution of difficult interpretative questions. As the Overseas Investment Office notes in its guidance document: *Determine If a Person is Ordinarily Resident in New Zealand*, "residing" is not defined by the Overseas Investment Act. Relevant case law makes clear that is a word of flexible meaning, with residence to be determined having regard to a range of relevant factors that may be difficult to apply in any particular case.
25. Additionally, the proposed new definition duplicates a requirement for the grant of permanent residency status. In order to obtain a permanent resident visa, an applicant must demonstrate a commitment to living in New Zealand permanently in one of five ways (described in the New Zealand Immigration Operational Manual), including "a significant period of time spent in New Zealand". Accordingly, where commitment to New Zealand is demonstrated by a significant period of time spent in New Zealand there is a direct overlap with the proposed new definition of "ordinarily resident".<sup>1</sup>

## "Ordinarily resident in New Zealand" should be linked to permanent residency status

26. NZBA submits that the definition of "ordinarily resident" should be tied solely to permanent residency status. In our view, revising the definition of "ordinarily resident" in this manner would minimise the compliance burden of the new regime as it is simple and easily verifiable.

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<sup>1</sup> We acknowledge that where an applicant has obtained a permanent resident visa by demonstrating a commitment to living in New Zealand in one of the other ways, the applicant may not have established that they have spent a significant amount of time in New Zealand. However, we consider it unlikely that permitting these sub-classes of permanent resident visa holders to purchase residential property would have a material effect on the New Zealand housing market.

27. Whether a prospective purchaser is “ordinarily resident” could be established by obtaining a copy of the permanent resident visa included in their passport.
28. In our view, NZBA’s proposed revised definition would achieve simplicity in the application of the definition, while also advancing the chief policy aim of the Bill; a housing market with prices shaped by New Zealand-based buyers.

## **Regulator’s power to dispose of property should be reviewed**

29. NZBA notes that cl 26 of the Bill empowers the regulator to issue a notice to dispose of property purchased in contravention of the Act.
30. NZBA submits that the regulator should be mandated to take the interests of interested parties (such as mortgagees) into account when issuing a notice under s 41E. That is because banks (as mortgagees) may face significant losses in the event of a forced sale, despite having no liability for the breach of the Act.

## **Other matters requiring clarification**

31. NZBA also seeks clarification with respect to the following related matters:
  - (a) NZBA requests that regulations outlining suitable resident visa classes and nationalities are published as soon as possible. NZBA would welcome the opportunity to submit feedback on the content of those regulations.
  - (b) At what point in the sales process is a “transaction to acquire the interest [is] given effect” (as that phrase is used in cl 31). For example, is it necessary for the conveyancing certificate to be issued before a buyer can go unconditional on a property purchase, or is the certificate only necessary prior to settlement? The timing of the conveyancing certificate will have a significant impact on the certainty of an unconditional offer.
  - (c) Clause 11 of the Bill introduces mandatory conditions which continue to bind the purchaser of the property after purchase. NZBA assumes that the mandatory conditions apply only to the purchaser of the property, and that any “person involved” with the purchase will not be responsible for monitoring compliance with them (for example, we do not consider that a bank should have responsibility for ensuring that its customer continues to occupy a property, consistent with the mandatory condition requiring occupancy).

We submit that supervision of the mandatory conditions is best undertaken by the regulator as this will avoid duplicated efforts by each “person involved” and will avoid repeated intrusion on the privacy of customers.

In the event that there is a requirement for a “person involved” to supervise compliance with the mandatory conditions, it will be necessary for guidance to be issued on the nature, scope, length, and frequency of the monitoring of those conditions.