

Privacy Commissioner's Submission to the Finance and Expenditure Select Committee on the Overseas Investment Amendment Bill

Executive Summary

1. The Overseas Investment Amendment Bill ("the Bill") amends the Overseas Investment Act 2005 ("the Act") to implement the Government's policy of banning purchases of residential land by overseas persons. The Bill brings residential land within the category of "sensitive land" for the purposes of the Act, meaning the restrictions in the overseas investment regime will apply to residential land.
2. My comments relate solely to the increased information gathering powers the Bill provides the Overseas Investment Office (OIO) in order to administer and enforce the Act. These powers are contained in clauses 24 and 25 of the Bill. Clause 24 amends section 41 of the Act to broaden the scope of information-gathering powers, while clause 25 inserts new sections 41A to 41D which govern the treatment of information obtained under those powers.
3. I am pleased with the level and nature of engagement on the policy development that officials had with me prior to the introduction of the Bill. As a result of this consultation, section 41C(3) has been amended to better align with the exceptions in Information Privacy Principle 11 of the Privacy Act 1993 and ensure that personal information is subject to the Privacy Act.
4. However, I consider that the amendment to section 41 makes the information-gathering power unnecessarily broad. The amendment creates the potential for overly intrusive requests for information relating to individuals in respect of whom the OIO has no reason to believe are ineligible to purchase sensitive residential land.
5. I **recommend** that section 41 should remain as currently enacted.

The information gathering power in the Bill is overly broad

Background

6. Clause 24 of the Bill amends section 41 to considerably broaden the scope of information-gathering powers available to the Overseas Investment Office as the regulator.
7. The existing provision is drafted so as to permit information gathering where there is reason to suspect an offence has been committed under the Act.
8. Clause 24 of the Bill replaces section 41(1):

41 Regulator may require information and documents ~~for purpose of detecting offences~~ **to be provided for purpose of administering or enforcing Act**

(1) If the regulator has ~~reason to suspect that a person has committed an offence under this Act~~ **reasonable grounds to believe that it is necessary or desirable**

for the purposes of administering or enforcing this Act, the regulator may, by written notice, require any person (A)—

(a) ~~to provide the regulator with any information that in the regulator's opinion may furnish evidence in relation to that offence~~ **to provide to the regulator, within the time and in the manner specified in the notice, any information or class of information specified in the notice; or**

(b) ~~to provide the regulator with any document that in the regulator's opinion may furnish evidence in relation to that offence~~ **to provide to the regulator any document or class of documents specified in the notice (within the time and in the manner specified in the notice); or**

(c) **if necessary, to reproduce, or assist in reproducing, in usable form, information recorded or stored in any document or class of documents specified in the notice (within the time and in the manner specified in the notice).**

9. As can be seen from the annotation above, there are two key differences in the proposed enhanced information-gathering power:

- It raises the threshold before the power can be invoked: the regulator is now required to have “reasonable grounds to believe” rather than “reason to suspect”.
- It expands the purpose from offence detection to a far broader purpose of “necessary or desirable for the purposes of administering or enforcing the Act”.

10. This greater scope of the Act and its information-gathering power warrants close scrutiny to ensure it is a proportional response to the policy objective and not unnecessarily broad. This is particularly the case given that the amended Act now covers all individuals buying residential property and would affect far more New Zealanders than previously.

Issue

11. Sections 23, 38 and 39 of the existing Act already grant relatively broad information-gathering powers to the OIO for transactions within the consent regime. Section 23(3) provides an administrative information-gathering power for the purpose of considering an application for consent. Section 38 establishes the power for the OIO to require consent holders to provide information for monitoring purposes. Section 39 establishes the power to require “any person with information relevant to overseas investments in sensitive New Zealand assets” to provide information for the purpose of compiling statistical information or monitoring compliance with conditions. As all of these provisions relate to those who have applied for consent and are therefore subject to the overseas investment regime, I am satisfied with the OIO's powers to enforce conditions in this regard.

12. The amended section 41 allows the OIO to obtain information about all individuals entering the residential housing market, regardless of whether the OIO suspects an offence has been committed. Figures from Land Information New Zealand indicate that there were nearly 200,000 property transfers registered with LINZ for the year ended June 2017, with approximately half of them estimated to involve a residential sale. Of

those transfers, 2.7% involved a transfer where at least one of the property buyers provided an overseas tax residency.¹ This means the information-gathering power could potentially be deployed in respect of 190,000 New Zealanders in whom the OIO has no legitimate interest.

13. The elements of necessity and proportionality underpin the safeguards and controls on the exercise of any powers exercised by enforcement or regulatory agencies. These elements also apply to the legislative thresholds in the Bill.
14. The amended information-gathering power was modelled on the power contained in section 25 of the Financial Markets Authority Act 2011. However, the regulatory context of that Act is significantly different from the wider scope of the Overseas Investment Act as amended by this Bill. As noted by the Ministry of Justice in the section 7 consistency report to the Attorney-General for the Financial Markets (Regulators and KiwiSaver) Bill², the purpose of section 25 is to further the objective of the Financial Markets Authority to promote the growth and development of fair, efficient and transparent markets, but “the information does not have high personal privacy value.”
15. The changes enacted by the Overseas Investment Amendment Bill serve to bring the entire residential house market within the purview of the OIO. This is a significantly different scope from the Financial Markets Authority Act. Information sought by the OIO for the purpose of administering or enforcing the Act may include information well within the sphere of personal information carrying a significant privacy interest. For example, details of family structure and marital status, financial details and transaction history could be used to inform a judgement by the OIO as to whether an individual is committed to residing in New Zealand.

Information gathering scenarios

Under the current provision, the OIO must have reason to suspect that a particular individual has committed a specific offence under the Act before it can approach a real estate agent and require them to provide documents about a particular transaction.

In comparison, under the new provision the OIO could approach a real estate agent who works primarily within a particular ethnic community to ask for all of their documents, without needing to suspect that any particular individual or property transaction warrants the scrutiny of that office.

¹ These figures are provided from <https://www.linz.govt.nz/land/land-registration/prepare-and-submit-your-dealing/property-tax-compliance-requirements/property-transfers-and-tax-residency-data>.

Figures: 195,347 property transfers, and 5,349 transfers where at least one buyer provided an overseas tax residency. These figures include all property transfers and not just residential sales, are not a register of foreign ownership, and do not specify whether property has been bought for investment; however they do provide some guidance on the size of the market and the numbers involved.

² This Bill formed the basis for the Financial Markets Authority Act 2011.

16. The broadened information-gathering power creates the opportunity for 'fishing expeditions' that is not proportional with the purpose of the Act. This would be inconsistent with Information Principle 1 of the Privacy Act, which requires that personal information must be collected only for a lawful purpose and the collection is necessary for that purpose. This collection power has the potential to allow overly intrusive requests for information relating to individuals in respect of whom the OIO has no reason to believe are ineligible to purchase sensitive residential land.

Recommendation

17. I **recommend** that section 41 should remain as currently enacted.
18. I **recommend** that the Bill should focus on solutions to address the question of administering and enforcing the overseas buyer ban before a sale has taken place, rather than extending the OIO's information-gathering power to use after a sale has taken place. One such solution that is less intrusive is the new section 51A, requiring a provider of conveyancing services to certify that a person acquiring an interest in residential land will not contravene or commit an offence under the Act by giving effect to the transaction.
19. I would be pleased to speak to this submission should the Committee find that helpful in its consideration of this Bill.

John Edwards

Privacy Commissioner