

# **Taxation (Land Information and Offshore Persons Information) Bill**

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*Commentary on the Bill*

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## OVERVIEW

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The Income Tax Act 2007 (the ITA 2007) contains provisions that impose income tax on certain property transactions, and also on rental income earned from property. Current tax rules include provisions which tax gains from property bought with the intention of disposal and provisions which tax land acquired for the purposes of a business dealing in land. However, although the ITA 2007 creates these obligations, the Government is concerned that compliance with these provisions may be relatively low. This may come about as a result of ignorance of the tax rules. It is recognised that enforcing tax rules on non-residents is very difficult, especially those with only limited engagement with New Zealand.

In order to investigate compliance with the ITA 2007 provisions, Inland Revenue does have the capacity to access records of land transfers in New Zealand. But this process is historic, rather than in real-time. Information received might also not give a complete picture of the activities or identity of a particular taxpayer.

The fact that Inland Revenue is not aware of certain transactions means that the scope of the problem is not able to be quantified.

To address these concerns, the Government is introducing a suite of measures aimed at providing clearer rules and providing more useful information to Inland Revenue to assist in its enforcement of the rules, including increased funding to Inland Revenue to investigate property compliance.

This bill contains two of those measures, to come into force on 1 October 2015.

First, transferors and transferees will be required to provide their IRD numbers (and, if they are also resident in another jurisdiction for tax purposes, their equivalent of an IRD number from that foreign jurisdiction) at the time of transfer. This information will be provided to Land Information New Zealand (LINZ) as part of the transfer documentation and then forwarded to Inland Revenue. An important feature of the proposal to provide IRD numbers is that all parties to a land transaction will be expected to have an IRD number, even if they are non-resident. A person who is not an “offshore person” as defined and who is purchasing a property with the intention of that property becoming their main home, or selling a property that was their main home, will be exempt from the requirement to supply this information.

Second, an “offshore person” (as defined) will be required to provide evidence of a New Zealand bank account as a prerequisite to obtaining an IRD number. This is to ensure that an offshore person looking to obtain an IRD number has first been subjected to New Zealand’s anti-money laundering and Countering Financing of Terrorism rules.

A separate legislative change, not contained in this bill, is planned to introduce a “bright-line” test, which is to come into force on 1 October 2015. The bright-line test will, in general terms, make the disposal of residential property taxable if the property is bought and sold within two years (subject to certain exemptions, such as if the property was the person’s main home). An issues paper on the bright-line test was released at the end of June 2015.

## **IRD NUMBERS AND TAX IDENTIFICATION NUMBERS**

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*(Clauses 3, 4, 5, 6, 7, 9 and 11)*

### **Summary of proposed amendments**

The proposed amendments would require transferors and transferees of real property to provide their IRD numbers, and if they are currently tax-resident overseas, their foreign equivalent of an IRD number, and the relevant country code of the jurisdiction in which they are tax-resident. This information will be passed on to Inland Revenue, to help compliance with New Zealand's tax legislation. It could also be provided to overseas tax authorities by Inland Revenue in accordance with existing information-sharing legislation.

A person who is purchasing a property with the intention of that property becoming their main home, or selling a property that was their main home, will be exempt from the requirement to supply this information. The main home information exemption is not available where the person is an "offshore person", where the property is to be or was owned by a trust, or if the person is selling their main home for the third time in a two-year period.

References in this section are to the Land Transfer Act 1952 unless stated.

### **Application date**

The amendments will come into force on 1 October 2015.

### **Key features**

The bill proposes amendments to the Land Transfer Act 1952, the Tax Administration Act 1994, and consequential Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002.

The proposed amendments require transferors and transferees of real property to provide their Inland Revenue Department (IRD) numbers. If they are currently tax-resident in another jurisdiction, they must also provide their equivalent of an IRD number from the foreign jurisdiction and the relevant country code of the jurisdiction in which they are tax-resident.

A New Zealand individual who is purchasing a property with the intention of that property becoming their main home, or selling a property that was their main home, will be exempt from the requirement to supply this information (unless they are selling their main home for the third time in a two-year period).

When a person is acting in another capacity (for example, as trustee of a trust), the information provided must relate to the capacity in which they are acting, rather than their individual capacity. A person buying or selling property as a nominee must provide the information relating to their principal.

This information will be collected by conveyancers from property transferors and transferees, and provided to Land Information New Zealand (LINZ), which in turn will provide the information to Inland Revenue, along with details about the transfer to which the tax information relates.

An offence will be committed if a transferee or transferor provides false or misleading tax information.

Under this legislation, regulations will be able to be made under these provisions to provide exemptions for particular transfers or parties to transfers that meet the following criteria:

- collecting the IRD number must be impractical or involve high compliance costs; or
- the transaction or person must represent a low tax avoidance risk.

Regulations will also be able to be made to include transfers of other estates in land to be covered by the tax information requirement.

## **Detailed analysis**

### ***Requirement to provide a tax statement***

Proposed section 156B provides that all transferors and transferees of real property who are transferring a “specified estate in land” must provide a “tax statement” before the transfer can be registered. The tax statement must be provided to LINZ, or a certifier, who will provide it to LINZ, in accordance with existing conveyancing processes as specified in proposed section 156B(2) and (3).

The definition of a specified estate in land is contained in proposed section 156A, and includes freehold estates, leasehold estates, and certain unit titles and licences to occupy, as well as any other estate in land that is declared to be a specified estate in regulations.

Proposed section 156C states that a tax statement must contain the following:

- full name, date and signature of the transferor or transferee;
- if the person is exempt, what category of exemption applies to them; and
- if the person is not exempt, the information set out in section 156C(2).

### ***Information required for persons who are not exempt***

A person who is not exempt must provide the information contained in proposed section 156C(2).

In all cases, the non-exempt person must supply their IRD number. (If the person does not currently have an IRD number, they must obtain one from Inland Revenue before they can complete the transfer). They must also state whether they are currently a tax resident of another jurisdiction. (If they are tax-resident in another

jurisdiction, they will generally be taxable on their world-wide income by that other jurisdiction.)

If they are currently a tax resident of another jurisdiction, the person must state the name and country code of that jurisdiction. The country code for a jurisdiction will be prescribed by Inland Revenue.

The person must also provide the equivalent of their IRD number in that jurisdiction that is, the unique identifier that they use in their dealings with the tax authority in that jurisdiction.

### ***Persons acting in different capacities***

Where a non-exempt person must supply information about their IRD numbers (and where applicable, their foreign equivalent of an IRD number and relevant country code), proposed section 156C(3) provides that a person who is acting in a different capacity must provide the information as it relates to the capacity in which they are acting.

For example, where trustees of a trust are buying or selling trust property, they must provide the trust's IRD number, not their own personal IRD numbers. Similarly, partners in a partnership who are buying or selling partnership property should provide the partnership's IRD number, not their own IRD numbers. Nominees must provide the IRD number of the person for whom they are acting as nominee.

### ***Exemptions from requirement to provide information***

There are two categories of exemptions from the requirement to provide information.

The first is for individuals who are not "offshore persons" who are buying or selling their main home.

The second is for particular transfers or parties to transfers that have been specified in regulations to the Act and which meet the following criteria:

- collecting the IRD number must be impractical or involve high compliance costs; or
- the transaction or person must represent a low tax avoidance risk.

Having to supply an IRD number does not necessarily mean that tax must be paid on the sale of property. Conversely, while a person who does not have to provide their information will generally not have to pay New Zealand tax on their gain, in some circumstances this might not be the case.

### ***Main home information exemption***

This exemption is intended for individuals who are buying or selling their main home. This is dealt with by proposed section 156A(2). The information exemption is not available where:

- the person is an “offshore person”;
- where the property is to be or was owned by a trust, or
- for the sale of a property where the main home exemption has been used twice or more in the past two years immediately preceding the date of transfer.

For the main home exemption to apply, the land must be residential land. The main home information exemption is not available for where the residence is on a commercial farm. Where a property is used mainly for investment purposes the main home information exemption will not apply.

Where a person has multiple homes (for example, a holiday home), the main home information exemption will not apply more than once.

The concept of a main home and similar concepts such as a principal place of abode are well established under case law. Where a person has more than one place of residence, their “main home” would be determined according to which property a person has the greatest connection with. The factors that determine these connections would include:

- the time the person occupies the dwelling;
- where their immediate family (if any) live;
- where their social ties are strongest;
- the person’s use of the dwelling;
- the person’s employment, business interests and economic ties to the area where the dwelling is located; and
- whether the person’s personal property is in the dwelling.

### ***Offshore persons***

Proposed section 156A(2)(b)(iv) will provide that the main home exemption is not available to “offshore persons” (to be defined in section 3 of the Tax Administration Act).

This means that the main home exemption will only be available to a person if one of the following applies:

- they are a New Zealand citizen or permanent visa holder who is currently present in New Zealand; or
- they are a New Zealand citizen who is not currently present in New Zealand but they have been away from New Zealand for less than three years; or

- they are a permanent resident visa holder who is not currently present in New Zealand but they have been away from New Zealand for less than one year.

All other persons who are transferring a property must supply their IRD number, and if they are a current tax resident of another country, their equivalent of an IRD number and the country code of the other country.

### *Trusts*

Where the property being bought or sold was or will be trust property, proposed section 156A(2)(b)(i) and (ii) provides that the main home information exception will not be able to be used. This means that the trustees of a trust will need to provide the trust's IRD number (and foreign equivalent of an IRD number and country code, if applicable) when purchasing trust property.

### *Persons selling their main home a third time within two years*

Proposed section 156A(2)(b)(iii) provides that a person who has sold their main home at least twice in the past two years must provide their IRD number (and foreign equivalent of an IRD number and country code, if applicable) if they sell their main home a third time within that two-year period. This is to address the situation where a person has a regular pattern of buying and selling a property in which they live, for profit. Such a person may be taxable under existing law on gains from the sale of these properties. Collecting information in relation to those who have sold their home for the third time within two years is intended to help Inland Revenue identify those situations.

### *Examples of main home information exemption*

#### **Example 1**

George bought his first home in Seymour Street a year ago. However, his neighbours complain about the noise when he plays his drum kit, so he decides to sell it and buy a new home with better soundproofing. When he puts his Seymour Street house on the market he is pleasantly surprised to discover that his house has risen in value. He has an offer accepted on a new house in Taradale Street, with new neighbours who love the sound of drums. George does not need to provide his IRD number for the sale of the Seymour Street property, which he lived in as his main home, or the purchase of the Taradale Street property, which is to be his main home.

#### **Example 2**

Mr and Mrs Brown and their children live in a house on a small lifestyle block in Oamaru. Mrs Brown works in Christchurch for three days a week. She plans to buy an apartment in Christchurch city. She will live in that apartment while she works in Christchurch. The main home information exemption will not apply in relation to Mrs Brown's Christchurch apartment as it is not the home with which she has the greatest connection, and she will have to supply her IRD number in relation to the purchase of that property.

However, if Mr and Mrs Brown were to sell their Oamaru property, they would not need to provide their IRD numbers in relation to that sale because that property was their main home.

### **Example 3**

Sarah is a New Zealand citizen who has been living in the United Kingdom (UK) for the past 10 years. Prior to returning to New Zealand, she decides to buy a house in Te Awamutu to live in. As she is an “offshore person” at the time she purchases the house, she cannot use the main home information exemption for this property and she will need to supply her IRD number in relation to the purchase of that property. Because she is a tax resident of the UK at the time that she purchases the property, she will also need to supply her UK National Insurance number (which is the equivalent to a New Zealand IRD number, and the UK country code.)

### ***Information exemptions under regulations***

Proposed section 236(l)(ha) will provide for information exemptions for particular types of transfers or parties to transfers. These must be specified in regulations to the Act.

In order for a type of transfer, or party to a transfer, to be specified in regulations, proposed section 236(4) provides that the Minister must be satisfied that the type of transfer or party to a transfer meets the following criteria:

- collecting the IRD number must be impractical or involve high compliance costs; or
- the transaction or person must represent a low tax avoidance risk.

Regulations will also be able to be made to include transfers of other estates in land to be covered by the tax information requirement, where these are economically equivalent (see proposed section 236(l)(hb)).

### ***Offence to supply misleading or false tax information***

Proposed section 156E provides that a person who knowingly, or with intent to deceive, gives false or misleading tax information, commits an offence. A person who commits such an offence is liable to a fine of up to \$25,000 if the conviction is a first time offence, and a fine of up to \$50,000 for every subsequent offence.

A person who provides information that they genuinely believe to be true but which is not in fact correct will not be committing an offence.

### ***Correction of errors or omissions***

Proposed section 156D provides a procedure for an omission or error that was contained in a tax statement provided to LINZ to be corrected. Such omissions or errors do not affect the validity of any registration of transfer instrument.

### ***Information disclosure and retention***

Proposed section 156H provides that tax information must not be disclosed unless authorised or required by law.

Proposed section 156F requires LINZ to supply Inland Revenue with the tax information and the details of the related property transaction that it collects.

Proposed section 156I of the Land Transfer Act and section 81 of the Tax Administration Act 1994 would permit tax information to be disclosed between authorised persons in specified circumstances, which is intended to allow for information matching between Inland Revenue and LINZ in relation to the information collected by LINZ.

Proposed section 156F also permits the chief executive of LINZ to release or to give tax information to any person who requests it, provided that the information is given in aggregate form only and in a manner that prevents any person, estate in land, or transaction from being identified.

Under proposed section 156G, certifiers and LINZ must hold tax statements for 10 years. A copy of a statement must be provided to the Commissioner of Inland Revenue if requested in writing.

### *Consequential amendments*

- Clause 5 makes consequential amendments to section 164B of the Land Transfer Act.
- Clause 7 makes a consequential amendment to the Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002.

## NEW ZEALAND BANK ACCOUNTS

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*(Clauses 9 and 10)*

### **Summary of proposed amendments**

The proposed amendments require an “offshore person” to have a New Zealand “bank account number” as a prerequisite to being issued an IRD number. If a person (other than an individual) becomes an “offshore person” after they have an IRD number, the obligation to provide a bank account number arises at the time they become an offshore person.

The intent of this particular requirement is that it will provide Inland Revenue with more confidence that it knows who it is dealing with by first ensuring that a person has satisfied a financial institution’s anti-money laundering verification of identity requirements.

### **Application date**

The amendments will come into force on 1 October 2015.

### **Key features**

Proposed section 24BA(1) of the Tax Administration Act 1994 provides that the Commissioner must not allocate a tax file number (commonly known as an IRD number) to an offshore person unless she first receives a bank account number for that person.

The main features of the rule are:

- the definition of “offshore person”; and
- the definition of “bank account number”.

### ***Offshore person***

The definition of “offshore person” applies both to individuals and non-individuals (for example, trusts and companies).

For individuals, a New Zealand citizen or person that holds a residence-class visa granted under the Immigration Act 2009 will generally not be classed as an offshore person unless:

- in the case of citizens, they have not been in New Zealand for the last three years; and
- in the case of residents, they have not been in New Zealand for the last year.

A non-individual will be an “offshore person” if they would be an overseas person under section 7(2)(b) to (e) of the Overseas Investment Act 2005 (modified to include the test for individuals described above). This test looks through structures that are New Zealand-tax resident and looks at their underlying ownership or control. The test is necessary to prevent offshore individuals avoiding the rule by interposing a New Zealand-resident structure.

Generally speaking this means a non-individual will be treated as being “offshore” if:

- It is a body corporate (such as a company) and:
  - it is incorporated outside New Zealand; or
  - 25 percent or more of its shares are owned by a body corporate incorporated outside New Zealand; or
  - an offshore person(s) has 25 percent or more of:
    - any class of securities;
    - the power to control the composition of its governing body; or
    - the right to exercise or control the voting power.
- It is a partnership or other unincorporated body of persons (other than a trust) and:
  - 25 percent or more of its partners or members are offshore persons;
  - an offshore person(s) has a beneficial interest in or entitlement to 25 percent or more of the profits or assets (including on winding up); or
  - an offshore person(s) has the right to exercise or control the exercise of 25 percent or more of the voting power at a meeting.
- It is a trust and an offshore person(s):
  - constitute 25 percent or more of its governing body; or
  - has a beneficial interest in or entitlement to 25 percent or more of the trust property; or
  - are 25 percent or more of those that have the right to amend or control the amendment of the trust deed; or
  - are 25 percent or more of those having the right to control the composition of the trust’s governing body.
- It is a unit trust and an offshore person(s):
  - are the manager or trustee, or both; or
  - has a beneficial interest in, or entitlement to, 25 percent or more of the trust property.

### ***Bank account number***

A “bank account number” is an identifying number of an account at either a “registered bank”, as defined in the Reserve Bank of New Zealand Act 1989,<sup>1</sup> or a “licenced non-bank deposit taker”, as defined in the Non-bank Deposit Takers Act 2013. The Reserve Bank publishes lists of both types of entity on its website.

The account number submitted to the Commissioner must be an account held by the IRD number applicant.

### ***Becoming an offshore person***

Proposed section 24BA(2) is intended to prevent the bank account requirement being circumvented by, for example, a New Zealand company being established, obtaining an IRD number and then being sold to an offshore person. The proposed section requires a person to give their bank account number to the Commissioner immediately upon becoming an “offshore person”. However, this requirement to provide a bank account number at this later time only applies to non-individuals. This means that, for example, a New Zealand citizen that emigrates will not be obliged to provide a bank account number after being away for three years.

### ***Penalties for non-compliance***

No new penalties are proposed as part of these amendments. If an offshore person does not provide a bank account number they will not be issued an IRD number. For instances, such as the requirement to provide a bank account number upon becoming an offshore person, existing penalties are in place – failing to provide information to the Commissioner when required to do so by a tax law is already an offence under sections 143 and 143A of the Tax Administration Act 1994.

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<sup>1</sup> This definition is already contained in section YA 1 of the Income Tax Act 2007, and so is incorporated in the Tax Administration Act through the operation of section 3(2) of that Act.