

# Final investigation report

201510088 – Russell Mawhinney – 28 August 2017

<b>Author(s) of Report</b>	[REDACTED]
<b>Asset Involved</b>	Glenorchy campground / [REDACTED]
<b>Subject of investigation</b>	Russell Mawhinney

## Summary of Case

1. This investigation is into Mr Russell Mawhinney's understanding of the sensitive land provisions of the Overseas Investment Act 2005 given he has provided incorrect legal advice on the Act to overseas investors.
2. Our investigation began after we learned that Pounamu Holdings 2014 Limited (**Pounamu**) had acquired the Glenorchy Campground without consent in 2014.<sup>1</sup> Pounamu's failure to obtain consent resulted from Mr Mawhinney's incorrect legal advice that the land was not sensitive.
3. Mr Mawhinney's advice to Pounamu was clearly wrong, therefore this office decided to investigate whether Mr Mawhinney had incorrectly advised *other* investors.
4. I have reviewed 364 transactions involving Mr Mawhinney between 2012 and 2016. Of the 364 transactions, we only identified two which involved sensitive land being transferred to an overseas person without consent: the Pounamu transaction and one other.
5. Having considered these two cases, I consider that it is appropriate to take steps to prevent Mr Mawhinney giving incorrect advice on the Act again. I propose that we take a range of practical actions aimed at:
  - (a) increasing his expertise in overseas investment matters;
  - (b) reduce the likelihood of him needing to give advice on Overseas Investment Act matters; and
  - (c) ensuring that other lawyers in his position are less likely to make the same mistakes he has.
6. I set out below a suggested course of action that would involve Mr Mawhinney agreeing to take some preventative measures to ensure other people are protected from receiving incorrect advice in the future. If he takes such action, I consider that our concerns are addressed and there would be no further value in making a referral to the Law Society.

## Mr Mawhinney's background

7. Mr Mawhinney is an experienced Queenstown based solicitor. He is a former member of the New Zealand Law Society Property Law Section Executive Committee and a former Queenstown Lakes District Councillor.
8. His practice is in business law and property law, including contracts, company law, tax, intellectual property, trusts (including foreign trusts), relationship property and estates. While he has made adjustments to his website recently, he continues to market his services to overseas clients, though not in respect of Overseas Investment Act matters.<sup>2</sup>

<sup>1</sup> We learned of this transaction through a complaint from a member of the public.

<sup>2</sup> Mr Mawhinney's website now says that the Overseas Investment Act is a specialist area of law, and that if he identifies that consent is required, he works with specialists in the area of law to ensure that consent applications are presented in the best light.

9. Since November 2014, he has been the principal of Mawhinney & Co lawyers, a general practice firm which employs two other solicitors. Prior to 2014, he practiced from other firms in Queenstown.

### Mr Mawhinney's advice to his clients

10. Our investigation involved reviewing 364 transactions in which Mr Mawhinney acted for the purchaser between 2012 and 2016. Of the 364 properties, only two involved sensitive land which was transferred to overseas persons without consent.
- (a) the Glenorchy Campground transaction in 2014; and
  - (b) the sale of [REDACTED] to [REDACTED] in 2012.
11. In each case, he incorrectly advised his clients about the need for consent under the Overseas Investment Act.

### Glenorchy Campground

12. The larger Glenorchy Campground site was acquired over six transactions between March and June 2014. Of these six transactions, only one (the main campground site) included sensitive land.<sup>3</sup> This transaction came to our attention through a complaint from a member of the public.
13. Mr Mawhinney correctly advised his clients that they were overseas persons but incorrectly advised that the main campground site was not sensitive land.
14. Schedule 1 of the Overseas Investment Act sets out the classes of sensitive land. Table 1 contains classes of land based on features of the land being acquired, while Table 2 contains classes of land based on features of land that *adjoins* the land being acquired.
- (a) Mr Mawhinney's view was that land was sensitive only if it was within a class of land from both table 1 and table 2. In other words, he considered that land was only sensitive if it both *included* a sensitive feature from Table 1, and *adjoined* land with a sensitive feature from Table 2.
  - (b) His's interpretation of the Act is clearly incorrect. To be sensitive, land needs to be in a class listed in *either* Table 1 or Table 2, but does not need to be in both.
  - (c) His's conclusion was that while the land *adjoined* land with a sensitive feature from Table 2, it *did not include* a feature listed in Table 1, and therefore was not sensitive land. The overseas person therefore did not seek consent.
  - (d) In fact, *adjoining* land with a sensitive feature listed in Table 2 is sufficient for the land to be sensitive land and subject to the consent requirements in the Act. As Mr Mawhinney identified, the campground adjoined land held for conservation purposes (the first item in table two) and exceeded the 0.4 hectare area threshold. The land was therefore sensitive and consent was required before an overseas person could buy it.
15. We expect all lawyers advising on property transactions to interpret the definition of sensitive land in the Act correctly.
16. In this instance, once the error was raised with the overseas purchaser, they sought retrospective consent for the purchase. The purchase was then granted retrospective consent in June 2015. As a result, Mr Mawhinney's clients were required to pay a retrospective penalty.
- [REDACTED]
17. Given the clear error made in relation to the Glenorchy campground, we decided to review other transactions Mr Mawhinney had acted on to check if any involved further breaches of the Act. From our review, we identified a sale involving [REDACTED]

<sup>3</sup> CFRs OT18D/892, OT18D/893 and OT18D/892, Otago Land Registration District

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18. [REDACTED] a residential property [REDACTED] Queenstown, was sold to [REDACTED] in 2012. [REDACTED] were overseas persons.
19. The land comprises a house lot ([REDACTED] ha) and an [REDACTED]<sup>th</sup> undivided interest as tenants in common in communal property ([REDACTED] ha).<sup>4</sup> The communal property adjoins the [REDACTED]. The land is sensitive because at [REDACTED] ha it exceeds 0.4 ha, and adjoins land in a class listed in the section 37 list.
20. Mr Mawhinney says that he advised his clients on 19 December 2011 that "I cannot say definitively that OIO consent is not required, but based on the information above I believe there is a good argument for saying that it is not required." He says that he told them that "I am leaving you to make a judgment call as to whether you wish to pursue the purchase or not based on this advice."
21. In fact, it is clear that the property is sensitive land. The section 37 list in force at the relevant times<sup>5</sup> provides that land is sensitive if a district plan provides for it to be used as a reserve or as a public park for the purposes of:
  - (a) protecting natural and physical resources or historic heritage; or
  - (b) providing public access to natural and physical resources or historic heritage.
22. In this case, the land adjoined the [REDACTED] which the Queenstown Lakes District Plan has designated for use as a recreation reserve.<sup>6</sup>
23. The statutory purposes of recreation reserves, include the protection of and providing public access to natural and physical resources. In particular, they include providing areas for the recreation and sporting activity, for the protection of the natural environment and beauty of the countryside, the retention of open spaces providing for outdoor recreational activities including recreational tracks in the countryside.
24. Mr Mawhinney's clients decided to proceed without consent. They have subsequently on-sold the property. In this instance Mr Mawhinney failed to identify that the land was sensitive and therefore failed to advise his clients that consent was required under the Overseas Investment Act. As a result, his clients were not in a position to make an informed judgment about seeking consent through the Overseas Investment Office.

### Potential breaches of the Act

25. There is no suggestion that Mr Mawhinney has breached the Act, only that his actions have contributed to breaches of the Act by two of his clients. The criminal and civil remedies in ss 42-51 are unavailable as he has not breached the Act.<sup>7</sup>
26. His clients acquired sensitive land without consent in breach of s 42 of the Act. Correct advice from him would likely have led to his clients either obtaining consent, or not acquiring the properties. In the case of the Glenorchy campground, his clients may well have avoided having to pay a retrospective penalty.

### Possible enforcement tools

27. In my view, action should be taken to reduce the risk of Mr Mawhinney giving incorrect advice again, and to help educate others so that they do not make the same mistakes as Mr Mawhinney.
28. His errors demonstrate a lack of knowledge of the sensitive land provisions in the Overseas Investment Act. No property lawyer can safely advise an overseas client without knowledge of the Act and what constitutes sensitive land.

<sup>4</sup> CFR [REDACTED] being [REDACTED] and a [REDACTED]<sup>th</sup> undivided interest in [REDACTED] Otago Land Registration District

<sup>5</sup> Since the date of these transaction, the s 37 list added a 0.4 hectare threshold to the area of the adjoining land. While this area threshold does not apply to this transaction, it would make no difference if it did apply, as the adjoining reserves is considerably larger than 0.4 ha.

<sup>6</sup> Queenstown Lakes District Plan designation [REDACTED]

<sup>7</sup> There is no evidence that he has, either directly or indirectly, sought to assist anyone to circumvent or evade the Act.

29. In such a situation, there are two enforcement options:
- (a) issue a warning letter to Mr Mawhinney clearly setting out the steps he should take to reduce the risk of incorrect advice being given, and helps ensure that others do not make the same mistakes as he did; and/or
  - (b) make a complaint to the New Zealand Law Society.

#### **Mr Mawhinney agrees to take steps to remove risk of incorrect advice**

30. Our concern is that overseas buyers are not provided incorrect advice when entering into property transactions involving sensitive land. This in turn will assist to ensure quality investment in New Zealand's sensitive assets. I consider an effective solution would be to have Mr Mawhinney agree to a solution in this instance that reduces the risk of incorrect advice being given, and to ensure that others do not make the same mistakes.
31. The first objective (reducing the risk of incorrect legal advice) could be achieved by Mr Mawhinney:
- (a) refraining from giving advice on Overseas Investment Act matters, and instead directing his clients to people who have expertise in interpreting the Act.<sup>8</sup>
  - (b) removing any claim to Overseas Investment Act expertise from his website and other marketing materials.
  - (c) undertaking appropriate education into the operation of the Overseas Investment Act.<sup>9</sup>
32. Mr Mawhinney has signalled that he will agree to take these steps.
33. After an appropriate passage of time, once he has undertaken appropriate education, and provided that he retains access to support from experts on the Act, then Mr Mawhinney could return to giving advice on Overseas Investment Act matters.
34. I recommend that we propose this course of action to Mr Mawhinney. If he agrees, then my recommendation would be to write a letter to him warning that the legal advice provided to his clients was incorrect, and clearly set out the steps that we have agreed with him.
35. The second objective (public education) requires a degree of publicity. This could be achieved by issuing a formal warning or by publicising any agreement reached with Mawhinney, along with publishing appropriate website content to support the messages contained in a warning letter or agreement.
36. The required publicity could be achieved by publishing this report and the warning letter issued to Mr Mawhinney on our website.

#### **Make a complaint to the New Zealand Law Society**

37. Section 132 of the Lawyers and Conveyancers Act 2006 allows us to complain about the conduct of a lawyer. In this case, we may be able complain that Mr Mawhinney's incorrect legal advice amounts to *unsatisfactory conduct*. In other words, that his advice falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.
38. As we only have evidence of two errors from 364 transactions over five years, my view is that an NZLS standards committee might reasonably decline to investigate our complaint.

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<sup>8</sup> Mr Mawhinney has already approached another Queenstown solicitor, [REDACTED] for this purpose. He is also aware of the services of [REDACTED] and [REDACTED].

<sup>9</sup> We are planning to conduct workshops next year to help practitioners increase their ability to advise overseas clients on their obligations under the Act. Mr Mawhinney has told us that he wishes to attend one of these workshops.

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- 39. If a standards committee did investigate, we would be committing to a potentially time consuming process which risks consuming more resources than Mr Mawhinney's conduct justifies and potentially delays resolving the harm we have identified. By comparison, the solution proposed at paragraphs 30-36 above would address our concerns in an efficient and timely way.
- 40. Mr Mawhinney has cooperated with us, and has acknowledged and regrets his errors.
- 41. Mr Mawhinney has already arranged for specialist Overseas Investment Act support to be available to him. He has amended his website to clarify that the Overseas Investment Act is a specialist area of law, and that he would work with a specialist if a consent application was required.
- 42. These further matters support my view that the solution discussed at paragraphs 30 to 36 is appropriate, rather than referring the matter to the Law Society.

### Summary

- 43. In the circumstances, I recommend that we propose the course of action set out at paragraphs 30-36 above to Mr Mawhinney. If he agrees, then my view would be that our concerns will have been addressed and my recommendation would be to close our investigation once those steps have been implemented. In these circumstances there would be no need to refer the matter to the Law Society for further consideration.

### Recommendations

- 44. I recommend that:
  - (a) we seek Mr Mawhinney's agreement to the course of action set out at paragraphs 30-36 above, and
  - (b) if he agrees, to implement the course of action set out at paragraphs 35-36 above.



Kirsty Millard  
Manager Enforcement

Agree:   
Disagree:

Date: